Law, Politics, and Political Discourse in Sixteenth-Century Manorial Norfolk

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CONTENTS

ABBREVIATIONS AND CONVENTIONS

TNA - The National Archives

DL - Duchy of Lancaster (class within the National Archives)

STAC - Star Chamber (class within the National Archives)

I have preferred to modernise spelling in quotations from primary texts.

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Durham, May 2020.

For my family.

PREFACE

I have three main aims in this thesis. The first is simply to interrogate the form and structure of the principle texts produced within the English legal system in the late sixteenth century. This is obviously a vast and complex undertaking. I have, therefore, limited the scope of the thesis to a consideration of that part of English law known as Equity;[1] with a particular focus on two jurisdictions and the texts produced for them: The Palatinate of Lancaster Court of Duchy Chamber, and the High Court of Star Chamber.[2] I discuss the instruments of litigation - bills of information and complaint, answers, demurrers, rejoinders, interrogatories, examinations and depositions - produced for both of these courts, in an attempt to explicate their form and structure. Such texts have been used extensively by scholars and a large secondary literature has developed, enriching both the associated scholarship and historiography more broadly. This has led to important challenges of prevailing orthodoxies about early modern legal culture; as well as reflections over, what the scholarship variously defines as, the limits of what legal texts such as court records can demonstrate historically. Few studies, however, focus on the form and structure of texts in their explanatory hypotheses. This thesis, therefore, addresses that lacuna by making form and structure the foundation of its analysis. It does so through an examination of the structural framework classical and contemporary rhetorical authorities argued was most appropriate for legal disputes: forensic rhetoric. This forensic framework, it is argued, is evident in legal texts throughout the English legal system; this thesis, however, examines texts specifically from the North Norfolk Manor of Gimingham. This allows the thesis to illustrate the significance of this framework in a

[1] Whilst reference will be made to English common law and ecclesiastic or civil law, none of these branches of law will be of primary concern in this thesis. This is not because I treat Equity as the pre-eminent aspect of English law. Rather, as will be addressed later in this introduction, it is motivated by a desire to engage in a particular aspect of the scholarship surrounding social history.

[2] Hereafter respectively referred to as the Duchy Chamber and Star Chamber.

specific locality.

My second aim has been to use the principle texts of the English legal system, that is, texts which had juridical significance, to illustrate a more general historical theme.[3] This aspiration has two distinct but closely connected strands. The first is that I hope to indicate some of the means by which English law *and* English legal culture developed in the late sixteenth-century. The distinction here between law and legal culture is fundamental, and forms a cornerstone of much of my argument throughout this thesis. Briefly, the term "law" is taken to refer to the rules established by custom, precedent and statute, which formed the basis of what legal historians commonly refer to as 'legal doctrine'. Conversely, I take "legal culture" to refer to the broad milieu surrounding law.[4] I will seek to show that a recognisably classical inheritance underpins English law and legal culture to a greater extent than is usually acknowledged. The decisive influence was exerted subtly, through an emphasis on the forms of adversarial legal argument, which were in turn structured to maximise persuasion through reason. One effect of this emphasis was that there began to be a movement away from apodixis in legal proceedings. This in turn enabled those without formal legal training to conceptualise the law as something more than an abstract set of, often seemingly immutable, rules - as a discourse they could participate in, contribute to, and use to their advantage. This leads on to the second strand of this aspiration, which is to illustrate that legal problems - the issues people take to law - are political problems, they arise out of a particular political context that only gets more complex when the number of participants in it increases to include lawyers and judges. I attempt to demonstrate this by excavating a much wider, but also much more specific, intellectual context for the Gimingham litigation examined throughout this thesis.

My third concern is to exemplify a particular way of approaching the study and

[3] The distinction between juridical and jurisprudential texts is an important one. This thesis is primarily concerned with the internal operation of the law within the English legal system. It is not primarily concerned with the philosophy of law (jurisprudence) in an extended sense.

[4] See below, Chapter One, Historiography and Scholarship.

interpretation of historical texts. As my concluding chapters will make clear, I treat law and politics in early modern England to be inextricably linked. Attempts to understand law or politics in isolation from one another run the risk of over-simplifying the past and the complex architecture of dependent institutional and social relationships that made up sixteenth century society. This thesis, therefore, sits at the crossroads of social, intellectual, legal and cultural history. It will become clear from the outset of Chapter One that I have been deeply influenced by the analytical concerns of intellectual history, particularly those of the Cambridge School of intellectual historians, but retained an evidentiary base that is almost exclusively a province social historians. This is, as far as I am aware, unique in the scholarship, and perhaps the historiography; therefore, a considerable portion of this introduction will be spent offering a substantive account of the methodological precepts I will attempt to follow throughout this thesis. Briefly put, however, just as we consider the classic texts or 'canon' in the history of political thought, I regard it as essential to consider the intellectual context of all texts in which complex legal and political arguments are set forth. I have, therefore, tried to write a history of political thought from the ground up, in order to excavate a larger context within which we might place individuals within the mass of ordinary people and thereby obtain a greater grasp the scope of early modern politics and civil society. This is, perhaps, demonstrated most forcefully in the analyses of Chapters Four and Five, wherein I attempt to excavate the interconnectivity of Gimingham's legal and political culture through its litigation.

Due to the complexity of the methodological precepts considered, the range of scholarship drawn upon, and the relationship of both methodology and scholarship to the intricacies of the argument developed throughout the thesis, I have chosen to offer a detailed introduction that is essentially a substantive chapter. The following introduction (Chapter One) will, therefore, be split into three main sections. The first will introduce the locality of Gimingham, around which the historical analysis of the thesis is situated. The second will discuss the historiography

of legal culture and approaches in the existing scholarship, before turning in the third section to a detailed exposition of the linguistic framework upon which the thesis rests. The final section will delineate the more specific aims of each of the four historical chapters: Chapters, Two, Three, Four and Five.

CHAPTER ONE: INTRODUCTION

Gimingham

Twenty two miles north east of Norwich, between the market town of North Walsham and the coastal town of Cromer, in the Hundred of North Erpingham, not far from the North Norfolk coast, lies the sleepy village of Gimingham. Today, the village is surrounded by farmland and has no amenities; indeed, it is little more than a small collection of houses along a single road. Appearances can, however, be deceiving. A small parish church, which dates back to the fourteenth century, is one of the few indications that there may be more here than meets the eye. Whilst it may seem unlikely to someone visiting today, Gimingham was once submerged in an ocean of litigation. This thesis is an examination of that litigation and some of the major currents which ran through it. In the texts that make up the legal record of this litigation, we see not just a much more substantial and lively locality; we see the winds of thought that blew through sixteenth century society manifested in the forensic arguments with which people sought to defend their livelihood.[5]

In the sixteenth century, Gimingham was an important jurisdictional area. Composed of around 9500 acres, it was made up of eight villages - Gimingham, Knapton, Mundesley, North Repps, South Repps, Sidestrand, Trimingham, and Trunch - with rights extending into the adjoining parishes of Paston, Swafield, North Walsham, and Antingham.[6] In the time before

[5] The notion that the manifestation of thought is not the expression of an idea, but the exercise of judgement through an argument, is drawn from Hannah Arendt. See, for instance, Hannah Arendt, 'Thinking and Moral Considerations', *Social Research*, 38 (3: 1970), pp. 417-46; J Glenn Gray, 'The Winds of Thought', *Social Research*, 44 (1: 1977), pp. 44-62.

[6] The only major study of Gimingham is to be found in Christobel Mary Hood, *The History of an East Anglian Soke: Studies in Original Documents: including hitherto unpublished material dealing with the Peasants' Rising of 1381, and bondage and bond tenure* (Bedford: Times Publishing Co., 1918). Whilst it is now over a century old, this extensive study is a treasure trove of local information and I have relied upon it heavily in contextualising

the Norman Conquest, these eight villages formed an economic jurisdiction known as a Soke. This was an area where smaller landowners chose to congregate around a larger landowner who then developed certain political rights over the smaller landowners. It was the product of a voluntary association of freemen with a lord in his court. Whilst this Anglo-Saxon jurisdiction bore many similarities to the manorial jurisdiction that was to be imported into England by the Normans, it was quite different: within a manor, political lordship was inseparable from landownership and the authority of master over serfs.[7] It was only after the Conquest, with the importation of feudal tenures and the manorial system, that the old Anglo-Saxon jurisdiction of the Soke was gradually superseded by the Manor of Gimingham, which assimilated the villages into one administrative jurisdiction. The soke, despite no longer being the jurisdiction of record, lingered on in the memory of the people and continued to exert an influence on the customs and identity of Gimingham long after it had been superseded.[8] This jurisdictional overlay of manor and soke gave Gimingham a unique local identity, which, in turn, gave rise to a number of legal idiosyncrasies. These idiosyncrasies, for instance, around concealed lands and bondmen, or the peculiarities of the foldcourse and attempted enclosures by local inhabitants, created the circumstances whereby many ordinary inhabitants felt it necessary to use the courts to defend themselves and their livelihoods. It is through their recourse to the law courts that this thesis will illustrate how the inhabitants of sixteenth century Gimingham understood and engaged with the world around them, and, more broadly, how political, social and cultural change in English society played out on a local stage.

The thesis is based primarily upon readings of records of litigation from the Duchy of

many of the events described in the litigation upon which this thesis is based.

[7] Paul Vinogradoff, *The Growth of The Manor* (London: Allen and Unwin, 1920), p. 302.

[8] Indeed, Cristobel Hood asserted that the twentieth-century inhabitants of Gimingham still remembered the soke in their folklore. See Hood, *History of an East Anglian Soke*, p. 1.

Lancaster Court of Duchy Chamber and the High Court of Star Chamber. Specific cases were identified through a series of spreadsheets provided by The National Archives, which catalogue the cases before each court.[9] These spreadsheets were invaluable in the editorial process of selecting the cases upon which this study is based because the archive itself is fragmentary and the records which make up the litigation in these courts are kept in different classes within the archives.[10] Pleadings before the Duchy Chamber, for instance, which make up a significant portion of the analytical bedrock upon which the thesis rests, are kept in the archival class "DL1". Depositions before the Duchy Chamber, however, are in the archival class "DL4". There are, then, significant difficulties linking the depositions with the corresponding pleadings in each case.[11] By examining the workbook which contained the DL4 material, as depositions occur after pleadings in the legal process, I was able to identify litigation which would likely have more extant material in the archive: if the depositions are extant then it is more likely that the pleadings are also extant, but the same cannot be said vice versa because not all litigation progressed to depositions after a pleading had been entered. The ability to identify complete cases, that is, litigation with extant material from the beginning of the legal process through to its conclusion, has been critical because the analysis rests on demonstrating the relationship between each stage of litigation. Emphasis has been placed on demonstrating how the arguments raised in the pleadings are confirmed by the evidence elucidated in the depositions; how, in order to understand what litigants and lawyers were doing in litigating, it is first necessary to see how the instruments of litigation necessarily relate to one another.

Whilst I have preferred to examine individual cases in detail, rather than doing extensive

[9] I am particularly grateful to Amanda Bevan at The National Archives for providing me with these internal catalogues and for her guidance navigating the archives.

[10] Star Chamber litigation is kept together in more complete bundles than the Duchy Chamber. There is, however, a tendency for Star Chamber material to have been misplaced; it is often required to trawl the related archival classes in search of additional material. This makes Star Chamber potentially more insightful on one hand, but simultaneously infinitely more frustrating on the other.

[11] One of the most outstanding benefits access to these spreadsheets provided was the ability to search and filter the archive by geographical location, which is at best cumbersome using the online version available on The National Archive's website.

statistical analysis, even a cursory examination reveals a range of striking statistics that suggest the exceptional nature of the litigation which surrounded sixteenth-century Gimingham. Out of 292 cases in the Duchy Chamber concerning Duchy holdings in Norfolk during the reign of Elizabeth I, for instance, sixty two can be identified as pertaining to Gimingham. That is to say, over twenty percent of all Norfolk litigation in the Duchy Chamber during the reign of Elizabeth I was related to Gimingham. Given that there is litigation before the Duchy Chamber concerning thirty four localities in Norfolk, which suggests that the Duchy had an interest in an even greater number, this is a staggering statistic. Gimingham accounts for more litigation before the Duchy Chamber than the next two Norfolk localities combined: Wighton and Aylesham respectively account for only five and eleven percent of Duchy litigation. Gimingham is, therefore, an exceptionally litigious area. As we will see, this litigation is a window through which we can glimpse the physical manifestations of social and cultural change, as well the ideological winds that carried such change through sixteenth century society.

Whilst there is a rich and diverse body of scholarship on the social and cultural history of Norfolk, Gimingham has largely been overlooked. Indeed, the only detailed study of the locality was conducted over a century ago and whilst its breadth is impressive, it lacks the analytical depth of modern scholarship.[12] In the time since this study was published, historians have made great strides filling in the details of sixteenth century society. There are now, for instance, studies that illustrate large-scale social change by drilling down into specific local contexts, such as the agricultural context of Norfolk and its peculiar pattern of sheep-corn husbandry, in an attempt to show how plebeian labourers were affected by the economic

[12] The only other discussions of the Manor of Gimingham in the secondary literature relatively brief. See: Andy Wood, *The Memory of the People* (Cambridge: Cambridge University Press, 2013), pp. 72-3,183,291,335; Nicola Whyte, 'Enclosure, common fields and social relations in early modern Norfolk', in Christopher Dyer and Norman Jones, eds., *Farmers, Consumers, Innovators: The World of Joan Thirsk* (Hatfield: University of Hertfordshire Press, 2016), pp. 63-76.

developments of the sixteenth century.[13] There are studies of political institutions and how they shaped local culture.[14] Social historians, of the late-twentieth and early-twenty-first century in particular, have extensively interrogated the structural implications of concepts such as class and capitalism on early modern society, in order to illustrate a distinctly plebeian experience of agency.[15] A younger generation of scholars has continued to emphasise, with increasing complexity, the interplay between agency and political economy on the constitution of early modern culture.[16] This thesis seeks to use litigation surrounding Gimingham to offer a unique methodological and historical contribution to this diverse and growing scholarship.

Litigation from sixteenth-century Gimingham provides a compelling insight into the social upheavals wrought by the enclosure of open field arable farmland. Whilst enclosure has been well documented to have caused significant unrest wherever it occurred, it was of particular complexity in Norfolk due to the idiosyncrasies of the sheep-corn husbandry that predominated throughout the county.[17] In short, because of the type of soil present throughout much of

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[13] K. J. Allison, 'The Sheep- Corn Husbandry of Norfolk in the Sixteenth and Seventeenth Centuries', *The Agricultural History Review*, 5 (1: 1957), pp. 12-30; A. Hassell Smith, 'Labourers in late sixteenth-century England: a case study from north Norfolk [Part I]', *Continuity and Change*, 4 (01: 1989), pp. 11-52; A. Hassell Smith, 'Labourers in late sixteenth-century England: a case study from north Norfolk [Part II]', *Continuity and Change*, 4 (03: 1989), pp. 367-94; R. W. Hoyle, 'Tenure and the Land Market in Early Modern England - or a Late Contribution to the Brenner Debate', *Economic History Review*, 43 (1: 1990), pp. 1-20; Whyte, 'Enclosure, common fields and social relations in early modern Norfolk', pp. 63-76.

[14] Diarmaid MacCulloch, 'Bondmen Under the Tudors', in Claire Cross, D. M. Loades and J. J. Scarisbrick, eds., *Law and Government under the Tudors* (Cambridge: Cambridge University Press, 1988), pp. 91-110.

[15] E. P. Thompson, *The Making of the English Working Class* (London: Penguin, 1963); Gareth Stedman-Jones, *Languages of Class: Studies in Working Class History, 1832-1982* (Cambridge: Cambridge University Press, 1983); Keith Wrightson, 'The Encosure of English Social History', in Adrian Wilson, ed., *Rethinking Social History: English Society 1570-1920, and its Interpretation* (Manchester: Manchester University Press, 1993), pp. 59-77; Jane Whittle, *The Development of Agrarian Capitalism: Land and Labour in Norfolk, 1440-1580* (Oxford: Clarendon Press, 2000); Andy Wood, 'Fear, Hatred and the Hidden Injuries of Class in Early Modern England', *Journal of Social History*, 39 (3: 2006), pp. 803-26; Jane Whittle, 'Peasant Politics and Class Consciousness: The Norfolk Rebellions of 1381 and 1549 Compared', *Past & Present*, 195 (suppl 2: 2007), pp. 233-47.

[16] Alexandra Shepard, *Accounting for Oneself: Worth, Status, and the Social Order in Early Modern England* (Oxford: Oxford University Press, 2015); Hillary Taylor, '"Branded on the Tongue" Rethinking Plebian Inarticulacy in Early Modern England', *Radical History Review*, 121 (2015), pp. 91-105; Elly Robson, 'Improvement and Epistemologies of Landscape in Seventeenth-Century English Forest Enclosure', *The Historical Journal*, 60 (3: 2016), pp. 597-632; Hillary Taylor, 'The price of the poor's words: social relations and the economics of deposing for one's 'betters' in early modern England', *Economic History Review*, 72 (3: 2018), pp. 828-47.

[17] On enclosure see: Maurice Beresford, 'Habitation Versus Improvement: The Debate on Enclosure by Agreement ', in R.J. Fisher, ed., *Essays in the Economic and Social History of Tudor and Stuart England* (Cambridge: Cambridge University Press, 1961), pp. 40-69; Peter Jerrome, *Cloakbag and Common Purse: Enclosure and Copyhold in 16th century Petworth* (Petworth: Window Press, 1979); Nicholas Blomley, 'Making

Norfolk, many of the open fields alternated between arable and pasture at different times of the year; sheep and cattle were permitted to graze on particular parcels of land at particular times of the year, with the sheep manure fertilising the soil ahead of crops being planted. Whilst sheep farming was predominantly the concern of the manorial lord or his lessee, flocks ranged over the land of the lords tenants. The area upon which a flock could graze was called a foldcourse.[18] Foldcourses included a mixture of open field and heathland in order to ensure the flock had pasture upon which to graze all year round. Whereas the enclosure of land elsewhere in England is often depicted in the scholarship as being at the instigation of the lord, who perhaps sought to erode the common rights of the local community; in Norfolk there was need for co-operation between landlord and tenant to ensure the viability of the foldcourse system. If this co-operation broke down, for instance, if the lord attempted to pasture a larger flock than was permitted, tenants could respond by enclosing their land with the aim of sowing crops year-round and preventing the lord's flock from grazing. This is the backdrop to which the enclosure litigation discussed in Chapters Three and Four is set.[19]

This litigation is accentuated by the complexity of Gimingham's political and jurisdictional identity. Indeed, although the overlay of regional identities in early modern England was relatively commonplace, the manifest ways in which inhabitants played upon competing jurisdictional claims and how these rival jurisdictions competed for the business of inhabitants, reveal Gimingham to be a nexus of political and legal contestation.[20] Not only did the political

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Private Property: Enclosure, Common Right and the Work of Hedges', *Rural History*, 15 (1: 2007), pp. 1-21; B. McDonagh, 'Making and Breaking Property: Negotiating Enclosure and Common Rights in Sixteenth-Century England', *History Workshop Journal*, 76 (2013), pp. 32-56; B. McDonagh, 'Disobedient objects: material readings of enclosure protest in sixteenth-century England', *Journal of Medieval History*, 45 (2018), pp. 254-75. For enclosures specifically in Norfolk see: Heather Falvey, 'The Politics of Enclosure in Elizabethan England Contesting Neighbourship in Chinley (Derbyshire)', in Jane Whittle, ed., *Landlords and Tenants in Britain, 1440-1660* (Boydell and Brewer, 2013), pp. 67-84; Whyte, 'Enclosure, common fields and social relations in early modern Norfolk', pp. 63-76.

[18] The best introduction to the foldcourse is still to be found in Allison, 'The Sheep- Corn Husbandry of Norfolk in the Sixteenth and Seventeenth Centuries'.

[19] See below, Chapters Three and Four. For the Gimingham context see the discussion in Whyte, 'Enclosure, common fields and social relations in early modern Norfolk', pp. 63-76.

[20] Whilst the contestation of political authority is described in Cristobel Hood's pioneering study of

jurisdictions of manor and soke underly the forensic arguments for and against enclosure around Gimingham; more broadly, the legal jurisdictions of the manorial, Duchy, equity and common law courts underwrote the litigation itself. Thus, whilst social historians have extensively mined the archival resources associated with early modern courts, few have attempted to use them to illustrate the ideological idiosyncrasies of plebeian politics and identity in a local context;[21] none have done so through an examination of specifically legal jurisdictions.[22] What makes this a particularly worthwhile analytical enterprise is that the overlay of local identities, through the political institutions of the manor and soke, remains a prominent feature of Gimingham litigation across legal jurisdictions. Thus, this thesis argues, we can examine the relationship between law and politics in sixteenth-century England through a contextualised study of the intellectual content of Gimingham litigation. The manifest ways in which lawyers and litigants used forensic rhetoric to construct legal arguments with which to legitimate behaviour, illustrates the relationship between ideology and action. Ciceronian and Tacitean threads of humanist political thought, which have been identified more generally elsewhere in the scholarship, were specifically deployed in relation to particularly local incidences of enclosure and poor relief in sixteenth-century Gimingham.[23] This is the context in which the litigation between Edward Coke and some of Gimingham's wealthier inhabitants

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Gimingham, it is primarily discussed in relation to the decay of the demense, which lacks an appreciation of the intellectual context that accompanied the social and economic developments of the late-sixteenth century. See Hood, *History of an East Anglian Soke*, pp. 255-334.

[21] Andy Wood's work is a notable exception to this. See, for instance: Andy Wood, *The Politics of Social Conflict: The Peak Country, 1520-1770* (Cambridge: Cambridge University Press, 1999); Andy Wood, *The 1549 Rebellions and the Making of Early Modern England* (Cambridge: Cambridge University Press, 2007), pp. 89-184; Wood, *Memory of the People*.

[22] Even the seminal work of Chris Brooks, which has been a touchstone for this thesis, is interested in explicating more general aspects of early modern "legal culture". See the following section of this introduction for a more precise examination of what is often meant by the term "legal culture". See, for instance, the discussion in C. W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge: Cambridge University Press, 2008). See also the collection of essays in C. W. Brooks, *Lawyers, Litigation and English Society Since 1450* (London: Hambledon, 1998).

[23] Quentin Skinner, *The Foundations of Modern Political Thought* 2 vols., vol. (Cambridge: Cambridge University Press, 1978); Erika Rummel, *The Humanist-Scholastic Debate in the Renaissance & Reformation* (Cambridge, Mass: Harvard University Press, 1995); Brooks, *Law, Politics and Society*. For the Gimingham context see below, Chapter Five.

is discussed in Chapter Five.

The inhabitants of Gimingham are perhaps the aspect of Gimingham which have received the most attention in the scholarship to date. Their antics animate the archival record, and stirred the cultural melting pot of late-sixteenth century Gimingham. The manor itself was, like most feudal tenures, ultimately held of the monarch. It was granted to Thomas Boleyn, father of Queen Anne Boleyn, in 1530. Boleyn held the lease for twenty years, where upon its expiry in 1550 it passed to one Edward Fisher. Little is known of Fisher and he figures only briefly in the history of Gimingham as, upon taking possession of the lease, he immediately sublet it in its entirety to one Peter Read of Norwich.[24] Read figures prominently in the Duchy and Star Chamber archives, and is a figure we return to time and again throughout the thesis. The ends and the means by which Read exercised his seigneurial power over the manor resulted in litigation which, not only ranged across at least four different jurisdictions but also, cut deep into the fabric of sixteenth-century English society.[25] The spectre of his seigneurialism loomed over Gimingham long after his death in 1568, and could still be recalled by inhabitants half a century later.[26] Other inhabitants of Gimingham, beyond individual lessees, also figure prominently in the archives.[27] Indeed, a handful of inhabitants, are thrust into historical focus by then Attorney General Edward Coke's prosecution of them in the Star Chamber 1597. This litigation in particular throws a unique light onto the complexity of the economic issues surrounding agricultural improvement and depopulating enclosures, because the pleadings and depositions for both the plaintiff (Coke) and the defendants (Bateman et al) survive in the archive.[28] Gimingham litigation illustrates, therefore, more than just a particularly specific

[24] The genealogy of the Gimingham lessees is discussed at length in Hood, *History of an East Anglian Soke*, pp. 237-46.

[25] See the discussions of Read in ibid. ; Wood, *Memory of the People*, pp. 72-3,183,291,335; Whyte, 'Enclosure, common fields and social relations in early modern Norfolk', pp. 63-76.

[26] See below, Chapter Five. See also, TNA, DL4/63/23

[27] The bulk of this work is still drawn from Cristobel Hood's study which, when used in conjunction with the archival material, gives a much clearer impression of the inhabitants of Gimingham.

[28] See below, Chapter Four. See also, TNA, STAC5/A2/40

instance of endemic enclosure disputes; it also illuminates the ideological apparati both sides used to legitimate their positions.

Crucially, however, what makes Gimingham litigation singularly valuable is the amount of interconnected material available in the archive. The amount of litigation from this relatively small locality allows us to contextualise individual cases using other pieces of litigation, instigated in multiple jurisdictions by people from the same area and at around the same time. The ability to not only grasp that three cases in three separate jurisdictions were all interrelated, as in the case of Peter Read's simultaneous litigation in the Duchy Chamber, Star Chamber and common pleas, but to also examine the content of those cases to examine how they were intended to function legally, is unique in the scholarship. The volume of litigation and the content of the cases themselves is such that, when properly contextualised, it allows us to grasp the micro and macro historical contexts in equal measure. As a micro history of enclosure, poor relief, and petty disputes, Gimingham litigation is, therefore, intimately bound up with macro historical questions of law, power, politics and social relations in early modern England.

Historiography of Legal Culture

Over the course of the proceeding chapters we examine macro historical questions of how legal culture is inextricably linked with law, power, politics, and social relations in the micro-historical context of sixteenth century Gimingham. An interrogation of legal culture in early modern England is, therefore, central to the analytical project of this thesis. It is also a central contention of this thesis, however, that the existing scholarship suffers from a lack of precision; specifically, a lack of clarity over what is meant by what is said, both historically and historiographically. That being said, the intention here is not to criticise existing historiography. It is, rather, to build upon existing perceptions of the past through an

intervention into the politics of historiography.[29] In what follows, therefore, we will examine how historians have approached questions of legal culture historiographically, and some of the consequences these historiographical decisions have had on the scholarship.

Historical analyses have, for a long time, been underpinned by a diverse range of theoretical apparati. The nineteenth-century sociological theories of Marx and Weber set the parameters for so much of the scholarship conducted throughout the twentieth century. In the social history of the law, Edward Thompson's work in particular drew upon social theories of marxism to create a paradigm within which legal and social historians have worked to explicate a 'culture of the rule of law' ever since.[30] Written in 1973, Thompson's taxonomy of legal culture underpins much of the work that has been, and continues to be, done on the history of English law and legal culture.

> The law when considered as institution (the courts, with their class theatre and class procedures) or as personell (the judges, the lawyers, the Justices of the Peace) may be very easily assimilated to those of the ruling class. But all that is entailed in 'the law' may not be subsumed into these institutions. The law may also be seen as ideology, or as particular rules and sanctions which stand in a definite and active relationship (often a field of conflict) to social norms; and finally, it may be seen simply in terms of its own logic, rules and procedures - that is, simply *as law*.[31]

Whilst this is not at all to suggest that investigations of legal culture have all been marxist, it is to say that the fundamental structure of much of the scholarship that has come after Thompson has explicated legal culture in terms of the relationship of law to social control. Such an approach has allowed historians to shine a light on some areas of English legal culture

[29] I am deeply indebted to the discussions in: Keith Thomas, *The Perception of the Past in Early Modern England* (London: 1983); J. G. A Pocock, 'The Politics of Historiography', *Historical Research*, 78 (199: 2005), pp. 1-14.

[30] E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975). The two most eminent and productive historians of English legal culture, writing since Thompson, have been John Baker and Chris Brooks. See: John H. Baker, *The Reports of Sir John Spelman* 2 vols., vol. (London: Selden Society, 1977); C. W. Brooks, *Pettyfoggers and Vipers of the Commonwealth* (Cambridge: Cambridge University Press, 1986); John H. Baker, *The Oxford History of the Laws of England, 1483-1558* 6(Oxford: Oxford University Press, 2004); Brooks, *Law, Politics and Society*.

[31] Thompson, *Whigs and Hunters*, p. 260.

that had been obscured by the mists of time. One of the points this thesis is concerned to make, however, is that this approach, whilst illuminating some areas of English law, has left others in darkness.

Another great stimuli of historical analyses, particularly in social history, has come out of twentieth century sociology and anthropology. In the 1960s, Keith Thomas and Peter Laslett began to draw attention to the growing scholarship in the social sciences, and encouraged historians to begin to work on a different canvas to that which was occupied by the historiography influenced by nineteenth-century social theory.[32] Since then, the influence of late-twentieth century social theory upon historiography has grown exponentially. Here the work of Clifford Geertz and James Scott are of particular theoretical importance.[33] Their comparative approach to legal systems, was designed to show that 'there is something useful to be said across cultures and historical epochs'.[34] This has been used to great effect by historians such as Andy Wood and Steve Hindle, who have used Scott's work in particular to shine a light into the sixteenth century; in order to illuminate, *inter alia*, the roots of what would become the class conflict imagined by Thompson, in the domination and dependence of those people who lived and died under the Tudors and Stuarts.[35] As we will see, however, the tradeoff of comparative anthropology is a steep price in analytical precision when speaking historically.

Some of the most stimulating analyses of legal culture in recent years, however, have come from investigations into the history of women and gender. Natalie Zemon Davis' pathfinding examination of pardon tales in sixteenth century France illustrated the performative nature of

[32] Keith Thomas, 'History and Anthropology', *Past & Present*, 24 (1: 1963), pp. 3-24; Peter Laslett, *The World We Have Lost* (London: Routledge, 1965).

[33] Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973); James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven: Yale University Press, 1985); James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven, CT: Yale University Press, 1990).

[34] Scott, *Domination and the Arts of Resistance*, p. x.

[35] Steve Hindle, 'The Shaming of Margaret Knowsley: Gossip, Gender and the Experience of Authority in Early Modern England', *Continuity and Change*, 9 (3: 1994), pp. 391-419; Wood, 'Fear, Hatred and the Hidden Injuries of Class in Early Modern England'.

legal texts.[36] This approach, founded upon the identification and examination of the linguistic acts performed within and by texts, draws upon the influence of postmodernist discourse in late-twentieth century social theory. Davis draws specifically upon Judith Butler's methodological interventions in postmodernist discourse, in order to excavate the agency of women through the performativity of their pleas for pardon. More recently, Garthine Walker and Laura Gowing have developed Davis' approach to legal texts in the context of English social history.[37] They have preferred, however, to cast aside an explicit engagement with the social theory which had underpinned Davis' work. Their work, which retains an essentially linguistic hermeneutic, has emphasised the multi-vocality of legal texts. This has allowed them to demonstrate the nuances of how women exercised agency in a patriarchal society.[38] Whilst this thesis will engage with scholarship underpinned by all three of these historiographical hermeneutics, it is the approach adopted by gender historians with which this thesis shares the closest affinity. It is to a more detailed discussion of these themes in the scholarship on legal culture to which we now turn.

One of the things that is evident from even a cursory glance over the scholarship on legal culture, particularly early modern legal culture, is that there is no agreed definition of what is meant by the term 'legal culture'. As Clifford Geertz once remarked, studies of legal culture are locked in an 'endless discussion as to whether law consists in institutions or in rules, in procedures or in concepts, in decisions or in codes, in processes or in forms'.[39] This can readily be seen in the work of two of the most authoritative historians of sixteenth century English law,

[36] Natalie Zemon Davis, *Fiction in the Archives: Pardon Tales and their Tellers in Sixteenth-Century France* (Cambridge: Polity Press, 1987).

[37] Laura Gowing, *Domestic Dangers: Women, Words, and Sex in Early Modern London* (Oxford: Clarendon Press, 1996); Garthine Walker, *Crime, Gender and Social Order in Early Modern England* (Cambridge: Cambridge University Press, 2003); Laura Gowing, *Gender Relations in Early Modern England* (Abingdon: Routledge, 2014).

[38] Above all, see Gowing, *Domestic Dangers*.

[39] Clifford Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective', in Clifford Geertz, ed., *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), pp. 167-234.

John Baker and Chris Brooks, who have been locked in just such an endless discussion; they are indicative of a scholarship that is unable to go beyond Edward Thompson's taxonomy of law in its effort to describe what is meant by 'legal culture'.[40] Indeed, the scholarship generally fudges its explanation of legal culture because that 'culture' is usually the secondary illustration:[41] an investigation into another aspect of law - whether it be of an institution (such as a particular court), the people around an institution (such as lawyers, attorneys, JPs), or whether it be an investigation into the logic of the rules and procedures of the law itself (such as, the rules and procedures of Equity, common or criminal law) - is used to illustrate the context that surrounds that particular institution, or profession, or ideological development; that context is then described as indicative of legal 'culture'.[42] Whilst all of these studies have made valuable contributions to the scholarship, they have been written with a number of different agendas in mind and have been dispersed in their spatial and temporal coverage. Few have been concerned with the role of law in politics and society broadly conceived.[43] Studies of legal culture have preferred to leave definitions of culture to cultural historians. Thus, Peter Burke's definition of culture as 'a system of shared meaning, attitudes, and values',[44] which it is often forgotten is taken directly from the anthropological literature, is cited more often than

[40] Indeed, Brooks' last great work begins by citing Thompson's influence: Brooks, *Law, Politics and Society*, p. 1. See also, the much expanded version of Baker's seminal essay *English Law and the Renaissance* in Baker, *Laws,*vol. 6, pp. 3-54.

[41] The two major exceptions here are Craig Muldrew and Alex Shepard's work on credit, but even these two important works have a relatively surface-level critical engagement with what they mean by 'culture'. See: Craig Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (Basingstoke: Macmillan, 1998); Shepard, *Accounting for Oneself*.

[42] For example: Ralph A. Houlbrooke, *Church Courts and the People During the English Reformation, 1520-1570* (Oxford: Oxford University Press, 1979); E. W. Ives, *The Common Lawyers of Pre-Reformation England: Thomas Kebell, a Case Study* (Cambridge: Cambridge University Press, 1983); J. A. Sharpe, *Crime in Early Modern England 1550-1750* (London: Routledge, 1984); Cynthia B. Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge: Cambridge University Press, 1987); Martin Ingram, *Church Courts, Sex and Marriage in England, 1570-1640* (Cambridge: Cambridge University Press, 1987); Walker, *Crime, Gender and Social Order in Early Modern England*.

[43] Two notable exceptions are Chris Brooks and Andy Wood Brooks, *Law, Politics and Society*; Wood, *Memory of the People*.

[44] Quoted in Brooks, *Law, Politics and Society*, p. 4. See also, Peter Burke, *Popular Culture in Early Modern Europe* (New York: Harper & Row, 1978); A. L. Kroeber and C. Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (Cambridge, Mass: 1952).

not before being cast aside because the scholarship of cultural history has been concerned not with legal culture but with notions of 'popular' and 'elite' culture.[45] In other words, there is a very real sense in the scholarship that historians have struggled to engage seriously not just with the concept of culture in general terms; they have also struggled to delineate what they themselves mean by the term.

Legal historians, almost universally, conceive of English law as a set of rules or doctrines that are particular to England.[46] The contrast is always made with other systems of law - such as Roman law, civil law, and customary law - but the analysis remains, essentially, a comparative analysis of systems of rules and doctrines.[47] One consequence of this conceptualisation is that legal scholars always approach the subject as either rules or doctrines being influenced by, or having exerted an influence upon, outside forces: such as, particular individuals, identifiable political and cultural movements such as the Renaissance and Reformation, or ideological currents like Humanism or Scholasticism.[48] There is, in other words, an implicit assumption in the legal scholarship that English law exists in a semi-independent state with its own logic, which could defend itself from alien incursion as well as exert an influence external to itself. This view of English law is endemic within the scholarship and there is a very real sense in which it can be said that English law did behave in this way.[49] This view of the law, however, could also be said to be somewhat restrictive; it lacks a holistic view of how the weave of English law fits into the tapestry of English society because it lacks a thorough engagement with the concept of culture.

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[45] See, for instance, the summary of the relevant scholarship in Brooks, *Law, Politics and Society*, pp. 1-4.

[46] Houlbrooke, *Church Courts and the People*; Ives, *The Common Lawyers of Pre-Reformation England*; Sharpe, *Crime in Early Modern England 1550-1750*; Herrup, *The Common Peace*; Ingram, *Church Courts, Sex and Marriage*; Baker, *Laws,*vol. 6.

[47] This is approach underlies, for instance, one of the most celebrated discussions of English Law in our time: Baker's answer to Maitland's Rede Lecture on English Law and the Renaissance. See Baker, *Laws,*vol. 6, pp. 3-54.

[48] Ibid.

[49] I personally would wish to emphasise that the ways in which individuals engaged with and participated in legal culture *made* the law behave in this way.

The most explicit discussions legal culture are to be found in the anthropological literature. Lawrence Rosen has suggested that law itself 'approaches culture' and that culture is the stitching together across domains of the categories and experience of relationships.[50] We should not be surprised by the similarities between Rosen's definition of culture and the definition we saw earlier in Peter Burke's work, as both owe a primary debt to the same anthropological school.[51] Rosen's *Law as Culture*, like James Scott's *Domination and the Arts of Resistance*, is an exercise in comparative legal anthropology; in his comparison of legal systems from around the world, Rosen argues that law is 'a marvellous entry to the study of that most central of human features, culture itself, and hence an open invitation, whatever one's ultimate interests, to think about what and who we are'.[52] Anthropology, almost by definition, however, is normative: it is the study of *human* social relations. It is not the study of a particular society and its social relations, it is the study of human relations in a particular society.[53] This leads Rosen to make a compelling case for seeing law and legal culture in the wider context of structures of social control. There is, of course, a very real sense in which law structures every society; this is what has allowed Andy Wood and Steve Hindle, for instance, to use James Scott's work to great effect and show how legal relationships of domination and dependence structured life in sixteenth and seventeenth century England.[54] Ultimately, however, the clear and present danger of comparative anthropology in historical analyses is its anachronism. There is clearly a serious loss of analytic purchase, for instance, in talking about law and legal culture 'when a kinsman mediates a dispute or members of a settlement use gossip or an

[50] Lawrence Rosen, *Law as Culture: An Invitation* (Princeton: Princeton University Press, 2006), pp. 1-13.

[51] See the discussion in Kroeber and Kluckhohn, *Culture: A Critical Review of Concepts and Definitions*. Though Rosen arrives at the foundational work of Kroeber and Kluckhohn via Clifford Geertz's seminal essay on law and culture in Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective', pp. 167-234.

[52] Rosen, *Law as Culture*, p. 200.

[53] The distinction is that anthropological frameworks are meant to be applied to any society in order to examine human relations; the frameworks should not be specific to a particular society.

[54] Hindle, 'The Shaming of Margaret Knowsley: Gossip, Gender and the Experience of Authority in Early Modern England'; Wood, 'Fear, Hatred and the Hidden Injuries of Class in Early Modern England'.

informal gathering to articulate their vision of society'.[55] Whilst law and legal culture may well fit into our modern understanding of broader systems of social control, it is hard to imagine that sixteenth century lawyers of the English common law would agree that participation in a superstructure of social control was a valid description of them or the role of the common law in English society.[56]

If we take the essence of Rosen's understanding of culture as the categories and experience of relationships in a given context, what we need is a way of historicising it in its legal context.[57] In this respect I would follow Clifford Geertz and suggest that existing approaches to law and legal culture miss the mark:

> The [two] main approaches to comparative law - that which sees its task as one of contrasting rule structures one to the next and that which sees it as one of contrasting different processes of dispute resolution in different societies - both seem to me rather to miss the point: the first through an over autonomous view of law as a separate and self-contained "legal system" struggling to defend its analytic integrity in the face of the conceptual and moral sloppiness of ordinary life; the second through an overpolitical view of it as an undifferentiated, pragmatically ordered collection of social devices for advancing interests and managing power conflicts.[58]

It is in recognising that legal systems regulate and construe behaviour - and here I diverge from Geertz significantly - and that it is this cultural dialectic which provides the resources for *individuals* to create agency.[59] It is here, in the method and manner of conceiving *individual* decision situations so that settled rules can be asserted or challenged that the informing *choices* lie.[60] That is to say, it is in recognising (rather than contrasting) the *choices* made by individuals and correctly identifying their actions that we illuminate their understanding of legal culture;

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[55] Rosen, *Law as Culture*, p. 7; Simon Roberts, 'Review: Law as Culture: An Invitation by Lawrence Rosen', *The Modern Law Review*, 70 (1: 2007), pp. 161-3.

[56] This is, in my view, a critical weakness of comparative anthropology when historians attempt to apply it to historical analyses.

[57] Rosen, *Law as Culture*, pp. 1-13.

[58] Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective', pp. 167-234.

[59] Geertz famously emphasises the role of the collective resources of culture as constitutive of legal sensibility. Ibid. pp. 214-15.

[60] The 'method and manner' terminology is borrowed from Geertz. Geertz would also say that it is not in the identification of choice, but in the contrast of different cultures, that the 'informing contrasts' lie. See ibid. p. 215.

what Geertz would call their legal sensibilities. Some of the most insightful recent scholarship in early modern social history has focused on identifying varieties of local custom.[61] It has demonstrated that *lex loci* is local knowledge. In order to historicise legal culture, then, we need to historicise the locality out of which it arose; this has been the bread and butter of social history for decades. What we need, and what this thesis will demonstrate, is a way of turning the infinite varieties of law into commentaries upon one another, the one lighting what the other darkens. As we will see in the litigation examined throughout this thesis, we need look no further than how people *used* knowledge and *used* law in their every day lives to create relationships of domination and dependence.[62] It is clear, therefore, that whilst comparative law may be a hermeneutic *grande jete*; an approach we see in the legal and social historiography, akin to 'Englishing Dante or demathmatizing quantum theory for general consumption, an imperfect enterprise, approximate and makeshift,' it is not, *pace* Geertz, 'all there is'.[63]

Within the historiography of early modern legal culture, it is historians of women and gender who have struck out on their own and left the paradigm of comparative law behind. A particular preoccupation with the textual interpretation of legal records is the hallmark of this hermeneutic; its most celebrated practitioners are Natalie Davis, Garthine Walker and Laura Gowing.[64] Walker has argued that, by focusing on the construction of narratives within texts, 'historians are able to do more than reveal information about crime, criminality and the legal process. They may open windows into the wider culture and ways of thinking and doing in early modern society. Hence, the history of crime becomes a broader cultural history of the

[61] Wood, *Memory of the People*; ibid. ; Andy Wood, ''Some banglyng about the customes': Popular Memory and the Experience of Defeat in a Sussex Village, 1549–1640', *Rural History*, 25 (1: 2014), pp. 1-14.

[62] It is hoped that the approach advocated in this thesis will complement existing scholarship which has made use of comparative approaches to law.

[63] Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective', pp. 167-234.

[64] Davis, *Fiction in the Archives*; Gowing, *Domestic Dangers*; Walker, *Crime, Gender and Social Order in Early Modern England*; Gowing, *Gender Relations*.

period'.[65] Whereas studies that have attempted to explicate early modern culture through anthropological frameworks, to paraphrase Kluckhohn, have often been occupied with constructing a great mirror in which we can 'look at [ourselves] in [our] infinite variety'.[66] Gender historians have, by contrast, taken a much more modest approach in their investigations of how women have been depicted in legal narratives and constructed such narratives themselves.

Historians of gender have approached legal texts through their discursive frameworks. In doing so, they have demonstrated that 'it is possible to embark on a linguistic analysis of texts, to read them for their semantic content or in the way which they are discursively constructed in particular material circumstances'.[67] Thus, by excavating the discursive context of how women are portrayed and how they construct their own legal narratives, Walker and Gowing have shown existing scholarship on early modern culture to be seriously misleading through its weakly conceptualised notions of masculinity and femininity[68]: 'historians tend to accept criminality in general to be a masculine category without conceptualising or contextualising it in terms of gender; male criminality is thus normalised while female criminality is seen in terms of dysfunction, an aberration of the norms of feminine behaviour'.[69] The tools of choice for Walker and Gowing in their excavation of the gender dynamics of early modern legal culture have been the postmodern linguistic theories of Joan Scott, Mikhail Bhaktin, and Michel Foucault, and it is to these theories to which we now briefly turn.[70]

The linguistic hermeneutics drawn upon by Gowing and Walker are a product of postmodernist developments in late-twentieth century historiography. In particular, Gowing

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[65] Walker, *Crime, Gender and Social Order in Early Modern England*, p. 6.
[66] Quoted in Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective', pp. 167-234.
[67] Walker, *Crime, Gender and Social Order in Early Modern England*, pp. 6-8.
[68] Gowing, *Domestic Dangers*; Walker, *Crime, Gender and Social Order in Early Modern England*; Gowing, *Gender Relations*.
[69] Walker, *Crime, Gender and Social Order in Early Modern England*, p. 4.
[70] Keith Thomas, 'The tools and the job', *Times Literary Supplement*, (April 7: 1966).{Walker, 2003 #397@1-22

and Walker have both drawn upon a seminal article by Joan Scott in defining the scope of their enquiries. The article begins by simply (and provocatively) defining the concept itself, which sets the scope for the entire enterprise: 'Gender. n. a grammatical term only'.[71] It is difficult to overstate the significance of this definition. Whereas all of the previous historiographical approaches to legal culture had construed the object of analysis as something physical that can be observed - people, institutions, behaviour, systems of social control - Gowing and Walker, in basing their analyses upon the definition of gender offered in this article, construe the object of analysis as linguistic. This is the fundamental move that has allowed Gowing and Walker to get away from comparative approaches to law and legal culture. An explicit engagement with Joan Scott's concept of gender and the linguistic hermeneutic which underpins it opens up a new historiographical vista.

> We need to deal with the individual subject as well as social organisation and to articulate the nature of how their interrelationships, for both are crucial to understanding how gender works, how change occurs. Finally, we need to replace the notion that social power is unified, coherent, and centralised with something like Foucault's concept of power as dispersed constellations of unequal relationships, discursively constituted in social 'fields of force'. Within these processes and structures, there is room for a concept of human agency as the attempt (at least partially rational) to construct an identity, a life, a set of relationships, a society with certain limits and with language - conceptual language that at once sets boundaries and contains the possibility for negation, resistance, reinterpretation, the play of metaphoric invention and imagination.[72]

Walker succinctly summarised her interpretation of Foucauldian power dynamics and Bhaktinian linguistic hermeneutics in the following way.

> Any utterance is dialogic in a dual sense. First, it is produced in a dialogue with sources that draw on certain other discourses according to context. In speaking or writing, we draw on all sorts of explicit and unacknowledged ideas. Secondly, it is produced in dialogue with the listener or reader, in that we assume the responses of those we address. Therefore, there are three categories of 'voice' in any given discourse: those

[71] {Scott, 1986 #730@1053}

[72] Joan W. Scott, 'Gender: A Useful Category of Historical Analysis', *The American Historical Review*, 91 (5: 1986), pp. 1053-75.

of source, author and listener.[73]

The approach to law and legal culture adopted by Gowing and Walker, which focuses on the vocabulary of texts, then, provides the scholarship with a new vocabulary to examine law and legal culture historically. Furthermore, a corollary of the linguistic parameters of such an approach mean that it does not necessarily detract from earlier scholarship; indeed it can add an extra dimension to the the anthropological historiographies of legal culture because it allows for an engagement with what Clifford Geertz called the 'semantics of social action'.[74] A linguistic understanding of the implications that follow from recognising the fact that 'man was not created governed, and the realisation that he has become so, severally and collectively, by enclosing himself in a set of meaningful forms, webs of signification he himself has spun, leads us into an approach to adjudication that assimilates it not to a sort of social mechanics, a physics of judgement, but to a sort of cultural hermeneutics, a semantics of action".[75] Ultimately, then, what this historiography of early modern legal culture gives us is the notion that interpretation is largely dialogical. The historiographical aspiration to arrive at a neutral operative definition of legal culture is itself unachievable because the law, not to mention the concept of culture itself, has a history; any concept that has a history necessarily escapes definition.[76] By employing the semantics of action we can, however, attempt to contextualise and historicise law and the relationships which enveloped it in order to offer an interpretation of a particular moment. It is upon this premise that this thesis seeks to offer an original contribution to the historiography of sixteenth century law and culture.

[73] Walker, *Crime, Gender and Social Order in Early Modern England*, p. 7.
[74] Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective', pp. 167-234.
[75] Ibid.
[76] This point is drawn from Nietzsche, but is more accessibly found in the discussion in Skinner. Cf. Friedrich Wilhelm Nietzsche, *On the Genealogy of Morality*, ed., Keith Ansell-Pearson, (Cambridge: Cambridge University Press, 2007); Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1997).

Linguistic Frameworks

In what follows I will lay out the methodological framework upon which the historical analyses in this thesis are based. This framework is designed to build upon the historiography discussed above. It is argued that existing scholarship, whilst illuminating some aspects of the past, leaves others in relative darkness. The hermeneutic discussed here addresses that darkness by setting out a way in which historians can approach legal culture with greater clarity and specificity. The ways in which gender historians have approached legal texts have already provided a new lens through which we can examine historical vistas; what follows is an attempt to bring the detail of those vistas into focus by discerning the acts performed within them. Where Walker and Gowing have drawn upon the discursive concepts of heteroglossia and multivocality to illustrate gender as a concept that was simultaneously, highly normative, contextually specific, and shot right through early modern society. I will show that by excavating the linguistic acts utterances performed in highly specific legal contexts, we can recover the specificities of how people engaged with the law. The aim, then, is to explicate a genuinely historical understanding of law and its culture.

Linguistic hermeneutics are not particularly new in the historiography. They do, however, force us into a more explicit engagement with complex conceptual debates, such as those around politics, law, gender, and how we as historians interpret and represent such conceptual discourse. In his 2003 Creighton Lecture, John Pocock described the narratives created by people in the past as 'myths' which were used to legitimate their behaviour; and how 'it is very hard not to imagine the historiography as either the invention or the subversion and explosion of the myths upholding authority.'[77] In other words, people in the past used the past to legitimate their behaviour in their present; just as much as, in their interpretations of the past,

[77] Pocock, 'The Politics of Historiography', p. 3.

historians legitimate particular discourses in their present.[78] We have already examined how a similar thought in the anthropological literature has influenced the historiography of legal culture. The representation of history and the construction of narrative is, then, central to historiographies which draw upon anthropological and linguistic hermeneutics.

Pocock's emphasis of discursive narrative bears a familial resemblance to the approach employed in the historiography of gender. It is an analysis of language, which emphasises how individuals throughout history, and throughout the historiography, are always doing something linguistically in creating and interpreting texts.[79] Pocock, however, goes beyond what we find in Gowing and Walker; he is much more concerned to isolate the valence of a text within a specific context.[80] This allows for the isolation of historical meaning by focusing on the linguistic force of utterances within texts, while retaining an interest how those forces ripple out of the text into a wider context which is always partly, but never wholly, the product of the actions performed within it. In other words, if illocution is in the centre of Pocock's picture, perlocution is in the next frame.[81]

Texts, Pocock argues, have different levels of abstraction.[82] It is perfectly acceptable, for instance, in legal culture, to consider texts in the context of the 'letter of the law' - that is, in a

[78] A classic example is Eric Hobsbawm's defence of Marxism through his reading of the nineteenth century politics. Another example is E. P. Thompson's engagement in socialist political discourse through his historical analyses. Cf. E. J. Hobsbawm, *The Age of Revolution: Europe 1789-1848* (London: Weidenfeld & Nicholson, 1962); Thompson, *Making*.

[79] Pocock is specifically concerned with texts in the traditional sense of written documents. However, the basic principle of his argument has been extended in the philosophical literature to include even the most abstract forms of texts. Indeed, it is becoming increasingly evident in histories of landscape and material culture to examine the performative aspect of environments and objects. Cf. Nicola Whyte, *Inhabiting the Landscape: Place, Custom and Memory, 1500-1800* (Bollington: Windgather, 2009); Angela McShane, 'Material Culture and 'Political Drinking' in Seventeenth-Century England', in Phil Withington and Angela McShane, eds., *Cultures of Intoxication: Past and Present Special Supplement* (Oxford: Oxford University Press, 2014); Robson, 'Improvement and Epistemologies of Landscape in Seventeenth-Century English Forest Enclosure'.

[80] Gowing and Walker have been, for the time being, content to illustrate the multivalence of their subject.

[81] The terminology is that of J. L. Austin, but the turn of phrase is quoted from Pocock. Cf. John Langshaw Austin, *How To Do Things With Words* (Oxford: Oxford University Press, 1975); J. G. A Pocock, 'The history of poltical thought: a methodological inquiry', *Political Thought and History: Essays on Theory and Method* (Cambridge: Cambridge University Press, 2009), pp. 3-19.

[82] Pocock is here working along similar lines to Gowing and Walker when they talk about how there are multiple voices at play within texts. See Walker, *Crime, Gender and Social Order in Early Modern England*, pp. 8-9.

strictly legal sense, what the words on the page say verbatim - and ignore the intentions with which the text was created, or even how it has been used since, in order to analyse it on a set of purely legal principles. Similarly, it is equally permissible to remove a text from its historical context entirely and ascribe to it an entirely different meaning, for instance, when historians relate texts to other texts despite them having developed completely independently of one another. There are, for instance, legitimate non-historical and perhaps even trans-historical approaches to the study of political thought. The point, for Pocock, is to ensure that analyses are logically consistent. In short, this means that if the aim is to give an historical account of a text, there are two contexts with which we should be concerned: (a) what the author meant by what they said and/or (b) how the text was received in a given historical context. For Pocock, if we remain on the same level of abstraction throughout our analysis, we might convey an impression of something vaguely coherent; whereas, in blending the historical with the non-historical, we are more like Picasso than Monet.[83]

This preoccupation with linguistic meaning raises important questions around how historians interpret texts. On the one hand, authors write texts for particular purposes, with particular agendas in mind, and it is to those underlying purposes that we need to be sensitive if we are to avoid the trappings of anachronism. On the other hand, however, it is perfectly evident that texts have been taken to mean things that their authors did not and could not have intended them to mean, but which they nevertheless come to represent. This is, essentially, the dialectic around which postmodernism revolves, and out of which the 'linguistic turn' emerged in the historiography.[84] This, it will be remembered, is also a central consideration for how

[83] This is a vastly simplified account of the argument Pocock advances in Pocock, 'The history of poltical thought: a methodological inquiry', pp. 3-19. It is, for instance, possible to weave different levels of abstraction together in the same analysis so long as each abstraction forms one thread of the analysis and is clearly identified as such. Pocock's point, as such, is that there are potentially an infinite number of threads one could weave into such a picture because the 'traditions of behaviour,' that generate those abstractions are themselves contingent.

[84] For insightful, but polarising, discussions of the scholarship surrounding the linguistic turn in history see: James Vernon, 'Who's Afraid of the 'Linguistic Turn'? The Politics of Social History and Its Discontents', *Social History*, 19 (1: 1994), pp. 81-97; Michael Bentley, 'Victorian Politics and the Linguistic Turn', *The Historical*

gender historians have approached legal texts.[85] Nevertheless, it is the linguistic aspect of a text that is most often left out of analyses in social history.[86] As we have seen, taking into account linguistic contexts has the potential to open up other fields of inquiry for social historians to excavate. It can afford them a fresh perspective on issues with which they have been traditionally concerned - power relations, for instance - and propel them beyond the enclosures of professional specialisation that stymie interdisciplinary analyses. Whilst linguistics, therefore, in one sense problematises textual interpretation by calling attention to whole new sites of meaning, it also, following Thomas Kuhn, supplies the tools with which to excavate those meanings.[87]

One of the most influential ways to approach historical analyses through language, is the method advocated by another member of the Cambridge School of Intellectual Historians, Quentin Skinner.[88] Briefly, Pocock situates texts in 'traditions of behaviour,' by which he means the whole complex of ways of behaving, talking, and thinking in politics; which we inherit from a social past. In Pocock's analysis of political thought, political thought forms a series of historiographical abstractions from these traditions of behaviour. Skinner, by contrast, focuses (in Pocock's terms) solely on one level of abstraction: what the author of a text meant by what they said. He thereby aims to write 'a history of political thought constructed on

Journal, 42 (3: 1999), pp. 883-902.

[85] Gowing and Walker are, however, take a much more capacious view of culture than Pocock; they are, also, interested in explicating a much less technically specific discourse that is nevertheless far more multivalent than the political ideologies examined by Pocock.

[86] This is not to say that they are not aware of it. See, for instance, Peter Burke, 'Introduction', in Peter Burke and Roy Porter, eds., *The Social History of Language* (Cambridge: Cambridge University Press, 1987), pp. 1-20. Andy Wood notes, however, that social historians have left linguistic analyses to cultural historians and historians of 'elite political thought'. Cf. Wood, 'Fear, Hatred and the Hidden Injuries of Class in Early Modern England'. n16.

[87] Following Kuhn's definition of a paradigm as 'a mental and linguistic construct that could not only supply the answers to questions but also determine what questions should be asked, to the exclusion and occlusion of others'. Quoted in J. G. A Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge: Cambridge University Press, 2009), p. xi.

[88] The 'Cambridge School of Intellectual Historians' was originally said to consist of John Pocock (focusing on language), John Dunn (focusing on biography), and Quentin Skinner (focusing on authorial intention). Between them, they pioneered the use of linguistics in historical analyses from the 1960s through to the 1990s. The Cambridge School can, nowadays, be a term applied to intellectual historians who use similar methods.

genuinely historical principles'.[89] This approach is not exclusive to intellectual history, but it is most widely practiced in the history of political thought. Social history can benefit from thinking along similar lines, while retaining its traditional interests in aspects of society such as power relations, because to think along these lines is not to change the object of analysis. It is only to approach the analytical object from a different perspective.

As has been demonstrated by historians of gender, the benefit to social history lies in the vocabulary employed in interpreting texts along these lines. This is manifest in two distinct ways. In the first instance, as I discussed earlier, the vocabulary most appropriate to textual interpretation is, in many cases, the vocabulary we use to speak about actions. If we treat texts as events, and therefore as actions, we open the gates to a whole new type of explanation in social history along the lines of linguistic performance. This is not to detract from existing scholarship, it is, rather, to add *another* dimension to it. By individuating the linguistic actions embedded within texts, it is possible to more precisely isolate the historical discourses it engaged with. It also makes it possible to validate specific interventions in those discourses by recovering the linguistic circumstances in which the intervention was made and, consequently, under which it can be legitimated. Secondly, and perhaps more importantly, it provides a level of theoretical clarity, which it has been observed is often lacking in social history.[90] This theoretical clarity, combined with a focus on linguistic action makes it difficult to avoid an awareness of, or even engagement with, our own place in the historiography; therefore, with what we are doing in writing history. It is to a more critical interrogation of some of the theory employed by social historians to which we now turn.

[89] Quentin Skinner, *The Foundations of Modern Political Thought, Volume I: The Renaissance* (Cambridge: Cambridge University Press, 1978). Preface; Pocock, 'Texts as events: reflections on the history of poltical thought', pp. 106-22.

[90] Wrightson, 'The Encosure of English Social History', pp. 59-77.

Whilst Pocock's essay is a useful way to orientate oneself in historical linguistics, Quentin Skinner's more specific focus on intentionality within linguistic action more broadly is the methodological bedrock upon which this thesis rests.[91] Skinner's starting point is that of recovering what an author meant by what they said. This entails two things: identifying a range of normative vocabulary upon which the speech we are analysing draws, as well as a corresponding range of meanings that could be attached to that vocabulary; then using the context in which the speech was made to identify which of the meanings the author intended to convey in the making of the utterance.[92] Although Skinner is clearly indebted to Weber in making the jump from linguistic action to legitimate forms of social action. He is careful not to leave himself open to criticism along the lines of Gareth Stedman-Jones's critique of historical sociology,[93] and grounds his analysis in a close, textural, analysis of language.[94]

Skinner argues that there is a body of words in our vocabulary that we use to both describe and evaluate actions; we also use these words to also characterise the motives behind actions. Skinner calls these 'evaluative-descriptive' terms.[95] They enable us to perform two types of closely connected speech acts: illocutionary actions and perlocutionary actions. In short, 'whereas an illocution is defined as an act performed in saying something, a perlocution is described as an effect and hence a consequence of saying something'.[96] When people attempt

[91] Whilst recent historiography of gender has been an important aspect of our discussion so far; we do not find a strong engagement with the linguistic theory which underpins that historiography in the scholarship. It has, therefore, been necessary to introduce a deeper engagement with linguistics by drawing upon Pocock.

[92] Quentin Skinner, 'Meaning and Understanding in the History of Ideas', *History and Theory*, 8 (1: 1969), pp. 3-53.

[93] See, for instance, Gareth Stedman-Jones, 'From Historical Sociology to Theoretical History', *British Journal of Sociology*, 27 (3: 1976), pp. 295-305.

[94] My analysis derives from Skinner's original methodological work in intellectual history Quentin Skinner, 'Some Problems in the Analysis of Political Thought and Action', *Political Theory*, 2 (1974), pp. 277-303; Quentin Skinner, 'Moral Principles and Social Change', in Quentin Skinner, ed., *Regarding Method* (Cambridge: Cambridge University Press, 2002), pp. 145-57. This is now a standard tenet of textual interpretation, see the discussion in Michael J. Braddick and John Walter, 'Introduction. Grids of power: Order, Hierarchy and Subordination in Early Modern Society', in Micheal J. Braddick and John Walter, eds., *Negotiating Power in Early Modern Society* (Cambridge: Cambridge University Press, 2001), pp. 1-42.

[95] Skinner, 'Moral Principles and Social Change', pp. 145-57.

[96] Ibid. pp. 148-9.

to legitimate their behaviour they will attempt actions that fall into both of these categories.[97] Whether people succeed in achieving the perlocutionary effects they generally attempt, such as persuading or inciting their listeners or readers to break down an enclosure, for instance, is not primarily a linguistic matter. It is simply a matter for historical investigation. The question of whether people succeed in achieving the illocutionary effects they attempt - such as evincing, expressing or soliciting approval and disapproval, satirising, questioning - on the other hand, *is* primarily a linguistic matter. It is a question of syntax and grammar. This is what gives evaluative-descriptive terms 'their overwhelming ideological significance'.[98]

This, for Skinner, is the whole ballgame. The moral dialectic we maintain between 'describing and thereby commending certain courses of action as [for example] honest or friendly or courageous, while describing and thereby condemning others as treacherous or aggressive or cowardly' is the dialectic around which legitimate social action oscillates.[99] It is largely 'by the rhetorical manipulation of these terms that any society succeeds in establishing, upholding, questioning, or altering its moral identity'.[100] This is why, Skinner argues, rational people will always attempt to make their actions appear legitimate to a particular audience.[101] Most people who use language will, therefore, be engaged in this rhetorical exercise in some way.[102]

Let us take the example of the innovating landlord in sixteenth-century Norfolk, who seeks to enclose part of the manorial waste, upon which the poor depend for their livelihood, in order to enlarge his own estate. Once he (or she) has accepted the need to legitimate his actions he will be committed to showing that some *existing* favourable terms can somehow be applied as

[97] The debt to Weber here is clear.
[98] Skinner, 'Moral Principles and Social Change', pp. 145-57.
[99] Ibid.
[100] Ibid.
[101] This could be as general as a society at large or as private as an individual. Part of the task is to identify the intended audience. Obvious exceptions are individuals such as anarchists and other non-rational individuals.
[102] Skinner, 'Moral Principles and Social Change', pp. 145-57.

apt descriptions of his behaviour. Similarly, the poor, as soon as they decide to resist, will be committed to showing that some corresponding existing disapproving terms can somehow be applied to the lord's actions.

> To legitimise their conduct, they [both parties] are committed to showing that it can be described in such a way that those who currently disapprove of it can be brought to see that they ought to withhold their disapproval after all. To achieve this end, they have no option but to show that at least some of the terms used by their ideological opponents to describe what they admire can be applied to include and thus to legitimise their own seemingly questionable behaviour.[103]

This leads Skinner to argue that 'all revolutionaries are to this extent obliged to march backwards into battle'.[104] The novelty of this hermeneutic, and its immense value, is brought out when one contrasts Skinner's approach with that of historians such as E. P. Thompson, who could not conceive that people could exercise legal and political agency in this way. Thompson had, at around the same time Skinner was writing, argued that 'the revolutionary can have no interest in the law, unless as a phenomenon of ruling class power and hypocrisy, it should be his aim to simply overthrow it'.[105] Skinner gives us the means to see how, in the hands of revolutionaries, pens could be mightier than swords. By primarily focusing on illocutionary effects, Skinner can individuate linguistic acts (illocutions) that authors intentionally performed within texts; in so doing, identify multiple discourses that may be at play, as well as the specific contributions authors saw themselves as making to those discourses. This is how, in Skinner's terms, he is able to write a genuinely historical history of political thought.[106] He argues that this approach allows him to write a history of what people saw themselves as doing at the time, rather than what they may have been judged to have done *ex post facto*. In Pocock's terms, Skinner restricts himself to one tradition of behaviour and one

[103] Ibid. p. 150.
[104] Ibid. pp. 149-50.
[105] Thompson, *Whigs and Hunters*.
[106] Skinner, *Foundations, I*. Preface

level of abstraction per text; or, put another way, Skinner focuses on what was meant by what was said.

Whilst Skinner's approach has become paradigmatic in the history of political thought, it is symptomatic of the enclosure of social history that, while occasionally noting the importance of the linguistic turn, social historians have yet to pursue a linguistic analysis along these lines.[107] As a way to explicate *social* action, a linguistic analysis on these terms is, for instance, ideally placed to facilitate the use of James Scott's hidden and public transcripts in more dynamic ways. That being said, I by no means wish to suggest that this approach is perfect, nor that it is necessarily the best approach in every context. Therefore, a critical observation needs to be added at this point. Skinner's history of political thought is, essentially, a history of ideologies.[108] This is not to be unexpected given Skinner's inherent interest in political thought, but before standing on his shoulders it is worth mentioning what I am trying to reach. The term 'ideology' is commonly employed to intimate some relationship between (a) conceptual and verbal structures and (b) social experience and reality viewed in considerable complexity and depth. This is, however, not what Skinner's methodology suggests he is primarily concerned with. Skinner restricts himself to: (1) the agent; (2) an action the agent desires to perform; (3) the languages available to the agent in which the action may be expressed. Skinner's history of ideologies, therefore, falls short of an engagement with cultural or social history because it does not concern itself with the reasons why these languages and not others were available to particular agents.[109]

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[107] For discussions of Skinner's work and method see: James Tully, ed., *Meaning and Context: Quentin Skinner and his Critics* (Cambridge: Polity Press, 1988); Annabel Brett, James Tully and Holly Hamilton-Bleakley, eds., *Rethinking the Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 2006).

[108] The remainder of this paragraph is is based on the discussion of Skinner's methodology in J. G. A Pocock, 'Reconstructing the Traditions: Quentin Skinner's Historians' History of Political Thought', *Canadian Journal of Political and Social Theory*, 3 (3: 1979), pp. 95-113.

[109] This is distinct from why agents used these words and not others. Rather, it is about the availability of vocabularies, not the deployment of a specific vocabulary.

This method, then, when applied to sources in social and cultural history, has enormous potential. It has, thus far, been applied only in the relatively narrow context of major texts in the history of political thought. This is an existentially small contextual window that, because it is contingent on how long ago the text was written, can contract until it is imperceptible.[110] If it is applied to texts with a much richer contextual background, where we can glean a much greater understanding of what was going on - for instance, court records, custumals, charters, proclamations, probate, pamphlets - we would be able to do so much more than write a history of political thought on genuinely historical principles. We may be able to write a historical geography of political thought, which could possibly show how political and social ideas developed differently in different regions. We could explore the idiosyncratic ideologies of regions, institutions, of different social backgrounds, all of which were normative while being grounded a specific *locus.* Applying Skinner's methodological precepts to social history widens the scope of the investigation so that it can account for why particular languages were available to particular agents. What I hope to reach, then, is a genuinely historical history of law and legal culture.

This survey of the methodological landscape in social and intellectual history has, admittedly, emphasised the benefit of linguistic hermeneutics over those closer to anthropology and sociology. This is not because I want to suggest that either should not be used in historical analyses. Quite the opposite. I join Keith Wrightson who, echoing Bernard Bailyn, hopes to incite a riot for

> a more determined attempt to integrate the 'latent' and the 'manifest' events of history; to examine the active and continuous relationship between the underlying conditions that set the boundaries of human existence and the everyday problems with which people constantly struggle; to illuminate the landscape surrounding major public events and to reassess them accordingly; to establish systems of filiation and derivation among phenomena that once were discussed in isolation from each other; to relate the public and the private; to put the story together again; now with a complexity and analytical

[110] An explication of Plato's *Republic* along these lines, for example, would be almost impossible.

dimension never envisioned before[111]

Social history has been, is, and should remain, an existentially messy collection of tools and craftsmen. It is the tavern that sits at the crossroads of different ways of thinking. That does not, however, mean that social historians should simply glean theory from those who pass through. Paul Cartledge and Richard Evans have argued that 'we continue to need social history … as a history of class, of oppression and exploitation, or - if class, oppression and exploitation are found analytically or morally objectionable terms - at all events of poverty'.[112] It is through a narrative of class, oppression, exploitation, and poverty that this thesis will demonstrate that social history is more than the sum of its base. As Marx once argued

> Men make their own history, but not of their own free will; not under circumstances they themselves have chosen but under given and inherited circumstances with which they are directly confronted. The tradition of dead generations weighs like a nightmare on the minds of the living. And, just when they appear to be engaged in in the revolutionary transformation of themselves and their material surroundings, in the creation of something that does not already exist, precisely in such epochs of revolutionary crisis they timidly conure up the spirits of the past to help them; they borrow their names, slogans and costumes so as to stage the new world historical scene in this venerable disguise and borrowed language.[113]

This thesis will investigate how ordinary men and women used language to make their history, while also remembering Hobbes' pithy epigram, 'of *our* conceptions of the past, *we* make a future'.[114] The whole enterprise of interpretation is dialogical and the name of the game is intertextuality. Intertextuality illuminates intentionality, and it is recovering intentionality - that is to say, what ordinary people meant by what they said - which is the fundamental interpretative exercise of this thesis.

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[111] Wrightson, 'The Encosure of English Social History', pp. 59-77.

[112] Paul Cartledge, 'What is Social History Now?', in David Cannadine, ed., *What is History Now?* (Basingstoke: Palgrave Macmillan, 2002), pp. 19-35.

[113] Karl Marx, *Surveys from Exile*, ed., David Fernback, (London: Verso, 2010), p. 146.

[114] Thomas, *The Perception of the Past in Early Modern England*, p. 25.

Argument

The remainder of this thesis is split into four historical chapters. Chapters Two and Three are twinned and form the first major line of argument that runs throughout the thesis; Chapters Four and Five are similarly twinned and form the other main line of argument. In short, the former is concerned with demonstrating the classical inheritance of equity pleadings and depositions, while the latter is concerned to explicate the significance of that inheritance. The thesis is not intended to be read as the study of a locality. Whilst it is geographically grounded in litigation from a manor in sixteenth-century Norfolk, this is to give the argument a general sense of cohesion. The point in grounding the thesis in a locality is rather to demonstrate how the broader issues we will discuss can be seen at a local level, in the ways in which ordinary litigants understood their experience and talked about it to each other. We will, therefore, be introduced to the issues with which the thesis is centrally concerned first. Namely, English law, politics and classical notions of rhetoric; we will be introduced to the locality in which the thesis is grounded, the North Norfolk Manor of Gimingham more slowly, through each chapter as the thesis progresses in order to illustrate how the issues discussed in each chapter can be seen at play in Elizabethan Gimingham. Our view of Gimingham and of its inhabitants will, therefore, develop in line with our analysis.

Chapter Two serves two purposes. The first is to act as the main historical introduction to the thesis; the second is to begin to question some of the fundamental assumptions we are confronted with in the existing scholarship surrounding early modern legal records. We are introduced to equity pleadings from the jurisdiction of the Duchy of Lancaster's Court of Duchy Chamber which, in many respects, form the bedrock of this thesis. We are also introduced to classical notions of what it meant to be persuasive in a legal context. That is to say, we are introduced to the concept of rhetoric. We discuss how, despite making unlikely bedfellows, classical notions of persuasion and the everyday run of the mill records from

English equity courts actually have a quite a lot in common. It is suggested that the scholarship surrounding early modern legal records is, in many ways, misleading because the notion of rhetoric is weakly conceptualised in it. That is to say, rhetoric in the scholarship is often simply used as a synonym for persuasive speech. Throughout this chapter we begin to see that persuasion, whist it may be the intended effect, is not the sum of rhetoric; which, when properly grasped, is much more concerned with *what makes* speech persuasive. Once this is held in mind we can begin to see how, contrary to the prevailing orthodoxy in the scholarship, English law was not nearly as insular as it may at first glance appear.

Chapter Three begins to discuss the process of equity litigation in more detail. We retain our focus on records from the Duchy Chamber's jurisdiction, but we begin to expand the scope of the inquiry. We are introduced to the structure of the archive and the different classes of document contained within it. In this chapter we begin to think of the whole process of equity litigation in rhetorical terms. We consider the stages of litigation side by side with how classical and vernacular rhetorical authorities argue one should structure an argument before a court of law. When we consider the instruments of litigation in context, that is to say when we consider the complaint alongside the related answer, rejoinder, demurrer, interrogatories and depositions, we can appreciate the legal and juridical context of litigation. This chapter demonstrates how, by examining all of the instruments of a piece of litigation alongside one another and situating them within the broader context of humanist legal discourse, we can excavate a vibrant legal tradition that owes much more to classical modes of thinking than the scholarship generally allows for. The form and structure of legal texts are shown to be inherently classical; this, it is argued, has broad significance for our understanding of English law and legal culture in Renaissance England.

In Chapter Four we move from demonstrating the classical provenance of English legal culture to explicating its significance. This significance, it is argued, is to be found in the effects

of forensic forms and structures had upon the development of English law. In this chapter we delve deeply into the legal scholarship surrounding Equity and the influence of humanism and the Renaissance on English law more broadly. The notion, put forward by Maitland and so pivotal to much of the existing legal scholarship, that 'English law is not where we look for humanism or the spirit of the Renaissance', is challenged.[115] The intellectual contexts of pleadings are excavated and illustrate how humanist discourse inflected more than just the forensic structure of the arguments advanced; humanism is also to be found in their substantive content. Lawyers and litigants are shown to have deployed the vocabularies of Cicero and Tacitus, as well as the more legalistic common law vocabularies associated with ancient constitutionalism. Throughout this chapter we begin to see how people used these vocabularies to make sense of the world around them, to engage with their surroundings and, most importantly, to try and effect change within their world. It is argued that the development of English law mirrored the development of English society in important respects. By being sensitive to these developments in English law, specifically to how people used language to evaluate and describe their behaviour in a legal context, and thus legitimate their actions, we can recover the character of early modern society. By examining the ideas and ideologies deployed in defence of everyday life we begin to get a sense of how the law operated on the ground for ordinary people; this illuminates how the early modern state functioned and how ordinary people's relationship with the State was mediated through the law. Crucially, this chapter demonstrates how key political concepts, which we most often associate with academic political theory, such as the concept of the State or commonwealth, were contested through litigation.

The final chapter, Chapter Five, develops this key insight into early modern politics. The

[115] Frederic William Maitland, *English Law and the Renaissance* (Cambridge: Cambridge University Press, 1901), p. 3.

focus shifts from a legal context, wherein we examined the effects of forensic rhetoric on early modern English law, to a social context. We interrogate the concepts of power and authority in early modern politics and examine what they meant to the ordinary people of Gimingham. We examine how people other than the plaintiffs and their lawyers involved themselves in litigation by giving evidence in examinations and depositions. We see how ordinary people had a vested interest in the litigation taking place around them and used the opportunity to give evidence to construct their own narratives. We see how litigation was shaped by more than the ends litigants attempted through recourse to the law. It was also deeply shaped by the strategies and wagers involved in engaging with the epistemic discourses on politics; what Sophie Smith has recently described as 'the politics of political theory'.[116] We examine the discourse of popular memory as a means through with ordinary people were able to challenge dominant ruling ideas of contemporary political discourse by deploying alternative narratives. We see how notions of power, freedom and authority were written into the landscape of early modern England; how ordinary people, who perhaps lacked the technical vocabulary to debate politics in an academic sense, nevertheless understood politics in their own terms and could engage with complex notions of power and authority for their own ends through litigation.

History, we were told in 1989, is at an end.[117] Human civilisation, in terms of its political development, has reached a terminal point in the form of Western liberal democracy. In making this provocative declaration, Francis Fukuyama intended to stir the political community to action, to reinvigorate and instil in people once again the 'willingness to risk one's life for a purely abstract goal,' to re-create a 'worldwide ideological struggle that called forth daring, courage, imagination, and idealism'.[118] One cannot help but feel bewildered that such a beacon

[116] Sophie Smith, *Okin, Rawls, and the Politics of Political Theory.* Paper delivered to the Foundations of Political Thought section of the American Political Science Association, June 2018.
[117] Francis Fukuyama, 'The End of History?', *Centre for the National Interest*, 16 (1989), pp. 3-18.
[118] Ibid. p. 18.

of postmodernist theory should be so existentially ironic; whether or not we agree with Fukuyama's assessment, his notion of history is indeed dead. We no longer think of history as the history of past politics.[119] Historians have done battle with the spectre of modernism in Marxist historiography and a resurrected empiricist political historiography. History is increasingly seen in contemporary discourse, to borrow an analogy from Clifford Geertz, as a representation of the past; the questions with which historians now concern themselves centre around how those representations are to be represented.[120] Most social historians, however, remain reluctant to critically engage with their sources along explicitly linguistic lines.[121] This thesis is, therefore, situated along that methodological rubicon social historians seem so reluctant to cross. It is an attempt to develop a productive framework with which to approach the language used within legal texts, through an illustration of how ordinary people in early modern England risked their lives and livelihoods in daring displays of courage, imagination and idealism on a daily basis. If it is successful, perhaps it might suggest that neither history, nor its historiography, could ever be at an end.

[119] Patrick Collinson, '*De Republica Anglorum*: Or, History with the Politics Put Back', in Patrick Collinson, ed., *Elizabethan Essays* (Manchester: Manchester University Press, 1994), pp. 1-30.

[120] Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective', pp. 167-234.

[121] The main exceptions to this are Laura Gowing and Garthine Walker, in their work explicating the concept of gender through a close analysis of early modern legal records. See: Gowing, *Domestic Dangers*; Walker, *Crime, Gender and Social Order in Early Modern England*; Gowing, *Gender Relations*. Andy Wood has also attempted to engage with texts linguistically. See: Andy Wood, "Poore men woll speke one daye': Plebeian Languages of Deference and Defiance in England, c. 1520-1640', in Tim Harris, ed., *The Politics of the Excluded, c. 1500-1850* (Basingstoke: Palgrave, 2001), pp. 67-98; Wood, *The 1549 Rebellions*. All of these works are discussed in more detail below.

CHAPTER TWO: PLEADINGS

This chapter is concerned with the unexceptionally exceptional. It is concerned with everyday legal records produced by the English equity courts. Classical rhetoric may not be the first thing that we think of when it comes to the law and legal history, yet we shall see that rhetoric occupied a significant place in Renaissance culture. There is a growing appreciation of how the rhetorical and juristic culture of the sixteenth century shaped the political developments of early modern England, but there is as yet no study of how the multitude of people engaged with this culture and began to use it to reshape the world in which they lived. This chapter will, consequently, begin to examine this question in relation to legal records created by the equity court of Duchy Chamber under the reign of Elizabeth I. I have three main aims in this chapter; the first is simply to demonstrate that, legal records are not as sterile or insular as the scholarship surrounding the law might suggest. Properly contextualised, they can make 'the law' a worthwhile and rewarding subject of investigation for historians. They do not wholly consist of formulaic legal jargon created by court bureaucracy; the 'platitudinous repetition of technical legal argument merged with more general observations on the nature of the rule of law' served a very specific purpose within these texts.[122] My second aim has been to demonstrate that when we examine these records with classical theories of rhetoric in mind we expose a number of tensions within the texts. These records may be centuries old, but they provide windows into a culture we only partially understand; it was constantly changing and evolving, just like our own. My third concern follows from the second in that I have sought to show that, once we begin to remember the rhetorical and humanistic ambience of late-Tudor

[122] Brooks, *Law, Politics and Society*, p. 59.

England, it becomes slightly less strange to think about Roman rhetoric and English law in the same analysis.

Scholarship

Classical rhetoric is rarely the first thing one thinks of when asked about the law, the legal profession, or the courts in sixteenth century England. Yet, it had a profound impact on the law and legal culture in sixteenth century England. Its influence rippled throughout society, and realigned a broad spectrum of English culture into a philological sphere; wherein eloquence became the preferred instrument with which to remake society. Scholars have, however, been slow to grasp the importance of rhetoric in sixteenth century society. Despite the presence of a large scholarship on the Renaissance and its influence on English society, outside of intellectual history, there is relatively little work on classical rhetoric. This is, perhaps, unsurprising; whilst the place of rhetoric in the humanist curriculum is well established, English law is 'not where we look for humanism and the spirit of the Renaissance'.[123] This thesis argues, however, that if we re-examine the classical and sixteenth century rhetorical literature alongside early modern legal records, we will find Ciceronian rhetorical precepts were deployed throughout the English conciliar courts. This should precipitate a re-examination of English law and legal culture in the scholarship.

Within the historiographical paradigms examined in Chapter One, the scholarship of sixteenth-century England has, over the course of the twentieth and early twenty-first centuries, emphasised innovations in English government, politics, and law under the Tudors.[124] Geoffrey

[123] John H. Baker, 'English Law and the Renaissance', in John H. Baker, ed., *The Reports of Sir John Spelman* (London: Selden Society, 1977), vol. 2, pp. 23-51.

[124] Whereas the previous chapter was largely concerned with historiography, this chapter concerns itself with

Elton posited a 'Tudor revolution in government' under the administration of Thomas Cromwell.[125] Elton and his apologists argued that the rise of bureaucracy under the Tudors formed the genus of a recognisably modern form of government - a theme picked up and debated throughout the course of the later-twentieth century. John Guy has similarly written on the political innovations of the Tudor monarchs, finding in the political expedients employed by Henry VIII and Elizabeth I a Machiavellian finesse which, when no longer present under the inelegant and 'fumbling' Stuarts, created the conditions for revolution.[126] In emphasising the transformation of English law during the sixteenth century, John Baker has spoken of a 'yawning gap' in the historiography of English law during the sixteenth century, resulting in 'generations of lawyers [being] prevented from seeing that most of their law took the shape in which they knew it in the sixteenth century.'[127] In the social and cultural historiography of sixteenth-century England, Phil Withington has examined the vocabulary of early modern England in an attempt to demonstrate how 'a better appreciation of the early meanings and chronologies' of words such as "society" and "modern" 'illuminates the nature and antecedents of modernity … [and] enables us to demarcate the sixteenth … century as a distinctive era of social and cultural change.'[128] In a more narrative vein of analysis, Mike Braddick has argued that our modern conception of the state began to take a recognisable form in the sixteenth-century.[129] Steve Hindle has similarly connected the formation of the state to specific pressures in sixteenth-century society, particularly pressures that precipitated a

scholarship.

[125] G. R. Elton, *The Tudor Revolution in Government: Administrative Changes in the Reign of Henry VIII* (Cambridge: Cambridge University Press, 1953).

[126] J. A. Guy, *Tudor England* (Oxford: Oxford University Press, 1988), pp. 437-58.

[127] Baker, *Spelman Reports*, p. 23.

[128] Phil Withington, *Society in Early Modern England* (Cambridge: Polity Press, 2010), p. 1.

[129] Michael J. Braddick, *State Formation in Early Modern England, c. 1550-1700* (Cambridge: Cambridge University Press, 2000).

recourse to the law.[130] Law and politics in sixteenth century England, it is clear, were irrevocably intertwined.

Delving further into the legal historiography of early modern England there have been studies made of crime,[131] on the ecclesiastical courts,[132] on the legal professions,[133] on civil litigation, and on the place of common-law thinking in early modern political thought.[134] However, while all of these have been valuable contributions to the scholarship, they are all written with a number of different agendas in mind. They have been dispersed in their chronological coverage, and few have been specifically concerned with the role of law in politics and society broadly conceived. Those working on the lawyers have concentrated on internal professional developments and the social origins and social mobility of practitioners. Studies of crime usually draw their conclusions with little reference to the ideologies and attitudes that were associated with law enforcement. Those studies that have used quarter sessions and assize records to study crime, or ecclesiastical court depositions to examine sex and marriage, have on the whole been more concerned with the nature and incidence of crime and criminals, or the character of sexual and marital relations, than with legal thought and practice. Whilst some studies have addressed questions about the relationship between law and agency, they have for the most part been interested primarily in the value of legal records as sources for social and cultural history rather than in the social history of the law itself.[135] Andy

[130] Steve Hindle, *The State and Social Change in Early Modern England, c.1550-1640* (Basingstoke: Macmillan Press, 2000).

[131] Sharpe, *Crime in Early Modern England 1550-1750*; Herrup, *The Common Peace*; Walker, *Crime, Gender and Social Order in Early Modern England*.

[132] Houlbrooke, *Church Courts and the People*; Ingram, *Church Courts, Sex and Marriage*.

[133] Ives, *The Common Lawyers of Pre-Reformation England*; Brooks, *Pettyfoggers and Vipers*; Wilfrid R. Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (Oxford: Clarendon Press, 1991).

[134] J. P. Sommerville, *Royalists and Patriots: Politics and Ideology in England 1603-1640* (London: Longman, 1999); Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (Cambridge: Cambridge University Press, 2006).

[135] Wood, *The Politics of Social Conflict: The Peak Country, 1520-1770*; Hindle, *State and Social Change*;

Wood's recent study of custom in early modern society, and Chris Brooks' seminal work *Law, Politics and Society* stand out as beacons in an otherwise dim historiographical landscape.[136]

In the scholarship surrounding the intellectual developments that took place in early modern society there have been studies of humanism and scholasticism,[137] on the development of political thought,[138] on rhetoric and poetics in literary texts,[139] on ideas of citizenship and republicanism,[140] and on the relationship between language and law in early modern discourse.[141] Once again, however, these studies are written with a number of different agendas in mind. Whilst some of these studies have concerned themselves with the role of law in politics and society, they are generally restricted to a particular social class or geographical area: the gentry, the aristocracy, London or a specific county or urban centre. Those working on intellectual movements such as humanism concentrate on individual exchanges between the protagonists or the wider pamphlet wars in which they take place. Studies of political thought often fall into the trap of teleology, but a teleology that takes as its milestones only the texts that were written by scholars, or those already involved in government. There is little consideration of texts created for, or by the actions of, those who were not active in government or politics: the smallholders, copyholders, tenants at will, neifs and villeins, those who worked the land and lived and died in the same place in which they were born. Those studies that have

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Gowing, *Domestic Dangers*.

[136] Wood, *Memory of the People*; Brooks, *Law, Politics and Society*.

[137] Rummel, *Humanist-Scholastic Debate*.

[138] Skinner, *The Foundations of Modern Political Thought*.

[139] Quentin Skinner, *Forensic Shakespeare* (Oxford: Oxford University Press, 2014); Lorna Hutson, *The Invention of Suspicion: Law and Mimesis in Shakespeare and Renaissance Drama* (Oxford: Oxford University Press, 2007).

[140] Phil Withington, *The Politics of Commonwealth: Citizens and Freemen in Early Modern England* (Cambridge: Cambridge University Press, 2005); Patrick Collinson, 'The Monarchical Republic of Queen Elizabeth I', in John Guy, ed., *The Tudor Monarchy* (London: Arnold, 1997), pp. 110-34.

[141] Cathy Shrank, 'Civil Tongues: Language, Law and Reformation', in Jennifer Richards, ed., *Early Modern Civil Discourses* (Basingstoke: Palgrave Macmillan, 2003), pp. 19-34.

used literary texts to study the intellectual culture of a broader swath of society have on the whole been concerned with poetic or dramatic texts, plays performed in urban theatres and poems written for the few rather than the many. Studies of language and discourse have often been underpinned by Foucauldian philosophy and stressed both the normative power and constraints of language, while focusing on a particular thread of discourse wherein recurrent links can be demonstrated between words within texts and actions outside of them.

The scarcity of interdisciplinarity and intertextuality in the scholarship surrounding the law has not gone unnoticed. In the opening pages of *Law, Politics, and Society in Early Modern England*, Chris Brooks argues that while scholars regularly make use of legal records, 'many British historians would probably maintain that … 'the law' itself is not a very worthwhile or rewarding subject of investigation'.[142] Brooks attributes this reluctance to investigate 'the law' to the 'insularity and sterility' of the existing scholarship, which in turn has its roots in 'the heart of western social thought'.[143] The predominant influence of Marxist social theory in the twentieth century drove scholars away from the study of law and legal history because such theory did not regard legal thought or institutions as keys to the understanding of any society. Instead, it regarded them as epiphenomenal to the means of production.[144] Brooks' study is a delicate weave of social, cultural, and legal history; drawing on threads from the Ciceronian and Aristotelian inheritance of law and politics, it shows how classical learning informed sixteenth and seventeenth century English culture through a rhetorical understanding of civil society.[145] What Brooks does not do, however, is offer an account of what constitutes rhetoric;

[142] Brooks, *Law, Politics and Society*, p. 2.
[143] Ibid. pp. 2-3.
[144] Ibid.
[145] Ibid. pp. 58-9,93,423-32.

of how rhetoric may have been employed in the contexts he examines. He quotes Thomas Wilson's definition of the art, which was essentially Ciceronian, emphasising the need to speak fully and eloquently about all things which by law and mans ordinance are enacted and appointed for the use and profit of man, but he does not give an account of what Wilson may have meant.[146] Rhetoric, in Brooks' analysis, has no visible content; if it does have content it is indistinguishable from the rest of the *studia humanitatis*.

Whilst some more recent studies in intellectual history have addressed questions about the relationships between politics, law, language, and agency, they have for the most part been interested in examining only literary texts.[147] Indeed, there is a growing literature on the political edge of Shakespeare's dramatic works and the rhetorical devices used within.[148] This preoccupation with literary texts, however, while allowing for a self-contained analytical demonstration of theory and its subsequent practice within a text, is the Humanities equivalent to conducting a scientific experiment in a lab. The scenarios being analysed are fiction. They are inherently removed from the way in which the majority of people experienced and engaged with the world around them. Shakespeare's use of classical rhetoric in *Hamlet* and *The Merchant of Venice* or *A Midsummer Night's Dream* may be unquestionable, as is the fact that those plays were enjoyed by hundreds of thousands of men and women in sixteenth-century England, but it would be misleading to suppose that these examples indicate widespread use (or understanding of) of Roman rhetorical precepts throughout early modern society. Only in the more general scholarship on Humanism and the Renaissance do we find discussions of

[146] Ibid. p. 58; Thomas Wilson, *The Arte of Rhetorique, 1560* (Oxford: Clarendon Press, 1909), p. 1.
[147] Hutson, *The Invention of Suspicion*; Skinner, *Forensic Shakespeare*.
[148] A good overview of the scholarship is to be found in Lorna Hutson and Victoria Ann Kahn, *Rhetoric and Law in Early Modern Europe* (New Haven: Yale University Press, 2001).

classical rhetoric in the broader context of early modern culture. This scholarship has, by and large, focused on the humanist educational curriculum and its influence on sixteenth century society; although it is not specific to the local study of this thesis, the examination of the humanist educational curriculum is deeply relevant to the broader themes examined throughout the thesis and it is, therefore, necessary to discuss it in some detail.

Legal Education

Any discussion of education, legal or otherwise, in the sixteenth century cannot be conducted as if the Renaissance, Reformation and Counter Reformation were incidental to its development. Moreover, Paul Kristeller's widely accepted definition of humanism as as a phase in the rhetorical tradition of Western culture is based on the sound observation that humanist thinkers were, as a group, fascinated by the power of speech.[149] In the intellectual scholarship, then, discussions of education in the sixteenth century tend to revolve around how different humanists, and different categories of humanists, conceived of the humanist project and practiced what they preached at various points in time: humanism, christian humanism, or civic humanism.[150] Scholarship which focuses on the place of rhetoric in the sixteenth century curriculum is centered on a debate over whether classical rhetoric in its Ciceronian form predominates over the tradition practiced by, among others, Peter Ramus, or vice versa.[151] The debate over the ascendancy of Ciceronian or Ramist rhetoric is the framework within which a

[149] James D. Tracy, 'From Humanism to the Humanities: A Critique of Grafton and Jardine', *Modern Language Quarterly*, 51 (2: 1990), pp. 122-43.

[150] See, for instance, the discussions in: Hans Baron, *The Crisis of the Early Italian Renaissance: Civic Humanism and Republican Liberty in an Age of Classicism and Tyranny* (Princeton: Princeton University Press, 1966); Alistair Fox, 'Facts and Fallacies: interpreting English humanism', in Alistair Fox and J. A. Guy, eds., *Reassessing the Henrician Age: Humanism, Politics, and Reform, 1500-1550* (Oxford: 1986); Anthony Grafton and Lisa Jardine, *From Humanism to the Humanities: Education and the Liberal Arts in Fifteenth- and Sixteenth-Century Europe* (Cambridge, Mass.: Harvard University Press, 1986); Tracy, 'From Humanism to the Humanities: A Critique of Grafton and Jardine'.

[151] This is, for instance, a central theme of Grafton and Jardine, *From Humanism to the Humanities*.

debate over the humanist project more broadly is conducted. The essence of which is that Ramus and his follows are characterised as emptying classical rhetoric of its moral content, reducing it to the 'endlessly bifurcating dichotomies' of forensic arguments.[152] Ciceronian rhetoric, epitomised in the sixteenth century by Thomas Wilson and his *Arte of Rhetorique* (1553), by contrast maintained an essential connection between eloquence and moral virtue. This intricacies of this debate are, for instance, the subject of Anthony Grafton and Lisa Jardine's influential discussion of sixteenth century humanism.[153]

This debate in the intellectual scholarship underpins the most important recent discussion of humanism and humanist education in the context of English law and legal culture.[154] That is to say, John Baker's much enlarged and revised 2004 *English Law and the Renaissance*. The evolution of Baker's essay, which has been revised every decade since the 1970s, illustrates how our understanding of legal education in the sixteenth century has changed over the course of the last half century.[155] At first, in the 1970s, legal historians were dismissive of the idea that Renaissance Humanism may have influenced the development of English law. Indeed, Baker even quipped that 'English law is not where we look for humanism and the spirit of the Renaissance'.[156] In his 2004 version of the same essay, however, Baker articulated a much more nuanced argument: humanism exerted no substantive influence on the content of English law, but the broad philological principles inherent in Renaissance humanism did, naturally, exert their influence on all kinds of law; 'English law sailed with the jurisprudential tide'.[157] The English common law mind, impervious to direct influence, was 'indeed susceptible to new ways of thinking about the legal process and to development by the courts'.[158] The way in

[152] Tracy, 'From Humanism to the Humanities: A Critique of Grafton and Jardine', p. 124.
[153] Grafton and Jardine, *From Humanism to the Humanities*. James Tracy provides a useful critique of Grafton and Jardine in Tracy, 'From Humanism to the Humanities: A Critique of Grafton and Jardine'.
[154] Baker, *Laws,*vol. 6, pp. 3-52.
[155] Baker, 'English Law and the Renaissance', pp. 23-51; John H. Baker, 'English Law and the Renaissance', *The Cambridge Law Journal*, 44 (1: 1985), pp. 46-61; Baker, *Laws,*vol. 6, pp. 3-53.
[156] Baker, 'English Law and the Renaissance', pp. 23-51.
[157] Ibid. p. 53.
[158] Ibid.

which our understanding of the ways in which humanism influenced English law has developed over the course of the last half century is indicative of how our understanding of legal education needs to develop if we are to grasp the influence of classical rhetoric on English society broadly conceived.

Discussions of specifically legal education in sixteenth century England have managed to elide the Renaissance context by and large.[159] Studies have, instead, focused largely on the education of lawyers once they reached University or the Inns of Court. This scholarship has, for instance, emphasised the formal and informal experience gained through apprenticeship of attorneys in the Inns of Chancery.[160] It has examined the formal training of barristers undertake at the Inns of Court.[161] These studies have been enormously influential in the scholarship, but their influence is such that, generally speaking, few historians of sixteenth century law challenge their basic tenets. Chris Brooks' studies of the lower branch of the legal profession, for instance, are incredible and indispensable to the scholarship. That being said, however, *Pettyfoggers and Vipers of the Commonwealth*, just as much as his *Law, Politics and Society*, struggles to conceptualise the concept of rhetoric and, therefore, misunderstands the formative influence a grammar school education could and did exert on the legal profession. Rhetoric, for Brooks, has no content; it is simply taken to mean any form of persuasive speech. This is, however, a deeply modern understanding of what it means to be persuasive. Rhetoric in the sixteenth century was understood in its classical and humanistic sense; as an art that taught one how to structure and ornament speech through a set of formal rules. Rhetoric and rhetorical speech in sixteenth century England entailed a deep and felicitous engagement with and understanding of latin grammar and the rhetorical literature taught in the grammar schools:

[159] There has been some discussion of the the engagement between English lawyers and Renaissance humanism, but this is rarely in the context of legal education. See, for instance, Prest, *Rise of the Barristers*, pp. 184-208.

[160] Brooks, *Pettyfoggers and Vipers*.

[161] Wilfrid R. Prest, *The Inns of Court Under Elizabeth I and the Early Stuarts, 1590-1640* (London: Longman, 1972); Prest, *Rise of the Barristers*.

above all, with Cicero's *De inventione.*[162] This thesis seeks to demonstrate that, in order to grasp the influence of classical rhetoric on sixteenth century English society, we first must grasp the role of educational context lawyers and litigants gained at grammar school. It is this formative experience, wherein students were steeped in the humanist curriculum of latin grammar and rhetorical literature before they began their University studies or a formal apprenticeship at an Inn, which had the most significant effects on sixteenth century legal culture.

Equity and Rhetoric

Early modern English law was made up of a set of competing jurisdictions. Broadly speaking, these jurisdictions fell into distinct categories: the common law, Equity, and ecclesiastical law.[163] Whilst we will primarily be concerned with the aspects of English law and legal culture associated with Equity, for clarity, it is necessary to briefly delineate the main jurisdictions. The first of which was the common law, the primary legal jurisdiction throughout the realm. The fundamental characteristic of the common law was that it was (and still is) based on precedent. Sir John Davies, a late-sixteenth century lawyer and Attorney-General for Ireland, summarised the common law as

> The Common Law of England is nothing else but the Common Custome of the Realm; and a Custome which hath obtained the force of a Law is always said to be *Jus non scriptum*: for it cannot be made or created either b Charter or by Parliament, which are Acts reduced to writing, and are always a matter of Record; but being onely matter of fact, and consisting in use and practice, it can be recorded and registered no-where but in the memory of the people.[164]

[162] See, in particular the discussion of grammar school education in Tudor England in Quentin Skinner's *Forensic Shakespeare* and his *From Humanism to Hobbes.* Skinner, *Forensic Shakespeare*; Quentin Skinner, *From Humanism to Hobbes* (Cambridge: Cambridge University Press, 2018).

[163] An important addition to this is statute law. That is, positive laws created in parliament. These laws, however, would modify the common law and thus any legal disputes pertaining to statute law would fall under the jurisdiction of the common law courts.

[164] J. G. A Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge: Cambridge University Press, 1957), pp. 32-3; Wood, *Memory of the People*, p. 94.

This fundamental principle, that custom constituted law, ran through English legal culture. It informed the common law as it was enforced in the central courts of Kings Bench and Common Pleas just as much as it did borough and manorial jurisdictions throughout the realm.[165] An analysis of the part of early modern English law known as Equity will form the basis of this thesis. This aspect of English law developed from the late-fourteenth century out of the need to mediate the common law, which was theoretically seen to be a universal good and not open to contextual interpretation or modification.[166] Common law, consequently, could not take into account the context surrounding individual legal cases; judges were required to determine the outcome of a case on the pleadings before them.[167] In other words, the letter of the law prevailed over the spirit in every case.

Equity, by contrast, was based on the medieval notion that a Prince stood above the law and could intervene upon, although not alter, the common law.[168] Its authority rested on royal prerogative, although in practice the prerogative was exercised by the Lord Chancellor who, acting in the name of the Prince, answered petitions from litigants whom the common law could offer no satisfactory remedy. The key point to take away is that Equity was not a body of rules or customs in the way that the common law was held to be. It originated and developed much more haphazardly through the idiosyncratic and oftentimes quixotic interests of the Chancellor and individual ministers in particular petitions and cases. Only towards the end of the sixteenth century did it become a more recognisable set of principles espoused in the prerogative courts.[169] The central courts of Chancery, Exchequer, Requests, and Star Chamber,

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[165] John H. Baker, *An Introduction to English Legal History* (Oxford: Oxford University Press, 2007), pp. 1-69.

[166] Ibid. pp. 97-115.

[167] S. F. C. Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 1981), pp. 11-79; Baker, *Introduction to Legal History*, pp. 71-95.

[168] Frederic William Maitland, *Equity, Also The Forms of Action at Common Law: Two Courses of Lectures*, eds., A. H. Chaytor and W. J. Whittaker, (Cambridge: Cambridge University Press, 1913); Milsom, *Historical Foundations*, pp. 82-98.

[169] This development of Equity is partly addressed by John Guy in his study of Star Chamber under Cardinal Wolsey but, for the most part, Equity still awaits its historian. J. A. Guy, *The Cardinal's Court: The Impact of Thomas Wolsey in Star Chamber* (Hassocks: Harvester Press, 1977). For an alternative, much shorter study, see

along with the Duchy of Lancaster Court of Duchy Chamber, were all prerogative courts that applied the principles of Equity in their orders and decrees. Of these jurisdictions, this thesis is centrally concerned with how people approached and pleaded before the latter two.[170]

The final major division of English law is ecclesiastical law. This encompasses the jurisdiction of the Church Courts and dealt with matters held to be of spiritual significance. Ecclesiastical law followed neither the common law nor the principles of equity. It was made up of civil law. Civil law is the other great legal tradition of Western Europe wherein the core *principles* of a society or institution are codified and referred to in the interpretation of the law in each context. This is to be contrasted with the common law tradition, wherein *precedent* not principle is the highest authority. The civil tradition is the classical inheritance of Roman law, specifically the Codex of Justinian. The emphasis in civil law is for arguments are provided on both sides of a case and it is the decision of the judge to decide which side has merit. The contrast with common law is that, in common law proceedings, judges are to a certain extent *required* to determine a case by the pleading entered into the court, rather than deciding on the merits of either side. We will not encounter ecclesiastical law in this thesis but, as we will see, Equity, by its nature, was bound to account for context and issue decrees on the merits of a case. The influence of the tradition of civil law upon Equity and common law is, therefore, an issue around which this thesis turns; the extent to which it, that is an essentially classical understanding of law, underpinned English society, is a question which runs through the thesis.

The legal records examined in this chapter come from the equitable jurisdiction of the Duchy of Lancaster's court of Duchy Chamber. The central premise of the chapter is, therefore, that many of these records are constructed according to a set of rhetorical precepts advocated

Sharon K. Dobbins, 'Equity: The Court of Conscience or the King's Command, the Dialogues of St. German and Hobbes Compared', *Journal of Law and Religion*, 9 (1: 1991), pp. 113-49.

[170] The theory of Equity is more fully explored in subsequent chapters, especially Chapter Four.

by humanist writings during the sixteenth century. The decision to examine legal records relating exclusively to courts of equity was taken in order that complimentary analyses could be conducted as the thesis progresses and the argument develops. It would be misleading to generalise and suggest that humanist rhetoric influenced the entirety of English law in the same way.[171]

The corpus of English law in the sixteenth century consisted of a number of different parts, including: common law, ecclesiastical law, and Equity; all of which can be divided into further subdivisions. Each division was distinct and possessed its own *telos*; consequently, they developed in different ways and at different rates. Not only did legal procedure and form vary between the different branches of law, jurisdictions and courts, so too did the type of case. Litigants were careful to choose under which jurisdiction and court they would litigate, the success or failure of an action often hung on that decision. The line of argument adopted throughout this thesis will become clearer as we progress through each chapter and each analysis builds upon the preceding one. The focus on two courts is meant to demonstrate that the conclusions drawn cannot be explained away as a local or court-specific peculiarity: the influence of humanist rhetoric extended into multiple jurisdictions.

Equity is the first branch of English law wherein we can discern the influence of humanist rhetoric. Originally developed and administered in Chancery and under the jurisdiction of the Lord Chancellor, it was intended to provide redress for litigants who could not secure justice due to the strict procedures of the common law. Unlike the common law, in the sixteenth century the legal procedures and content of Equity as a body of law were not fixed; they could vary according to the inclinations of the individual occupying the office of Lord Chancellor.

[171] For valuable discussions of humanism in English society see Markku Peltonen, *Classical Humanism and Republicanism in English Political Thought 1570-1640* (Cambridge: Cambridge University Press, 1995); Grafton and Jardine, *From Humanism to the Humanities*; Tracy, 'From Humanism to the Humanities: A Critique of Grafton and Jardine'; Rummel, *Humanist-Scholastic Debate*.

The courts which operated under its jurisdiction were, therefore, much quicker to adapt to the evolving culture and circumstances of English society. One consequence of this versatility was that the equity courts were often seen as a courts of appeal: litigants who were unhappy with a decision rendered in the Courts of King's Bench or Common Pleas could bring a case under an equity jurisdiction such as Chancery, Star Chamber, or Duchy Chamber, and if successful they could have the original common law verdict overturned.[172] Often criticised by contemporaries for its ever-increasing authority at the discretion of the Lord Chancellor, the seventeenth-century jurist John Selden described equity as:

> a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience.[173]

It is for precisely this reason that equity was the first branch of English law to exhibit rhetorical forms of argument in its procedures.

We begin to discern the effects of the increasingly rhetorical basis of legal learning in a number of legal treatises before we see it in the texts produced by the courts themselves. In the 1540s, Sir William Stanford composed a treatise entitled *An Exposicion of the Kinges Perogative*.[174] In the preface to what is essentially a series of explanatory essays, Stanford extolls the singular virtue of English law, but laments that 'the knowledge of the said laws is placed so far of, the journey thereunto so exceding long and painfull, & the ways and paths so rugged and unpleasant'.[175] Shortly afterward in the 1550s, Edmund Plowden began to compose

[172] Strictly speaking, Equitable jurisdictions could not alter judgements given at common law. The decrees obtained at equity would simply order the common law judgement not to be enforced by the successful litigant.

[173] John Selden, *The Table Talk of John Selden*, ed., Samuel Harvey Reynolds, (London: Forgotten Books, 2017), p. 60.

[174] Composed in the 1540s but not published until 1567.

[175] William Stanford, *An Exposicion of the Kinges Prerogatiue Collected Out of the Great Abridgement of Justice Fitzherbert and Other Olde Writers of the Lawes of Englande By the Right Worshipfull Sir William Staunford Knight, Lately One of the Justices of the Queenes Maiesties Court of Comon Pleas: Whereunto is*

his *Commentaries*; although originally written in law French and not published in print until 1571, they are indicative of the way in which attitudes towards legal arguments were changing with the times. The *Commentaries* were designed to be a tool to help law students and are essentially records of the different arguments used in court. In the preface, Plowden states that one of his aims in writing the *Commentaries* was to 'give diligent attention to, the debates and questions of law'.[176] Similarly, the reports of Sir James Dyer, the former Chief Justice of the Court of Common Pleas, were published posthumously in 1586. Dyer's *Reports* were his notes on over 1000 legal cases taken from his personal notebooks.[177] They provide a remarkable insight into the thought process of one of the most senior and learned legal minds of the time, as well as a glimpse of how legal knowledge was applied in both the ordinary and extraordinary workings of the law. All of the works mentioned above were widely available and known in late-Elizabethan England and demonstrate what John Baker has described as an evolution of older forms of legal learning, specifically regarding legal proofs, to a more jurisprudential understanding of the law: 'a shift in emphasis from *doctrine* (or common learning) to *jurisprudence* (or judge-made law)'.[178] As Chris Brooks pithily summarises, 'litigants evidently wanted decisions and they wanted to know the reasons for those decisions'.[179]

It is now incumbent to establish more specifically how this curriculum began to have an impact upon how people understood and engaged with the law and how they came to influence not only the legal profession, but also the courts and even the law itself. The classical and Renaissance handbooks on the art of rhetoric are almost entirely devoted to offering advice on how to understand and engage with the law through the use of forensic rhetoric; the extent to which their advice was followed only increased as the sixteenth century wore on. This is the

Annexed the Proces to the Same Prerogatiue Appertaining (London: 1567). Preface.

[176] Edmund Plowden, *Les Comentaries Ou Les Reportes de Edmunde Plowden* 1571). Preface.

[177] John H. Baker, *Reports from the Lost Notebooks of Sir James Dyer* (London: Selden Society, 1994), pp. xxxv-xxxvi.

[178] Baker, 'English Law and the Renaissance', pp. 23-51.

[179] Brooks, *Law, Politics and Society*, p. 64.

claim that - beginning with an examination of the opening stages of litigation in the Duchy Chamber - this chapter will attempt to illustrate, and the attempt to do so will occupy us for the rest of this thesis.

Form and Structure

When we examine complaints to the Duchy Chamber under Elizabeth I we can see they possess a definite structure and form. This structure and form often closely follows the precepts advocated by the humanist proponents of the Roman rhetorical tradition. That we can discern this at all brings into question the assertion that English law was insular and sterile.[180] Indeed, the presence of rhetorical forms of argument in the workaday texts of busy jurisdictions is symptomatic of a wider ideological conflict which took place throughout sixteenth-century Europe and Renaissance England between the proponents of humanism and the defenders of medieval scholasticism. It is, therefore, somewhat misleading to characterise English law as insular or sterile: such law would *not* be susceptible to influence from external pressures such as humanism, and we would not be able to see rhetorical forms of argument replacing outdated forms of legal proof.[181] They did, however, and we can. In decrying the 'dark and farr off' nature of English law, contemporaries were not, primarily, commenting on how it developed independently of any external influences such as Civil law or Canon law, although there is *some* truth to this view.[182] They were lambasting how difficult it was to understand and engage with the law: they were commenting on the difficulties faced in pursuing a legal education.[183]

[180] Ibid. pp. 2-3,59.

[181] See the discussions in Alessandro Giuliani, 'The Influence of Rhetoric on the Law of Evidence and Pleading', *Juridical Review*, VII (1962), pp. 216-51; John H. Baker, 'The Dark Age of Legal History', in D Jenkins, ed., *Legal History Studies* (Cardiff: University of Wales Press, 1975), pp. 1-27.

[182] Thomas Wilson, *The Arte of Rhetorique, for the use of all suche as are studious of Eloquence* (London: 1553).

[183] Ibid. ; Thomas Elyot, *The Book Named the Governor* (London: 1531).

There seems to me to be some confusion, or perhaps more accurately some imprecision which has engendered confusion, in the scholarship surrounding the history of English law.

John Baker's famous characterisation of the sixteenth century as 'The Dark Age of Legal History' is perhaps one of the most easily identified causes of this confusion.[184] Although Baker made the remark when characterising the state of modern scholarship on English law, the characterisation has its rings true to sixteenth-century characterisations of English law.[185] Baker's argument is, just like many of the writers in Tudor England, focused on the state of the scholarship surrounding the law; not on the law itself. Indeed, there is a tension in much of Baker's work between his desire to investigate the intellectual influence of the Renaissance on English law and the abject state of many of the sources and surrounding scholarship which prevent the historian from looking backwards with any degree of clarity.[186] The historical prejudice of the term "Dark Ages" hangs like an albatross around the neck of the historian of Renaissance England. English law did experience a renaissance during the sixteenth century and Baker, following Maitland, has sought to illustrate this in his contributions to the scholarship while also encouraging us to pay more attention to this neglected aspect of History. The humanist advocacy of teaching rhetoric, specifically forensic rhetoric, as the basis for understanding law - rather than the medieval scholastic method of dialectical disputation - led to an emphasis on the persuasive power of rhetorical argument as being key to successful litigation; although he eschews a detailed exposition and analysis of such forms, their presence is implicit in much of Baker's work, as well as in the related work of Christopher Brooks.[187]

[184] Baker, 'The Dark Age of Legal History', pp. 1-27.
[185] Pocock, *Ancient Constitution*. See below for a more detailed exposition of this point.
[186] Baker, 'The Dark Age of Legal History', pp. 1-27.
[187] John H. Baker, *The Legal Profession and the Common Law: Historical Essays* (London: Hambledon Press, 1986); Baker, *James Dyer*; Brooks, *Law, Politics and Society*; Brooks, *Pettyfoggers and Vipers*.

Whereas Baker largely 'laid aside the question of the extent to which law was influenced by *the* Renaissance', this is one of the fundamental questions this thesis attempts to (partially) address.[188]

The precepts of forensic rhetoric were designed to make judicial speech more persuasive in a formal legal context, as such they apply a general theory of rhetoric to a legal context and offer specific advice about how to conduct a speech in court with maximum effect. Cicero and the author of the *Ad Herennium* argued that the *ars rhetorica* was comprised of five main elements or skills that an orator should master: *inventio*, *dispositio, elocutio, memoria,* and *pronuncitatio;* with *inventio* being by far the most important. It was further argued that a rhetorically complete speech would be divisible into six distinct parts, each with its own purpose:

> The Exordium is the beginning of our speech, by means of which our audience's mind is made ready to hear our case. The *Narratio* is the factual account of what happened or might have happened. The *Divisio* is where we indicate what is agreed and what is in dispute, and where we explain what points we plan to take up. The *Confirmatio* is the stage at which we offer an exposition of our own arguments with full seriousness. The *Confutatio* is when we demolish the arguments of our opponents. And the *Conclusio* is when we bring our speech to a resounding close.[189]

The specific rhetorical devices - the figures and tropes of speech - appropriate to each of these sections then varied even further according to what type of speech was being given. The rhetoricians offer three categories of rhetorical speech: epideictic (to speak in praise or blame of a particular person), deliberative (wherein we seek to persuade or dissuade people from a

[188] Baker, *Legal Profession and the Common Law*, pp. 435-60; Baker, 'English Law and the Renaissance', pp. 23-51.

[189] *Rhetorica Ad Herennium*, ed., Harry Caplan, (Cambridge, Mass.: Harvard University Press, 1954), pp. 8-10 'Exordium est principium orationis, per quod animus auditoris constituitur ad audiendum. Narratio est rerum gestarum aut proinde ut gestarum expositio. Divisio est per quam aperimus quid conveniat, quid in controversia sit, et per quam exponimus quibus de rebus simus acturi. Confirmatio est nostrorum argumentorum expositio cum adseveratione. Confutatio est contrariorum locorum dissolutio. Conclusio est artificiosus orationis terminus.'. Quoted in Skinner, *Forensic Shakespeare*, p. 17.

particular course of action), and finally judicial or forensic speech (the type of speech most appropriate to courts of law wherein there will be a prosecution and a defence of a particular controversy).

The complaints examined in this chapter, when examined side by side with the rhetorical handbooks, show that they can be read as if they form the *exordium* of a legal case: the beginning of a legal action, wherein we prepare the judge to hear our case. The later stages of litigation - answers, demurrers, examinations, depositions and judgements - then, form subsequent *partes* of the case; taken together they form a rhetorically complete legal argument. Each text is composed of a set number of parts; when all of the parts are taken together they form a rhetorically complete judicial text. That is, however, only part of the story. That text is just one document, one record in a series that document the life of the case. In order to appreciate the full force of the rhetorical arguments deployed we need to situate each of these documents in the rhetorical and juristic context in which they were created. We need, that is, to ask what exactly it is these lawyers and litigants are doing *in* these texts: they are not all doing the same thing. Just as each part of a speech has its own *telos,* so does each document, which is why the rhetoricians emphasise that a mastery of *inventio* is of paramount importance: one must be able know which arguments are appropriate to different sections of a speech and at different points within the life of the case. This is not to say that these texts can *only* be understood when we examine the other records associated with the same claim. It is only to suggest that we should be mindful of the wider rhetorical context of a case if our objective is to work towards a more holistic understanding of them.

Legal Complaints and the Jurisdictions of Gimingham

Complaints to the Duchy Chamber under the reign of Elizabeth I are held in the National Archives in London and make up the bulk of material in the class of DL1 in that archive. The Duchy Chamber had jurisdiction over all lands and properties ultimately held or claimed by the Duchy of Lancaster; the Duchy held vast possessions in counties across England, however an analysis which touches all of these possessions is obviously beyond the scope of this thesis. I have, therefore, chosen to concentrate on the Duchy's holdings in Norfolk, and more specifically on Gimingham and the surrounding area in north Norfolk.

Not far from the North Norfolk coast, in the Hundred of Erpingham, is situated the Manor and Soke of Gimingham: composed of around 9500 acres, the Soke was once an important jurisdictional area that bound a number of local villages - Gimingham, Knapton, Mundesley, North Repps, South Repps, Sidestrand, Trimingham, Trunch - together economically and administratively.[190] In the time before the Norman Conquest, the Soke of Gimingham referred to these eight villages in terms of an economic jurisdiction: smaller landowners chose to congregate around a larger landowner who then developed certain political rights over the smaller landowners. The Soke was the product of protection, not of tenure. After the Conquest, with the growth of feudalism and the manorial system it employed, the old Anglo-Saxon jurisdiction of the Soke was gradually replaced by that of the Manor of Gimingham, which assimilated the villages into one administrative jurisdiction. The Manor of Gimingham was, however, unlike the Soke of Gimingham, based on feudal tenure. Whereas the Soke was characterised by the relationship between a lord and the free suitors of his court, in the Manor

[190] Despite being part of the Soke, the villages of Sidestrand and Mundesley were only partially within its jurisdiction due to a number of competing jurisdictional claims.

'lordship is indissolubly blended with landownership, and the authority of a master over serfs'. In short, a Soke is 'a jurisdictional district attached to an estate', while a Manor is 'an estate acquiring some rights of jurisdiction'.[191]

Whilst the legal jurisdiction of the Soke was overwritten by that of the Manor, the memory of an earlier, slightly different, time lived on and we find tenants invoking 'the Soke of Gimingham' well into the sixteenth and seventeenth centuries; even, or perhaps especially, as the yoke of feudalism and its manorial braces gave way to that new economic imperative: capitalism. Whilst I do not wish to suggest that sixteenth and seventeenth century litigants invoked the concept of the Soke in a way that would have made sense to those inhabiting it in the tenth century, I would follow Andy Wood in suggesting that invoking the memory of the past was a way in which people attempted to make their actions appear legitimate.[192] An appeal to authority at once piercingly specific and frustratingly vague, it could be used to cover all manner of sins. What is often easily overlooked, however, is that an appeal to memory and custom in this way is also to deploy a rhetorical device; indeed, every classical authority since Aristotle has argued it is one of the strongest forms of argument in a legal case: demonstrating that there are conflicting laws or jurisdictions.[193]

That being said, the lingering memory of the former jurisdiction of the Soke is indicative of more than simply institutional memory or skilled legal acumen. Law in sixteenth century England underwent rapid change in a relatively short period of time. Manorial courts, which

[191] Hood, *History of an East Anglian Soke*, pp. 1-5; Vinogradoff, *The Growth of The Manor*, pp. 303-8.

[192] Wood, *Memory of the People*, pp. 1-43. See also Skinner, 'Some Problems in the Analysis of Political Thought and Action'; Andy Wood, *Riot, Rebellion and Popular Politics in Early Modern England* (Basingstoke: Palgrave, 2002), p. 109.

[193] Aristotle, *The Art of Rhetoric* (Cambridge: Harvard University Press, 1926); Marcus Tullius Cicero, *De partitone oratoria* (Cambridge, Mass.: Harvard University Press, 1942); Marcus Tullius Cicero, *De inventione* (Cambridge: Harvard University Press, 1949); Quintilian, *The Orator's Education* 5 vols., vol. 1, ed., D. A. Russell, (Cambridge, MA: Harvard University Press, 2001).

had replaced the old courts held in the sokes, were themselves fast becoming obsolete as litigants turned towards the more impartial and often faster justice on offer in the central courts. Indeed, Maitland argued that after the Statute of Gloucester was passed in 1294, the manorial court was 'condemned in the course of time to become a petty court'.[194] In an attempt to stem the tide of litigation to the royal courts, the statute had set a minimum value of 40 shillings on any case brought before the royal courts. This was, however, interpreted by the judges as a *limit* on the value of litigation which could be brought in manorial courts.[195] Whilst this did not immediately have an overwhelming impact on the courts as 40 shillings was not an inconsiderable sum in the thirteenth century, by the sixteenth-century inflation had greatly reduced the value attributable to 40 shillings and the statute had not been altered to provide redress for this change in the economic reality facing the courts.[196] Furthermore, while manorial courts continued to hold jurisdiction within their manors, the central courts held sway over the entire country and could overturn manorial decisions. It was, therefore, often in the interest of the litigant to simply skip the local jurisdiction entirely and plead before the Common Law, or in Chancery or the Star Chamber. Although the Duchy Chamber sat at Westminster its jurisdiction did not extend across the whole of England but rather only to the Duchy holdings, wherever they may be. It was still, however, a higher court than the manorial court at Gimingham and could overrule its decisions. Often with less business than the central courts, the Duchy Chamber was often more convenient than litigating in Chancery or Star

[194] Frederic William Maitland, *Select Pleas in Manorial and Other Seignorial Courts: Volume I. Reigns of Henry III and Edward I* (London: Quaritch, 1889), p. lvi.

[195] Ibid. pp. lvi-lvii.

[196] It is important to note, however, that the coercive power of the manorial courts was not totally destroyed by the 40 shilling limit. They were still widely used in cases involving less than 40 shillings and, of course, by the manor's poorest inhabitants. Cf. John Philip Dawson, *A History of Lay Judges* (Cambridge: Harvard University Press, 1960), pp. 228-9.

Chamber, and more expedient than King's Bench or Common Pleas. These competing jurisdictions were not just an intricate web that one was liable to get tangled up in, they were part of a dark, elaborate, labyrinth that one needed to navigate in order to reach a successful judgement. The old half forgotten jurisdiction of the soke was but one potential road a litigant could take; numerous turns onto connected roads were required if one was to find a path all the way through.

The amount of litigation in Gimingham and its immediate vicinity is what makes it particularly interesting to a historian using legal records as the basis for their investigation. Out of some 290 cases concerning Duchy of Lancaster possessions in Norfolk during the reign of Elizabeth, sixty-two pertain to Gimingham and its inhabitants. Given the size and population of Norfolk in relation to the other counties in England at the time, and the relatively small size of Gimingham, this is significant as it means that suits concerning Gimingham made up nearly one fifth of all suits from Norfolk which were brought before the Duchy Chamber. This gives us a large, but also compact, set of evidence which we can use to build up an understanding multiple aspects of early modern culture.

Beginning a Judicial Speech

Robert Bateman brought a suit before the Duchy Chamber in 1586 when, after the death of his uncle, his father seized a piece of land willed to Robert by the now deceased uncle. In seizing the land, his father had, according to Robert, violated the custom of Gavelkind and deprived Robert of his rightful inheritance under the custom of the manor.[197] Robert's complaint to the

[197] TNA DL1/141/B23; Gavelkind and partible inheritance were widespead throughout East Anglia. Although, the present argument is less concerned with whether Gimingham was an area of partible inheritance and more concerned with Gavelkind being invoked in a legal argument. Cf. Edward Hasted, 'General History:

Duchy Chamber, written on one large side of parchment and kept in a large storage box filled with similar complaints in the National Archives, forms a single document: only this complaint features on that piece of parchment; unlike the plea rolls for King's Bench or Common Pleas which are extremely long flowing pieces of parchment containing the details of case after case. It is, therefore, possible to analyse it in isolation from the cases being conducted around it, *as well as* in light of the other documents associated with the case.[198] This is a feature common to every complaint to the Duchy and so, unless stated otherwise, it should be kept in mind that all of the documents considered throughout this thesis take this form. Shared physical attributes are only the beginning however; it is the intellectual content these documents share which is of interest to us moving forward.

Robert Bateman's complaint in 1586 begins, unsurprisingly to anyone familiar with early modern legal complaints, by addressing the judge presiding over the case - in this instance, as the Duchy Chamber is a court of equity, the Chancellor of the Duchy of Lancaster - and informing him (and the reader) why the complaint is addressed to him.

> To the right honourable Sir Francis Walsingham, knight. Chancellor of the Duchy of Lancaster and principal secretary to her majesty[199]

The etiquette governing speeches in court is important here on two fronts. In the first instance it is important to remember that, even in our own time, barristers and attorneys begin addressing the court by addressing the judge, as it is the judge who dispenses royal justice. As this is a

Socage and Gavelkind Tenures', *The History and Topographical Survey of the County of Kent* (Canterbury: 1797), vol. 1, pp. 311-21; George C. Homans, 'Partible Inheritance of Villagers' Holdings', *The Economic History Review*, 8 (1: 1937), pp. 48-56; Rosamond Jane Faith, 'Peasant Families and Inheritance Customs in Medieval England', *The Agricultural History Review*, 14 (2: 1966), pp. 77-95; E. P. Thompson, 'The Grid of Inheritance', in Jack Goody, Joan Thirsk and E. P. Thompson, eds., *Family and Inheritance: Rural Society in Western Europe, 1200-1800* (Cambridge: Cambridge University Press, 1978), pp. 328-60.

[198] Contrast this with the common law plea rolls where hundreds of cases follow one another on one continuous stream of parchment.

[199] TNA DL1/141/B23

written document, however, the duality of audience is of subtle importance here. The formal address not only opens the text but it serves as a clear indicator of what the text pertains to: a civil suit in the Duchy Chamber.[200] Without an effective contemporary system of storing and cataloguing the records within the archive, it is as much a clerical necessity as it is anything else.

The complaint continues in earnest:

> In most humble manner complaining showeth unto your honor your duly Orator Robert Baytman of South Reppes in the county of Norfolk, yeoman[201]

By addressing the judge as a supplicant, Bateman not only introduces himself in an appropriately formal manner as required by the conventions of legal speech, but he also emphasises that he is requesting that the law be administered, that he is appealing to the Chancellor for justice. Equitable justice at this elementary level is 'the good will, between those who are roughly equal, to come to terms with each other, to 'come to an understanding,' again by means of a settlement - and, in connection with those who are less powerful, to *force* them to reach a settlement'.[202] A glance through some of the dictionaries and thesauri of Elizabethan England highlights this. Thomas Cooper's *Thesaurus Linguae Romanae et Britannicae*, first published in 1565, for instance lists the following synonyms for 'humble': 'Base: low: simple: poor: abject: vile: of low condition'. Similarly, Thomas Thomas' *Dictionarium Lingue Latinae et Anglicanae*, first published in 1587, defines humble as 'Base, low, simple. poor, abject, vile, of low condition, faint, feeble, small, of small cost'.[203] In highlighting his faint and feeble status

[200] The distinction between criminal and civil litigation will be addressed in Chapter Four.
[201] TNA DL1/141/B23
[202] Nietzsche, *Genealogy of Morality*, p. 46.
[203] Thomas Cooper, *Thesaurus Linguæ Romanæ & Britannicæ* (London: 1565); Thomas Thomas, *Dictionarium Linguae Latinae et Anglicanae* (London: 1587).

the complainant draws the judge's attention to the fact that he is unable to remedy the situation on his own and is in need of assistance which, as Chancellor of the Duchy, it was within Walsingham's prerogative to provide.

Indeed, as we can see, immediately after explicitly stating his base status and his inability to redress the situation himself, Bateman addresses the judge directly as 'your honor'. This is standard practice when addressing the judge in court and so the view that this is simply a legal form evidently holds water. It is worth briefly returning to the dictionaries however, as if we look under 'honour' we find it listed beside 'dignity: Reverence: honesty: Beauty' in Thomas Cooper's *Thesaurus*.[204] Thomas Thomas is characteristically more thorough in his definition, demarcating honour as relating to 'dignity, glory, promotion, office, estimation, reputation, reverence, honesty, beauty'. He also lists it as part of the latin *honestus*, which he defines as 'honest, good, kind, noble, honourable, of good behaviour, well mannered, honestly and well conditioned, commendable, of good reputation, worshipfull, comely, fair, beautiful, and well-favoured'.[205] An appeal to honour, regardless of whether or not it can be deemed a legal form, carries with it a number of explicit connotations that would not have been lost on the attorney or the judge educated to university level, either at Oxford or Cambridge, or in one of the Inns of Court, and steeped in the humanist learning that accompanied the English Renaissance.[206]

Whilst the Bateman case may be said to be a typical example of how complaints to the Duchy Chamber begin, it can also be said that this is simply the standard way in which legal

[204] Cooper, *Thesaurus Linguæ Romanæ & Britannicæ*.{Thomas, 1587 #769

[205] Thomas, *Dictionarium Linguae Latinae et Anglicanae*.

[206] Withington, *Society in Early Modern England*; P. J. Withington, 'The Inns of Court, Renaissance and the Language of Modernity', in Michael Lobban, Joanne Begiato and Adrian Green, eds., *Law, Lawyers and Litigants in Early Modern England* (Cambridge: Cambridge University Press, 2019), pp. 114-39; Jessica Winston, *Lawyers at Play: Literature, Law, and Politics at the Early Modern Inns of Court, 1558-1581* (Oxford: Oxford University Press, 2016); Hutson and Kahn, *Rhetoric and Law in Early Modern Europe*; Hutson, *The Invention of Suspicion*.

complaints begin and that the formulaic repetition of these openings is indicative of little more than a clerical template which attorneys could use for any case: a sort of fill in the blanks top sheet wherein the case-specific data is simply fitted around the necessary preexisting legal jargon. Clearly this argument has some purchase, but its basic premise - that these ways of opening cases, which are repeated with almost pedantic regularity, are simply technicalities, administrative or legal in origin - seems to obscure a whole type of inquiry. That is to say, it prevents us from asking *why* these forms used in the first place? One answer, I would suggest, can be found by examining the classical and vernacular rhetorical handbooks available during the sixteenth century.

The rhetoricians argued that, if one is to maximise their chances of success in persuading a judge of the validity of a particular case, the beginning of any legal argument should begin by developing a successful *exordium*.[207] A successful *exordium* will aim to establish our *ethos* or character in such a way as to render the judge attentive (*attentus*), responsive (*docilis*), and, above all, well-disposed (*benevolus*) to our side of the case.[208] There are said to be two types of *exordium*: a *principium* and an *insinuatio*. The two are distinct in that 'a *principium* is an address that which in plain language makes the audience well-disposed, receptive, and attentive;' while 'an *insinuatio* is an address by which dissimulation and indirection unobtrusively steals into the mind of the audience'.[209] In order to discriminate which type of opening is appropriate we need to discriminate two features of our case. We first need to

[207] Cicero speaks of an *exordium* in *De inventione*, while the *Ad Herennium* prefers to speak of a *prohoemium*. Both are essentially the same and refer to the opening section of a judicial oration.

[208] See also the discussion in Skinner, *Forensic Shakespeare*, p. 18.

[209] Cicero, *De inventione*, p. 42: 'Principium est oratio perspicue et protinus perficiens auditorem benivolum aut docilem aut attentum. Insinuatio est oratio quadam dissimulatione et circumitione obscure subiens auditoris animum'; *Ad Herennium*, p. 20: 'Principium eius modi debet esse ut statim apertis rationibus … aut benivolum aut adtentum aut docilem faciamus auditorem'; Skinner, *Forensic Shakespeare*, pp. 18-9.

distinguish whether the issue around which our case revolves is honest (*causa honesta*), foul (*causa turpis*), or strange (*causa admirabilis*). We then need to consider whether the *constitutio* of the case is legal, conjectural, or juridical. That is to say, whether the point of controversy stems from a text, a series of facts or events, or whether some action was justly or unjustly performed. We need to identify these two points because the question of whether to use a *principium* or an *insinuatio* essentially rests on the moral standing of our argument: if our cause is honest we should always open it with a straightforward *principium*; if it is foul or strange it will generally be necessary to use a more subtle approach, an *insinuatio*.[210]

If we keep this advice in mind as we examine another complaint before the Duchy Chamber it is possible to discern that the way in which the rhetoricians advise us to open an honest speech, a *principium*, is not dissimilar to the way in which attorneys typically open the initial complaints in the Duchy Chamber. As with the Bateman case, the cases initiated by Sir Henry Lee between 1574-1580 begin with a formal address to the Chancellor of the Duchy: 'To the right honorable Sir Ralph Sadler, Knight, Chancellor of the queens majesty's courte of her Duchy of Lancaster'.[211] If we now, instead of simply assuming that this is a legal commonplace, ask *why* Lee opens his case in this way, if we ask what is he *doing in* opening it in this way it becomes possible to see that he may in-fact be following some rhetorical advice about how to conduct a legal argument. Indeed, immediately following this opening line Lee continues, just as Bateman did, in seeking to 'humble show and on the behalf of our sovereign Lady the queens majesty inform your honour'.[212] The rhetorical dimension to these opening lines now becomes apparent. The formulaic structure, the choice of words, even the syntax -

[210] Skinner, *Forensic Shakespeare*, pp. 11-25.
[211] TNA, DL1/101/L7
[212] TNA, DL1/101/L7

the *dispositio* - takes on new meaning and significance when examined in this light.

That it is possible draw a line between classical rhetorical theory and sixteenth century legal complaints, however, is only one aspect of this analysis. It is also possible to draw this conclusion without necessarily diminishing the argument that the opening lines of these complaints are legal commonplaces. Indeed, illustrating that they possess a rhetorical dimension does not change the fact that they are legal forms, commonplaces typical to every complaint. The opening lines are exercises in throat-clearing, a necessary preamble that every attorney and plaintiff was (and is) required to begin with because this was (and still is) the prevailing convention in a court of law. This is evident in that of the 292 cases from Norfolk initiated in the Duchy Chamber during the reign of Elizabeth I, each and every one of them begins with a subtle variation of the opening examined in this chapter. That being said, if we put this point the other was round we can elucidate its significance for the present analysis: the prevailing convention *in courts of law* required attorneys to begin a case in this way. That is to say, these documents are, *de jure*, written examples of judicial orations in court. They are the formal legal beginning of a case, they are meant to be able to be read as if the reader is physically in court watching and listening to the case being heard.

To argue that the opening lines of these documents are an exercise in throat-clearing, a simple preamble before the substantive matters are dealt with should be axiomatic. If our aim is to perceive their significance we need to begin asking *why*. The attorneys, judges, perhaps even the litigants, will all have had experience with litigation; they will have been involved in other cases and watched them progress through the courts.[213] They will therefore have a degree of familiarity with the proceedings and perhaps even with the people involved. That familiarity,

[213] Brooks, *Pettyfoggers and Vipers*.

however, did not diminish the need, or indeed requirement, for formal procedure in each individual case. On the contrary, the volume of litigation and the level of familiarity that it engendered in the court is arguably one of the main reasons why such stringent formality was (and still is) observed in legal proceedings. The foundations of common law, of equity, of the concept of justice itself rest on the bedrock that is the impartiality of the law - in theory, if not always in practice.[214]

A further point to be emphasised here is that these documents were not created simply for internal court business. If they were, they would more closely resemble the plea rolls of the King's Bench and Common Pleas. The plea rolls, unlike the documents presently examined, are not records of what was said in court, but rather a summary of the proceedings without the same level of rhetorical formality inherent in equity pleadings.[215] The complaints to the Duchy Chamber and their connected documents are not simply records, they *constitute* the case both in terms of the speech they represent, and also in that they are the written record of that case, without which there would be no documentary evidence of its existence. The fundamental point to grasp here is that once we ask why these texts are constructed in the way they are, and what their authors may have been doing in constructing them in this way we can come to appreciate that these texts are not simply legal records. That is to say, we can begin to discern the *character* of the texts in front of us. They are written examples of judicial speech; and as we shall see, judicial speech in sixteenth century England was governed by the principles of forensic rhetoric.

[214] Studies detailing the fraudulent exploitation of the law by those inside and outside the legal profession are endemic in the scholarship.

[215] A systematic analysis of the plea rolls is beyond the scope of this thesis. I would, however, hope to revisit this particular class of document at a later point in my research program.

Developing a Judicial Speech

If we examine the pleadings in more detail we soon see that they follow the rhetorical advice in more than just their opening lines. Their whole structure follows the rhetorical precepts laid out by Cicero and the *Ad Herennium.* In what follows we will examine the rhetorical advice side by side with the archival evidence. We will do so primarily through an examination of the litigation initiated by Sir Henry Lee in relation to bondmen around the manor of Gimingham. Lee was a courtier granted a commission to manumit bondmen on the Queen's estates in Norfolk, a profitable enterprise as anyone found to be of villein status could be compelled to pay a fee upon their manumission.[216] Lee's suits, therefore, are an attempt to demonstrate that certain parcels of land, ultimately held by the Duchy, were hereditary feudal tenures and that those inhabitants resident on those lands owe services in return for being allowed to cultivate it. Lee initiated five such suits in the Duchy Chamber between 1574-1580. In what follows we will examine one of the suits in detail and demonstrate, through the examination of several quotations of the initial pleading, how the classical precepts of forensic rhetoric were applied to pleadings before the Duchy Chamber.

After developing a successful *exordium* in which we prepare the audience to favourably hear our argument, the rhetoricians argue that it is necessary to develop a *narratio* in which we briefly and completely set out a plausible account of what we intend to argue.[217] The defining characteristics of a successful *narratio* are said to be that it is brief, clear, and plausible. A narrative will be brief if we confine ourselves to what is immediately relevant to the issue hand,

[216] See the valuable discussion of sixteenth century Bondmen in MacCulloch, 'Bondmen Under the Tudors', pp. 91-110.
[217] Cicero, *De inventione*, p. 57.

taking pains to neither start in the mist of history nor continue too far into the future. This may seem rather obvious but, Cicero cautions against rashness at this point as, many are deceived here by an appearance of brevity so that they are prolix when they think they are brief.[218] Orators must be careful not to try and say many things in a short compass; they should instead confine themselves to saying few things, or not more than is necessary. A narrative will clear if it proceeds chronologically, being careful not to omit anything pertinent to the case. Again, a word of warning here in that clarity goes hand in hand with brevity: for often a case is misunderstood more from excessive length of the narrative than from obscurity.[219] Finally, a *narratio* will be plausible if it appears to embody the characteristics which are accustomed to appear in real life, if it possesses verisimilitude.[220]

Typically, after the opening preamble the complaints move on to give a narrative account of the controversy around which they see the case revolving. In this case, from 1575, Lee's *narratio* begins by clearly and concisely sketching the context of the suit.

> Where the queens majesty and her progenitors is and has long time been seized in the right of her and their Dukedom of Lancaster amongst other manors of and in the manors of Gimingham in the county of Norfolk and Knapton likewise in the county of Norfolk. The said manors are part and parcel of the possessions of her highness Dukedom of Lancaster unto the which manors time out of memory of man there have been and yet are divers and sundry villeins and neifs regardant of whom the Queen's majesty and her most noble progenitors have been seised…[221]

By recounting the Queen's rights to the manors and their historical association with the Duchy of Lancaster, Lee does a number of things: he establishes the Crown's interest and the jurisdiction of the Duchy Chamber in the suit. There was a long history of bondmen in Norfolk

[218] Ibid. p. 59.
[219] Ibid. pp. 57-9.
[220] Ibid. pp. 59-61; *Ad Herennium*, pp. 25-7.
[221] TNA, DL1/107/L7

and Suffolk; the inhabitants of Gimingham would have been acutely aware of this. There was, then, no need for Lee to define the scope of villenage or the implication of particular types of tenure: the manor court rolls would explain all of that in detail if the defendants demur on a point of law; Lee's assertion that there will have been bondmen on the manor is, therefore, not a legally controversial statement. This is not to say, however, that the issue of bondage was uncontroversial. Quite the opposite: claims of bondage cut to the bone of social relations in sixteenth century England, partly because they were something of a feudal anachronism.[222] For this reason the number of manumission cases from Gimingham is particularly illuminating of the jurisdictional decay in Elizabethan Gimingham.[223] It will be noted, then, that Lee's simple precis of the historical context avoids prolixity and serves to keep his narrative brief.

The narrative continues with the assertion that the manors of Gimingham and Knapton are part of that ancient estate. The pleading justifies Lee's involvement by demonstrating his commission to survey and manumit any such bondmen that remain on the estates, before finally indicating that his case is supported by readily available evidence. This is almost exactly in line with the precepts governing the construction of a judicial speech.

> … as of her [the Queen] and their [her progenitors] villeins and neifs and regardant to her said manors of Gimingam and Knapton by being parcels of her highness said Duchy of Lancaster time out of memory of man and whereas also by virtue of the Queen's majesties commission sealed with the seal of her gracious court of the Duchy of Lancaster her majesty hath appointed [Sir Henry Lee] to make a survey of such and enquire of all and singular of her majesties bondmen and neifs in bond regardant unto any of her majesties said manors and of all bondmen and neifs engrossed to her belonging and of their goods chattels and lands…[224]

[222] Bondmen under the Tudors was last discussed seriously in a classic article by Diarmaid MacCulloch, which even specifically mentions the manumissions by Sir Henry Lee in the 1570s. MacCulloch, 'Bondmen Under the Tudors', pp. 91-110.

[223] I intend to make a fuller study of the Bondmen in Elizabethan Gimingham in a future publication. Also, see below, Chapter Five.

[224] TNA, DL1/107/L7

The narratives Lee develops in all of his suits before the Duchy follow this advice with remarkable exactitude. No extraneous details are given. There are no discussions of how the manors came to be Duchy possessions: they simply have been since 'time out of memorie of man'. There is no discussion of what villeins or bondmen are as it assumed that these terms will be understood by everyone.[225] The evidence upon which the claims rest is said to be 'court rolls and also evidences and writings as also by the examination of witnesses': all of which the rhetoricians describe as non-artificial proofs in the demonstration of judicial claims.

> … it doth appear as well by the court rolls of the said several manors of Giminham and Knapton and as well by divers and sundry other ways and means that Richard Coggill of Norwich in the county of Norfolk, John Coggill of Gimingham lately in the county of Norfolk and all their ancestors time out of memory of man have been villeins and neifs regardant to the said manor of Gimingham and that John Knowell of Knapton in the county of Norfolk and all his ancestors time out of memory of man have been villeins and neifs regardant to the queens majesties said manor of Knapton[226]

Here we see Lee begin to move from the narration to the confirmation of facts. Cicero, it will be remembered, tells us that 'confirmation or proof is the part of the oration which by marshalling arguments lends credit, authority, and support to our case'.[227] The rhetorical advice offer a range of advice on how to create a successful confirmation, but for our purposes it is enough to divide them into two categories: artificial and non-artificial proofs. Artificial proofs are syllogistic arguments and inductive reasoning; non-artificial proofs are non-rhetorical proofs, such as witness testimony and written records. As we can see, Lee deploys simple induction by arguing that 'it doth appear' from the textual evidence that the defendants are in fact in unfree tenants of the manor and have been for time immemorial.

The final substantive part of a judicial oration is the confutation. This comes after the facts

[225] MacCulloch, 'Bondmen Under the Tudors', pp. 91-110.
[226] TNA, DL1/107/L7
[227] Cicero, *De inventione*, p. 69.

have been confirmed and its aim is to combine artificial and non-artificial proofs in order drive stir the emotions of the audience and forcefully tie the evidence to the argument laid out throughout the oration. Lee does this by casting the defendants and their actions in morally dubious terms.

> … may it please your honour that the said Richard Coggill John Coggill have departed from the said manor of Gimingham and also that the said John Knowell hath departed from the manor of Knapton and that they the said [defendants] have sought by all secret ways and means to conceal and hide their said bondage and not withstanding that it doth plainly appear by the court rolls of the aforesaid several manors that they and all their ancestors time out of memory of man have been bondmen and neifs regardant to the aforesaid manors in indentures as aforesaid yet they and every one of them have and do refuse to acknowledge their said bondage to Queen's majesty and do such service unto [her] as they ought and are bound to do to their utter disinheritance of the Queen's majesty.[228]

This is exactly what Cicero advises in *De inventione* when it he discusses how to forcefully confirm an argument.[229] Lee marshalls artificial proofs by syllogism and induction to suggest that the defendants have intentionally attempted to conceal their status and manifestly stolen from the Crown in the process; their malicious intentions are clear because they have done this 'notwithstanding that it doth plainly appear by the court rolls' that they are bound to the Queen. All that is left to do now is to bring the oration to a swift and decisive close, which Lee does simply by calling for the Duchy to bind the defendants to appear before it and answer the charge. This is, then, an example of how a pleading before the Duchy Chamber is constructed according to the precepts of classical forensic rhetoric. Furthermore, whilst I have chosen to illustrate the use of forensic rhetoric before the Duchy Chamber through the examination of one pleading, all of these precepts are also evident in the five other manumission cases initiated

[228] TNA, DL1/107/L7
[229] Cicero, *De inventione*, p. 71.

by Lee throughout the 1570s.[230] My choice to illustrate this with quotations from one case, rather than several, was to accentuate how the different parts of a judicial speech fit together; which would have been lost if quotations were taken from multiple cases.

It is possible to argue, however, that this is simply coincidence, or another self-evident legal commonplace; that in seeing the similarities between classical theories of forensic rhetoric and the way in which these texts are constructed I am inventing an *ex post facto* explanation. To advance this argument in the face of the educational currents of Renaissance Humanism, however, is to deliberately ignore the intellectual context in which these texts were created.[231] This analysis does not detract from the argument that this may be a legal commonplace, a necessary exercise, it compliments it and explicates a reason *why* this may be a legal form. That is to say, it is a legal form because forensic rhetoric told lawyers it was; that way of thinking has proved to be incredibly influential even down to our own time, so much so that it is still familiar to modern lawyers. It is this 'yawning gap' in the historiography, its failure to ask *why* this may be a legal form, that has resulted in 'generations of lawyers [being] prevented from seeing that most of their law took the shape in which they knew it in the sixteenth century.'[232] The vocabulary of legal argument is the vocabulary of classical theories of forensic rhetoric. Once we begin to accept this premise we can start to build up a more holistic understanding of these texts and the culture in which they were created.

Variation in Pleadings

I now wish to advance a related but distinct line of argument to that which was pursued above

[230] TNA, DL1/101/L7; TNA, DL1/101/L8; TNA, DL1/107/A5; TNA, DL1/112/L3; TNA, DL1/117/L3
[231] Grafton and Jardine, *From Humanism to the Humanities*; Rummel, *Humanist-Scholastic Debate*.
[232] Baker, *Spelman Reports*, p. 23.

in that I wish to address the second potential criticism that could be mounted against approaching these texts as examples of judicial rhetoric. Namely, the claim that the idiosyncrasies inherent in these texts prohibit any characterisation of them as being constructed according to the precepts of forensic rhetoric. It is certainly true that there is a great deal of variation inherent in the complaints to the Duchy Chamber: they do not all always follow the advice offered by the rhetorical handbooks. That they all possess certain features such as the opening preamble may be conceded; similarly it may also be taken for granted that they narrate the facts of their case as they see them. But this is where the wheels may seem to come off the wagon. Where the rhetoricians argue for brevity, clarity, and plausibility in a narrative, some complaints exhibit narratives so long and complex that they have no hope of ever appearing plausible.

There seem to be at least three potential explanations for this. First, the attorney writing the complaint may not have been aware of the rhetorical advice offered on how to develop a persuasive narrative. This explanation, however, seems to be rather unlikely. The ubiquity of the humanist curriculum, and specifically of rhetoric in grammar schools, as well as throughout the Universities and the Inns of Court during the sixteenth century meant that students would have obtained at least a rudimentary understanding of forensic rhetoric. For them to have no knowledge of it at all seems to be implausible.[233] The second explanation follows from the first in that instead of being completely unaware of how to construct a rhetorically persuasive narrative, the attorney may simply have lacked the necessary ability. That is to say, they may not have properly mastered the necessary skills of *inventio* and *dispositio* and so may have been unable to avoid the pitfalls facing those seeking to argue persuasively. For instance, they

[233] Brooks, *Lawyers, Litigation and English Society Since 1450*; Brooks, *Law, Politics and Society*.

may have begun their narrative too far back in time from the relevant events, or they may not observed a chronological order when narrating the events - both of which, as we have seen, were specifically given as examples of potential traps the orator may fall into. The third potential explanation, however, rather than assigning ignorance or inability on the part of the attorney, is conversely that they may have knowingly jettisoned the rhetorical advice and intentionally constructed a different kind of narrative.

The second and third explanations seem to have more purchase than the first. Indeed, the vernacular rhetorical literature is littered with condemnation of the state of eloquence in Tudor England. Thomas Wilson, throughout *The Arte of Rhetorique*, extolls the civilising nature of rhetoric and repeatedly reminds the reader of the need for eloquence.[234] Philip Sidney in his *Defence of Poesie* similarly laments the state of eloquence throughout the realm.[235] It is, therefore, entirely possible that some attorneys may simply have lacked the rhetorical skill necessary to construct a rhetorically persuasive narrative. Conversely, it is equally possible that some attorneys made conscious decisions to ignore the rhetorical handbooks. An explanation of why they may have done this is, however, beyond the scope of this thesis as it would require a detailed knowledge of the life and times of each attorney at the time they wrote each complaint; such contextual knowledge may even be for the most part impossible to recover. What this thesis is concerned with in relation to these two premises, however, is that it does not follow from either of these lines of explanation that these texts *cannot* be constructed according to the precepts of forensic rhetoric. Indeed, to advance that argument would seem to be a *non sequitur* for it commits us to endorsing the basic assumption that the rules of forensic

[234] Wilson, *The Arte of Rhetorique, 1560*.
[235] Philip Sidney, *The Defence of Poesie* (London: Printed for William Ponsonby, 1595). Preface

rhetoric governed properly constructed judicial arguments. The result is to make it seem obvious that forensic rhetoric did influence the way in which these texts were constructed.

Robert Bateman's complaint of 1586 is a good example. Bateman began his complaint with a flawless *exordium*, but as it moves into the *narratio* his complaint seems to fall into some of the pitfalls the rhetoricians warn us to take care to avoid. For instance, Bateman begins his narrative by claiming that his grandfather settled his land upon the eldest of his three sons and his heirs. The narratives continues by telling us that there was a will and that it was certified by the parish authorities. Already this would seem to be erring towards offering extraneous detail as if the land was settled on the eldest son there would have had to be a will and it would *ipso facto* have had to be certified and accepted; otherwise the land would remain, by definition, unsettled.[236] We must, as the *Ad Herennium* observes, 'avoid stating the obvious'.[237] The eldest son we are then told, however, died intestate and without any heirs, so the lands passed to the two remaining brothers 'according to the custom of gavelkind'.[238] This is the first indication that primogeniture was not the custom of the manor and that we are in fact dealing with an area of partible inheritance.[239] It would seem, then, that the complaint has either failed tell everything in a chronological order or failed to mention everything pertinent to the case, both of which it will be remembered are key to developing a rhetorically lucid narrative.[240] The final nail in the coffin is that the narrative goes on to give a step by step account of the means by which Bateman's father deprived him of his inheritance.[241] The rhetoricians, it will be

[236] For a recent study on probate see Clive Burgess, *The Right Ordering of Souls: The Parish of All Saints' Bristol on the Eve of the Reformation* (Woodbridge: Boydell Press, 2018).

[237] *Ad Herennium*, pp. 26: 'si dicam me ex provincia redisse, profectum quoque in provinciam intellegatur'.

[238] TNA DL1/141/B23

[239] On Gavelkind see Hasted, 'General History: Socage and Gavelkind Tenures', pp. 311-21. On partible inheritance see Thompson, 'The Grid of Inheritance', pp. 328-60.

[240] *Ad Herennium*, p. 26; Cicero, *De inventione*, pp. 59-61.

[241] TNA DL1/141/B23

remembered, had warned this was not appropriate in a *narratio*, for in constructing a judicial narrative 'it will frequently be sufficient to offer a summary, without going into the specific elements of the story, for often it is enough to say what happened without recounting how and why it happened'.[242] That level of detail belongs, according to the rhetoricians, in the later parts of the speech - the *confirmatio* and *confutatio* - where we prove our argument in detail and refute our opponents arguments. What this indicates, then, is a lack of understanding of - or flagrant disregard for - the rules of *inventio* and *dispositio*: the discovery of appropriate arguments and the most effective distribution of them within an oration.

The result is a confusingly long and complex narrative which, to quote Thomas Wilson, 'tumbles one tale in anothers necke leaving it rawe, hacking and hemming, as though our wittes and our senses were a woll gathering'.[243] This does not, however, negate the rhetorical dimension of Bateman's complaint. It does still hit the major notes of developing a formal opening and it does attempt to narrative a version of events. The argument advanced here is that this Bateman's complaint can be read as being necessarily weaker and less persuasive than other complaints which do follow the rhetorical precepts more exactly - such as those initiated by Sir Henry Lee - and thus they may have been more likely to fail at judgement. Furthermore, it is to suggest the relative strength of these complaints would have been evident to anyone in the legal profession in sixteenth-century England. Robert Bateman's complaint could, therefore, be held up as an example of how *not* to construct a convincing judicial narrative. This is not to say that the rhetorical dimension of legal complaints is only evident in some

[242] Cicero, *De inventione*, pp. 56: 'satis erit summam dixisse, eius partes non dicentur-nam saepe satis est quid factum sit dicere, ut ne narres quemadmodum sit factum'; *Ad Herennium*, pp. 24-6: 'summatim, non particulatim narrabimus'.

[243] Wilson, *The Arte of Rhetorique, 1560*, p. 107.

complaints and not others; it is only to suggest that some complaints possess more rhetorically sound arguments than others and those complaints are inherently more persuasive.

To argue in this way is not to suggest that success is guaranteed if every rhetorical precept is followed with absolute precision. Indeed, Quintilian concedes that there are limits to the power of rhetoric and that even if we follow every rule we may still not succeed in persuading our audience to accept our argument. The argument they make is not that we will be successful, but rather that we are more *likely* to be successful in persuading our audience. It is a mistake, Quintilian argues, 'to subject the orator to the sway of fortune to such an extent that, if he fails to persuade, he cannot retain the name of an orator'.[244] That is to say, we should not measure rhetoric by its capacity to successfully persuade, but rather that in using it orators are attempting to enhance the persuasiveness of their arguments. In other words, the key to understanding the significance of rhetoric in these texts is not to examine their *perlocutionary* effects, but rather the *illocutionary* actions embedded within them.

Conclusion

I began this chapter with three general aims. In the first instance I have sought to show that the law in sixteenth century England was not as sterile and insular as has been suggested in the existing scholarship.[245] I have attempted to demonstrate this by showing that complaints to the equity court of the Duchy of Lancaster, the Duchy Chamber, were influenced by an essentially Roman rhetorical theory of how to argue persuasively in a court of law. My second concern has been to illustrate that, once we accept this premise, we can begin to discern a number of

[244] Quintilian, *Institutio oratoria,*vol. 1, pp. 356: 'oratorem fortunae subicit, ut, si non persuauserit, nomen suum retinere non possit'.

[245] Brooks, *Law, Politics and Society*, pp. 2-3.

tensions within the complaints which mirror some broader tensions within early modern legal culture. My third general concern has been to suggest that historians have perhaps been asking too narrow a set of questions when examining sources of this nature. If, instead of exclusively concerning ourselves with the effects of these texts, we ask what their authors may have been *doing in* them we can begin to excavate a dimension of them that we have since lost sight of. I now want to begin to draw some general conclusions from these lines of inquiry and sketch the way in which I seek to develop these conclusions in subsequent chapters.

The insularity and sterility of the scholarship surrounding English legal history, I would suggest, is not simply a historiographical construct. Its roots are actually to found in the theory and practice of the law in sixteenth century England. What has not been explicitly brought out in the existing scholarship is that while this view may have died very hard, it is in fact the product of a conscious attempt on the part of the common law judges to resist the ever expanding jurisdiction of equity.[246] This conscious attempt on the part of the common law judges is itself the result of some latent assumptions in the common-law mind, which were themselves the result of a practice and experience of a purely insular form of law.[247] To expand upon an example that John Pocock has examined and which I will work through in detail as this thesis develops, the deployment of arguments based upon english historical ideas, of concepts such as custom and memory, is also causally linked to those latent assumptions. They are the product of English history itself; and contingently limited the way in which lawyers thought.

[246] Cf. Baker, *Introduction to Legal History*; Milsom, *Historical Foundations*; Baker, 'English Law and the Renaissance', pp. 23-51; R. J. Schoeck, 'Rhetoric and Law in Sixteenth-Century England', *Studies in Philology*, 50 (1953), pp. 110-27.

[247] Pocock, *Ancient Constitution*, pp. 30-55,.

The deployment of custom and memory, of legal concepts such as 'time out of memorie of mane', as legal justification does not fit well with the legal developments taking place in sixteenth century legal theory and practice. As John Baker has shown, the modes of proof used to prove a case were becoming philological rather than dialectical.[248] That is to say, there was a shift away from an inquisitorial legal system towards the adversarial system we have today where arguments are heard *in umtranque partem*, on both sides. Whereas common law and customary law were never fully compatible, the issue was rarely pressed. With the growth of the equity jurisdictions during the sixteenth century, however, the incompatibility of custom and common law was highlighted as litigants turned to equity as a means remedying the failures of common law. This was itself possible because there was no straightforward separation between the different types of law and the different jurisdictions actually competed for legal business. This also serves to highlight a further tension within these texts, and within legal theory more broadly in that 'time out of memorie of mane' as a legal concept continued to be deployed throughout the sixteenth century. But it was deployed more as a rhetorical device; as a form of rhetorical proof, a way of legitimating actions and behaviour.

As Andy Wood has observed, with every judgement issued by a central court concerning a local custom 'the legitimacy of the ruling instruments of the early modern state was deepened. The story of dispute of custom is, therefore, in some part, a story about the contradictions of state formation in early modern England'[249]. The point I would wish to emphasise here, which does not detract at all from Wood's argument, is that "the state" and its instruments in this context are not necessarily the product of an intelligent design on the part of those with political

[248] Baker, 'The Dark Age of Legal History', pp. 1-27.
[249] Wood, *Memory of the People*, p. 33.

power. Rather, they are more often than not the byproduct of attempts by those excluded from politics to exercise some form of agency. The aspect of these complaints that I therefore want to suggest we have lost sight of somewhat is the political dimension of legal argument; within that, specifically the way in which these texts are indicative of an engagement with political science on the part of litigants and lawyers. It is this engagement with political science and how it translates into political practice that will be addressed in Chapters Three and Four.

CHAPTER THREE: INSTRUMENTS OF LITIGATION

The legal records examined in this chapter pertain to various cases initiated in the equity court of the Duchy of Lancaster, the Duchy Chamber. The bulk of the material examined in the present chapter is made up of documents created in the later stages of litigation, after the initial complaint has been made. That is to say, answers, replications, demurrers, rejoinders, examinations and depositions. As with the complaints examined in Chapter Two, the texts themselves are held at the National Archives in Kew. The answers, replications, demurrers, and rejoinders are held in the class of DL1, along with the complaints; whilst the examinations and depositions are held in DL4. The significance of this, which may seem obvious but which is nevertheless important to grasp, is that examinations and depositions are the last stage in the legal process before a judgement is rendered. Therefore, if the examinations and depositions are extant in the archive there will generally be evidence of the earlier stages of litigation to be found in DL1. It was suggested in Chapter Two that if we examine these texts alongside the rhetorical literature of the period - both the classical texts and the neo-classical vernacular texts they engendered - we can begin to explicate why attorneys structured these texts in the way in which they did; and why a certain vocabulary was employed which, from our standpoint, may seem dry and formulaic. This chapter develops that argument and extends the analysis beyond the opening lines of the initial complaints and in an attempt to illustrate that each part of the case, each text, each document, is governed according to the precepts of forensic rhetoric.

Partes of an Oration and Parts of Litigation

An essentially Roman understanding of rhetoric predominated the sixteenth century humanist curriculum throughout the grammar schools and universities. The two great textbooks used in the teaching of rhetoric in Renaissance England were Cicero's youthful *De inventione* and the

anonymous *Rhetorica ad Herennium*. These authorities argued that any oration would be divisible into roughly six parts, each with its own *telos* but also constitutive of the greater whole; in mastering the five elements of the *ars rhetorica* - *inventio, dispositio, elocutio, memoria,* and *pronuncitatio* - an orator would be able to weave these parts together so eloquently that they would be able to deliver a speech with the maximum amount of persuasive force. In these elementary textbooks, the rhetoricians discuss each part of a speech in turn and offer some general advice in relation to each part; before, in later books, offering guidance on the specific figures and tropes of speech with which to amplify one's argument.[250]

This preference for offering broad advice before moving into specific techniques is reflected in the vernacular rhetorical literature such as Thomas Wilson's *Arte of Rhetorique* (1553).[251] The previous chapter demonstrated that the opening lines of these texts can be said to follow the basic advice offered by the rhetoricians concerning how to begin a judicial oration. In modern scholarship surrounding rhetoric, however, there is a tendency to reverse this emphasis and concentrate on the more specific rhetorical figures and tropes at the expense of the more general advice advocated at the beginning of the rhetorical textbooks.[252] In what follows we will see that if we place too much emphasis on specific rhetorical devices, we are liable to misunderstand the influence of Roman rhetoric on Renaissance culture.

This tendency in the modern scholarship surrounding rhetoric to emphasise the specific figures and tropes of rhetorical speech over the more general advice has created some confusion within the scholarship concerning what it means to speak about rhetoric. Indeed, to do so is to put the cart before the horse. But this stems less from a misunderstanding of rhetoric than it does from misidentifying the specific contexts surrounding the vernacular rhetorical works

[250] See above, Chapter Two.

[251] Wilson, *Arte of Rhetorique*.

[252] James Jerome Murphy, *Renaissance Eloquence: Studies in the Theory and Practice of Renaissance Rhetoric* (Berkeley: University of California Press, 1983); Brian Vickers, *In Defence of Rhetoric* (Oxford: Clarendon Press, 1988); Peter Mack, *Elizabethan Rhetoric: Theory and Practice* (Cambridge: Cambridge University Press, 2002).

produced throughout the sixteenth century. In the Roman rhetorical tradition, as Quintilian argues in his *Institutio Oratoria*, the salient point to grasp about rhetoric is that it requires not just 'a care for words, but a deep concern for the subject'.[253] That is to say, the specific words, the syntax, the figures and tropes of speech - *dispositio* and *elecutio* - are not as important as understanding which arguments are appropriate for that particular moment. If we search for words without first thinking about subject matter, 'we shall merely do violence to what we have found out', rather than enhancing our speech.[254] What the Roman rhetoricians want to emphasise is that *inventio* is the key skill upon which all others depend; and what they mean when they speak of *inventio* is the act of discovering and applying whichever lines of reasoning and argument are most appropriate to the case in hand. This understanding of *inventio* as being the key element of rhetorical argument was, however, challenged in a number of the vernacular rhetorical treatises of the sixteenth century.

If we examine the volume of rhetorical literature produced in sixteenth-century England, such as the works of Richard Sherry (1506-55), the headmaster of Magdalen College School, who wrote his *Treatise of Schemes and Tropes* in 1550; Henry Peacham, whose *Garden of Eloquence* was first published in 1577 and reprinted in 1593; George Puttenham's *The Arte of English Posie* (1589); as well as Angel Day's *The English Secretorie* (1586), it is tempting to conclude that the Roman rhetorical tradition I have explicated above was overtaken by another tradition that took its cues not from Cicero, but from Lorenzo Valla (1407-57), Rudolph Agricola (1443-85), and Peter Ramus (1515-72).[255] In what was essentially an educational debate surrounding humanism and scholasticism these writers, in arguing that the *ars rhetorica* was distinct from the *ars dialectica*, claimed that *inventio* and *dispositio* were properly parts of dialectic, with rhetoric being comprised of *elecutio, memoria,* and *pronuncitatio.*[256] Indeed,

[253] Quintilian, *Institutio oratoria,*vol. 1, pp. 318-9.
[254] Ibid.
[255] See the discussion in Skinner, *Forensic Shakespeare*, pp. 33-47.
[256] Rummel, *Humanist-Scholastic Debate.*

this line of thinking is precisely the one taken up by Thomas Elyot in his *The Book Named the Governor* (1531) when he discusses the education appropriate for gentlemen.[257]

On the other side we have the Ciceronian tradition, its chief advocates being Leonard Cox (1495-1550) with his *The Art of crafte of Rhetoryke*, first published in 1532; Richard Rainolde (1530-1606) with his *The Foundacion of Rhetorike* (1563); and most importantly Thomas Wilson (1524-1581) with his *The Arte of Rhetorique*, first published in 1553.[258] On the face of it, quantitively, it may appear that the Ramists have taken the field. But, it is in taking this analysis at face value, in drawing a qualitative conclusion from a quantitive analysis, that the confusion arises and in which we stray into imprecision and error.

Much of the modern scholarship on rhetoric, in focusing on *dispositio* and *elecutio*, not only comes perilously close to anachronism but also seems to misidentify the contexts in which these vernacular texts were produced and utilised by contemporaries. There is, in fact, little evidence to suggest that a Ramist understanding of rhetoric ever had a significant impact on the teaching of rhetoric in sixteenth-century England because there is little evidence of them on any educational curriculum. The *Ad Herennium* and Cicero's *De inventione* remained the most widely used manuals throughout the century, and Thomas Wilson's *Arte of Rhetorique* was by far the most popular vernacular rhetorical treatise of the second half of the sixteenth century, being reprinted no fewer than seven times before the end of the century. The humanist curriculum throughout the grammar schools, universities, and Inns of Chancery and Inns of Court was Ciceronian, not Ramist. To focus on the figures and tropes of speech when examining the influence of rhetoric on English law is, therefore, to attribute to the vernacular texts a broad educational context which, with the exception of Wilson's *Arte of Rhetorique,* they simply did not possess.[259] It is this Roman, this Ciceronian, understanding of forensic

[257] Thomas Elyot, *The Book Named the Governor [1531]*, ed., S. E. Lehmberg, (London: Dent, 1962).
[258] Skinner, *Forensic Shakespeare*, pp. 33-47.
[259] Giuliani, 'The Influence of Rhetoric on the Law of Evidence and Pleading'.

rhetoric that had a profound impact on the theory and practice of English law, and my attempt to illustrate this will occupy me for the remainder of this chapter.

The texts examined in this chapter, it will be argued, are generally structured according to the precepts of forensic rhetoric, both internally and externally. That is to say that each text, whether it be a complaint, answer, replication, demurrer, or rejoinder, can generally be said to follow a set structure that consists of a number of parts; it will be shown that these parts generally correlate with the advice offered in the rhetorical literature. When all of these *partes* are taken together they form a rhetorically complete judicial speech. This is, according to the rhetoricians, the ideal outcome which will give a speech the best chance at persuading its intended audience. Furthermore, what they also want you to see is that each speech is just one part of the story, one part of the larger judicial argument that spans the life of the case.

In order to appreciate the full force of the rhetorical arguments deployed we need to situate each of these documents in the rhetorical and juristic context in which they were created. We need, that is, to ask what exactly it is these lawyers and litigants are doing in these texts. They are not all doing the same thing. Just as each part of a speech has its own *telos,* so does each speech, which is why the rhetoricians emphasise that a mastery of *inventio* is of paramount importance: one must be able know which arguments are appropriate to different sections of a speech as well as which speeches are appropriate to the different stages within the legal process. Complaints are not meant to do the same things or have the same effects as replications or demurrers, answers are not meant to do the same things as rejoinders. Whilst each individual text is made up of a number of constituent parts that each have a function within the text which when taken together form the overall force of the text, the text itself is but one constituent part of the larger judicial argument. It is in taking these larger constituent parts together - that is to say, taking the complaint, together with the answer, together with (if they are extant) the replication, rejoinder and demurrer - that we can perceive the whole judicial argument as it was

intended to be understood, and which, in rhetorical and legal theory, form a complete judicial argument. This is not to say that these texts can *only* be understood when we examine the other records associated with the same claim. It is only to suggest that we should be mindful of the wider rhetorical context of a case if our objective is to work towards a more holistic understanding of them and it.

We can imagine, and we should imagine, the aspiring lawyers of Elizabethan England sitting in grammar school learning rhetoric by reading Cicero's *De inventione* and the *Ad Herennium*; we need to picture them emerging from grammar school with a humanist education and perhaps going to university, or being apprenticed in one of the Inns of Chancery where they would have studied it in much greater depth. We need to grasp that the people within legal profession were absolutely saturated in humanist rhetorical theory by the time they began working as attorneys. This is the context that we must keep at the forefront of our mind as we move through this thesis and examine the texts with which it is concerned.[260] The fundamental question that will concern us for the remainder of this chapter is *how far* this rhetorical culture can be said to have influenced the construction of these texts; I argue that this culture was so pervasive that these texts should not, and indeed cannot fully, be explicated without recourse to this culture.[261]

There seem to be at least two obvious potential objections that could be raised against the argument advanced in this chapter; and in what follows I will address them both in turn. The first relates to method: it could be argued that in approaching these texts in this way we are applying an *a priori* framework to them and, therefore, reading a rhetorical structure into them

[260] As it was established in the Chapter Three that forensic rhetoric could have an influence on the construction of these sorts of texts there is no need to rehearse that argument here. Having accepted this premise, it follows that these same texts can also be read as written examples of judicial speech. In addition this, the rhetorical culture of sixteenth century England and the humanist education that was given in the grammar schools and universities throughout the sixteenth century has been discussed at length both in Chapter Two and in the scholarship; I will therefore omit any further discussion of it in the present chapter.

[261] It should be remembered at this point that my present remarks are concerned only with documents created by the equity court of Duchy Chamber.

ex post facto. That is to say, it could be argued that these texts may have been influenced by the theories we have discussed but to find in these texts a sustained fidelity to those theories is a misreading. This line of criticism however, whilst it is perhaps the most instinctive, seems to miss the mark slightly as to advance this argument in the face of the educational curriculum widely demonstrated in the scholarship is to misunderstand - or ignore - the intellectual context in which these texts were created.

A second line of criticism that could potentially be mounted may be along the following lines. If it is conceded that complaints, answers, replications, demurrers and rejoinders are generally structured according to the rhetorical precepts I have suggested, surely this cannot also be said for the examinations and depositions because they are simply questions and answers. Interrogatories asked to deponents whose answers were then recorded by a clerk of the court. Whilst it is certainly the case that examinations and depositions cannot be said to be written examples of judicial speeches in the same manner that the other stages of litigation can be. It would be erroneous to suppose that this means that they are devoid of any structure or rhetorical influence. For instance, who do we suppose crafted the interrogatories? The answer is the attorneys; if the attorneys created the questions, why did they ask these questions and not others? What were they trying to elicit from the deponents in asking these specific questions; why did they try to draw out these specific details and not others? Once we start to ask these questions we can begin to get a sense of what attorneys were doing in asking these questions; indeed, understanding what the questions were designed to elucidate can also help us make sense of how deponents answered them. What might a deponent be trying to do in answering an interrogatory in what appears to be a rather indirect way? Once we ask these questions we are driven back to how the interrogatories were constructed and for what reasons, which in turn demonstrates that they are part and parcel of the same rhetorical exercise as the other texts. Being sensitive to how these different texts relate to one another seems to me to be the key

understanding their intellectual context.

In the analysis that follows we pursue two distinct but closely connected lines of inquiry. The first explores the extent to which later stage pleadings - answers, replications, demurrers and rejoinders - from the Duchy Chamber can be said to follow the precepts of forensic rhetoric in their structure and forms of argument; do these texts *really* demonstrate a fundamental and explicit engagement with forensic rhetoric along the lines suggested? The second line of inquiry interrogates the interrogatories and examinations specifically, with a view to illustrating precisely how they fit into the structures of argument advanced earlier in a case before sketching some implications of what this suggests about the changing nature of evidence in English law.

Later Stage Pleadings

Litigation in the Duchy Chamber was initiated by a bill of complaint - as opposed to the purchase of a writ from Chancery as in the common law courts of King's Bench and Common Pleas. Unlike the common law courts, pleading was done in written form rather than orally: complainants would submit their bill of complaint to the Duchy Chamber and then defendants would have to submit an answer in response.[262] Sometimes this was the end of the story as a case would be withdrawn when the plaintiffs claims were met with an answer. If the litigation was to progress, however, the plaintiff would then submit a replication - a formal restatement of their claims in light of the defendants answer. If this then covered the extent of the controversy the attorneys for each side would draw up witness lists and craft a series of interrogatories to be asked of all the deponents. Although the Duchy Chamber sat in

[262] The differences between oral and written procedure in English Law and the implications of this will be explored in greater detail in Chapter Five. It should be noted, however, that written procedure being the norm rather than oral proceedings in equity jurisdictions does not invalidate the premise that these texts should be thought of as written examples of judicial speech; if anything it enhances that aspect. This will be more fully explored below and in subsequent chapters.

Westminster, examinations and depositions took place in the localities and were recorded by clerks at the sessions there before being sent to Westminster for consideration and judgement.

Interrogatories were constructed ahead of the examination of witnesses but were not meant to be shared with the opposing side until the date of the depositions.[263] If, however, defendants had further objections to the restatement of the plaintiffs claims in the replication they could submit a rejoinder, or if they had a purely legal objection to the case they could submit a demurrer. Demurrers are particularly rare as they are an answer to a particular kind of legal argument concerned with the technicalities of law rather than with the substantive issues of a case. In forensic terms, they are only appropriate to juridical arguments.[264] The salient point to grasp here is that all of these stages of litigation, all of these texts, are constructed *ex parte*; wherein each party set our their case at length and in the most favourable light. This highlights their rhetorical dimension.

The texts examined in this chapter, as in Chapter Two, pertain to the soke and manor of Gimingham and its inhabitants. Gimingham is located near the North Norfolk coast, in the Hundred of Erpingham, and is composed of around 9500 acres.[265] For our present purposes the salient details are that it was once an important jurisdictional area that bound a number of local villages - Gimingham, Knapton, Mundesley, North Repps, South Repps, Sidestrand, Trimingham, Trunch - together economically and administratively.[266] In total, over 292 cases have been examined from the court of Duchy Chamber and as with the complaints in the previous chapter, the answers, replications, demurrers and rejoinders deployed in this chapter are taken from eighty-six cases initiated during the reign of Elizabeth I (1558-1603). The depositional evidence collected from DL4 is much more sparse and whereas out of the 292

[263] In practice, however, a skilled attorney with connections in the court could quite easily discover both the interrogatories and witness list for the opposing side and prepare accordingly.

[264] For a fuller exploration of rhetorical forms of argument see above Chapter Two.

[265] The jurisdictional qualities of the manor and soke were touched upon in Chapter Two.

[266] Despite being part of the Soke, the villages of Sidestrand and Mundesley were only partially within its jurisdiction due to a number of competing jurisdictional claims.

cases examined, while eighty-six were initiated relating to Gimingham, there are only extant examinations and depositions for fourteen of those eighty-six.[267] This may seem like a substantial drop, and it is, but it does not necessarily point towards some kind of archival disaster that has left a large whole in the extant evidence. Rather, it is indicative of how people engaged with the law in sixteenth century England. Litigation could be expensive; a protracted legal proceeding could end up being rather costly and time consuming for both parties - especially given that legal proceedings in equity jurisdiction were primarily written rather oral exercises - each text had to be drawn up by an attorney who charged per document, as well as for examining witnesses and clerks transcribing their testimony. Initiating a suit and delivering a forceful argument in the first instance was often enough to compel parties to reach a settlement out of court and avoid the time and expense of taking the case to a judgement that was far from certain to be desirable.

As we have seen, the rhetoricians argued that, if one is to maximise their chances of success in persuading a judge of the validity of a particular case they should try to ensure that their speech is structured in such a way as to take advantage of every possible opportunity to persuade. That is to say, we should ensure that our speech is made up of - as far as it can be - of six parts. Quentin Skinner, in a recent study of classical rhetoric in Shakespeare, succinctly summarises the advice as follows.

> The [*exordium*] must aim to establish our ethos or character, and in such a way as to render the judge attentive (*attentus*), responsive (docilis), and above all well-disposed (*benevolus*) to our side of the case. The *narratio* should then furnish the judge with the salient facts, while persuading him at the same time to accept our version of events. The *confirmatio* and *confutatio* should call on 'non-artificial' proofs such as written documents and the testimony of witnesses in addition to the most appropriate 'artificial' or rhetorical forms of argument. Finally, the *conclusio* should not only summarise our

[267] TNA, DL4/14/6; TNA, DL4/14/32; TNA, DL4/14/55; TNA, DL4/18/44; TNA, DL4/24/6; TNA, DL4/26/82; TNA, DL4/27/68; TNA, DL4/33/12; TNA, DL4/33/46; TNA, DL4/63/23; TNA, DL4/64/9; TNA, DL4/67/56; TNA, DL4/67/58; TNA, DL4/155/44.

> case but make use of 'amplifications', especially in the form of *loci communes*, to excite the emotions of the judge. Sometimes the rhetoricians suggest that suitably resonant commonplaces can be inserted at any stage where they seem likely to have a powerful emotional impact, but they always add that the [*conclusio*] is the moment at which they must chiefly and indispensably be used. The figure of the perfect orator whom these writers take themselves to be fashioning is accordingly said to be endowed with two closely related abilities: knowing how to invent or find out suitable arguments, and knowing how to amplify and ornament them with maximum emotional force. As Cicero summarises at the start of *De inventione* —in a phrase that proved to have exceptional resonance—the ideal orator will therefore be a man who combines in the highest degree the power of *ratio* or reasoning with that of *oratio* or eloquent speech.[268]

In order to successfully discover which arguments are appropriate to each part of our oration, however, we first need to ensure that we correctly discriminate two features of the case. We need to distinguish whether the issue around which our case revolves is honest (*causa honesta*), foul (*causa turpis*), or strange (*causa admirabilis*). We need to identify this because the type of *causa* will determine whether or not we can be upfront and direct in our speech and claim that our case is absolutely right, or whether it will be necessary to dissemble and steal into the mind of our audience to win them over covertly. Once we have identified the *causa* we then need to identify what the rhetoricians stress as much the most important thing about a case: its *constitutio,* the issues around which the controversy chiefly turn. Without correctly identifying the *constitutio* we cannot discover what arguments are appropriate to our cause, and if we cannot discover the appropriate arguments we have no hope of persuading anyone of the validity of our claim.

Robert Browning's answer to the complaint of William Tatsell in 1588, begins by simply stating what the text is - 'the answer of Robert Browning, defendant to the Bill of Complaint of William Tatsell, complainant' - before moving straight into a direct repudiation of the plaintiff's complaint: 'the said defendant say that the said bill of complaint as this defendant is

[268] Skinner, *Forensic Shakespeare*, pp. 18-9.

informed by his counsel is very untrue and insufficient in the law.'[269] If we were to imagine this being read out in a courtroom this would happen immediately after the initial complaint had been read. There is no need for an *exordium* along the same lines as the complaints we examined in Chapter Two, the case has already been introduced and all parties present know what the issue at hand concerns. This is a standard way of beginning an answer to a complaint before the Duchy Chamber and it should be treated as an example of a legal form, a necessity that needs to be got out of the way at the beginning of the answer.[270] As we saw in Chapter Two, however, this does not mean that it is not also a rhetorical opening along the lines we have seen in the rhetorical literature. The question is, once again, why is this sort of opening a legal commonplace? If we continue reading we can see that it continues by eloquently embellishing the rejection of the complaint: '… to be answered unto for many very great and manifest imprecisions and insufficiencies therein apparent'.[271] The answer is, as before, that this is a written example of judicial speech and therefore needs to be read as such. For our present purposes, however, it is once we move into the defendant's narrative of events that things begin become much more interesting as we get to the substantive issues of the case.

The *narratio* of William Tatsel's complaint gives us a brief summary of his case, which is essentially that Robert Browning, his brother in law, had unlawfully taken a piece of land that had been willed to him by his father in law according to the custom of gavelkind.[272] In his answer, however, Robert Browning claimed, *inter alia*, that there was no such custom in force in Gimingham and the suit should be heard by the manorial court at Gimingham, not the Duchy Chamber. Note the competing jurisdictional claim: it is likely that Tatsel knew he would be unlikely to receive a favourable verdict at the manorial court and so deliberately chose a

[269] TNA, DL1/143/T4a
[270] This is also the same formulation used at the outset of rejoinders and demurrers.
[271] TNA, DL1/143/T4a
[272] TNA, DL1/143/T4

favourable jurisdiction.[273] The case then, it seems, revolves around whether the manor of Gimingham was an area of partible inheritance. In another complaint of 1588, Nicholas Thompson claimed that Stephen Powle and others were not only denying him right of way to market, but that they were doing it on lands that were not even their own and which they had concealed from the crown.[274] Stephen Powle and his fellow conspirators answered by claiming that they held the lands in question by virtue of a lease that they had, apparently, paid for some years before.[275] This case then, it seems, turns on who holds the title of the lands in question.[276] The truth or falsity of these claims has little bearing on the present argument as, for the moment we are only concerned with these claims being an advanced as a form of argument; the key to arguing persuasively and effectively lies in correctly identifying the issues around which it chiefly turns: its *constitutio*.

The *constitutio* of the case can take one of three forms: legal, conjectural, or juridical.[277] That is to say, the point of controversy will stem from a text, a series of facts or events, or whether some action was justly or unjustly performed; the right way to discover which type you are dealing with is simply 'to put together the charge levelled by the accuser with the basic plea of the defence'.[278] Returning to William Tatsel and Robert Browning, then, we can see that the *constitutio* appears to be legal, because the matter around which the case will turn will be whether the custom of gavelkind can be found within a text - the custumals of the manor. Similarly, if we turn look again at the case between Nicholas Thompson and Stephen Powle, we can see that the case in that instance appears to have turned around the whether or not Powle

[273] On cross litigating and choosing favourable jurisdictions see the discussion in Thomas G. Barnes, 'Star Chamber Litigants and Their Counsel, 1596-1641', in John H. Baker, ed., *Legal Records and the Historian* (London: Royal Historical Society, 1978), pp. 7-28.

[274] TNA, DL1/143/T2

[275] TNA, DL1/143/T2a

[276] For a brilliant examination of concealment in this period see: C. J. Kitching, 'The Quest for Concealed Lands in the Reign of Elizabeth I: The Alexander Prize Essay', *Transactions of the Royal Historical Society*, 24 (1974), pp. 63-78.

[277] Cicero, *De inventione*, p. 21.

[278] *Ad Herennium*, pp. 32-3.

and his acquaintances did actually purchase the lease when they claimed; the *constitutio* of that case therefore appears to be conjectural. The significance of this is that in correctly identifying the *constitutio* of a case we will be able to determine the most effective line of argument, and the most appropriate forms of proof with which to validate our case.

Failing to correctly identify the *constitutio* can result in offering inappropriate proofs in support of a claim and therefore advancing a less persuasive argument. For instance, if Tatsel identified the *constitutio* as conjectural and then went on to offer an argument based, not around the custumals but, rather around past events and the testimony of deponents, and then Browning was able to produce the custumal of the manor in refutation, the case would likely go in Browning's favour. As a general rule, written forms of evidence held up better than oral testimony; it is in missing this and focusing on the weaker form of oral proof instead of refuting the validity of the textual evidence that would lead to a fundamentally weaker argument.[279] This is not to suggest that textual evidence and oral testimony cannot be offered in support of the same claim, it is just to note that failing to address the textual evidence at all leaves us open to a direct refutation along the lines the rhetoricians described. It is to these forms of proof in support of a claim, offered after we have identified the *constitutio* of a case, in the *confirmatio and confutatio* of a speech, that form the most important parts of a legal argument and to which we now turn.

In 1571 Anne Reade, widow of Peter Reade and farmer on the manor of Gimingham, initiated a claim before the Duchy Chamber against a number of other tenants of the manor alleging that the tenants were unlawfully claiming rights of foldcourse, demense and pasture

[279] Adam Fox and Daniel Woolf, *The Spoken Word: Oral Culture in Britain 1500-1850* (Manchester: Manchester University Press, 2002); Adam Fox, *Oral and Literate Culture in England, 1500-1700* (Oxford: Clarendon Press, 2000); Tim Stretton, 'Women, Custom and Equity in the Court of Requests', in Jennifer Kermode and Garthine Walker, eds., *Women, Crime and the Courts in Early Modern England* (London: UCL Press, 1994), pp. 171-99.

on land for which, she claimed, she held the lease.[280] The complaint begins with the standard formulation we examined in Chapter Two, before giving a brief narration of the facts which describes how, her husband Peter Reade leased the land from one Edward Fisher during the reign of Edward VI; now that her husband is deceased she, as 'widow administrix' of her husbands estate, lawfully holds the lease of the lands in question.[281] The tenants, in their answer to her complaint, reply by claiming that Read was breaching the customs of the manor, which afforded them the right to demense and foldcourse, in order to unjustly levy charges and fines upon the tenants.[282] Both of these texts - the complaint and the answer - develop a flawless *exordium* along the lines explicated above, before delivering a brief *narratio* in which they set out the salient facts of their case; after which, both texts then move seamlessly into a *confirmatio* and *confutatio* in which they gesture to physical evidence (non-artificial proofs), while also amplifying their arguments with specific rhetorical tropes (artificial proofs), before bringing their orations to a close with a brief *conclusio* designed to arouse the emotions of the judge and drive their case home. That is to say, the texts that make up this case can be said to construct an argument that bears a remarkable similarity to how the Roman rhetorical tradition advocated one argue in a court of law; this is, I argue, not a coincidence, but rather the product of an inescapably rhetorical understanding of legal argumentation endemic throughout sixteenth-century England.

Every rhetorical authority since Aristotle has argued that the most important methods of non-artificial confirmation are by means of legal documents - especially laws and contracts - and the testimony of trustworthy witnesses.[283] Anne Reade's complaint initially identifies the *constitutio* of the case as legal and, therefore, advances an argument that emphasises the textual

[280] TNA, DL1/83/R7a
[281] TNA, DL1/83/R7a
[282] TNA, DL1/83/R7b
[283] Aristotle, *Rhetoric*, p. 150; *Ad Herennium*, p. 74; Cicero, *Topica*, p. 314; Quintilian, *Institutio oratoria,* vol. 1, p. 346; Richard Rainolde, 'A Booke Called the Foundacion of Rhetorike', (1563); Wilson, *The Arte of Rhetorique, 1560*, p. 219.

evidence in the form of written leases that prove she has the title to the lands she claims. Her *confrimatio* and *confutatio* correspondingly gesture towards these texts in attempting to substantiate the claim: 'a certain indenture sealed with the seal of the said Duchy being dated to the xith day of August…'.[284] Even precise dates are offered to substantiate the validity of the evidence, directly contrasting with the often more imprecise memory of oral testimony. The tenants' answer, by contrast, while also having identified the *constitutio* as legal, offers non-artificial proofs in the form of 'the manifest customs of the manor of Gimingham' by referencing the court rolls as evidence of customary providence.[285] One form of textual evidence thereby refuting another and in so doing illustrating that the question to be adjudicated is in fact not whether Reade holds the title to the lands, but whether the rights she claims the tenants are infringing actually come with that title. The replication Reade submitted in answer to the tenants' answer of her complaint then reflects this by refuting the defendants use of court rolls in arguing that 'the same court rolls doth show' that the tenants are abusing the customs of the manor to claim these rights to the 'manifest disinheritance of your said orator'.[286] As we saw above, this is exactly how the rhetorical literature argues that a legal argument should develop and progress.

If we turn to the artificial forms of proof advanced in the complaint, answer, and replication of this case, we find artificial proofs peppered throughout; with a focus immediately after non-artificial proofs have been offered. Again, just as the rhetoricians advice in order to amplify the persuasive effect of the documentary evidence. Anne Reade's initial complaint attempts to stir the judge into action by citing the potential damage to the Crown and to the commonwealth if the 'manifest disinheritance of the Queens majesty and the impeachment of her highness liberties … [and] great weakening of your said orator' is allowed to go unchecked.[287] Similarly,

[284] TNA, DL1/83/R7a
[285] TNA, DL1/83/R7b
[286] TNA, DL1/83/R7d
[287] TNA, DL1/83/R7a

the tenants' answer deploys similar language but reverses the impetus in an attempt to evoke sympathy and emotion in the judge, using *loci communes* - commonplaces - such as threats to the commonwealth and the liberty of subjects.[288] The use of these amplifications and commonplaces throughout these texts accentuates the fact that these texts were not simply created for internal use, to furnish the court with the salient facts of a case as in the plea rolls of King's Bench and Common Pleas. These texts were written for a wider audience and for a completely different purpose. They were written to persuade an audience; in the absence or oral pleading in a courtroom setting, they constitute the legal record of a case as well as the pleas themselves. The attorneys who wrote these texts thought about them in depth. They invented the arguments used within and structured them in such a way as to make them persuasive. They were designed and the arguments advanced, as well as the proofs offered in support of those arguments were carefully selected so that they did in fact confirm, rather than undermine, the arguments attorneys were concerned to advance on behalf of the litigants. This is, almost by definition, the classical theory of invention: from the Latin *invenire,* to discover, to find out the arguments most appropriate to a given context; given the educational background of the legal profession it would be misleading to suggest ignorance of this on the part of the attorneys when they were constructing these texts.

Interrogatories and Depositions

It is important to examine how the material kept in the archival class of DL4 - that is, interrogatories and depositions - fits into the judicial narratives constructed in the pleadings. In this section I have been guided by the work of Laura Gowing and Garthine walker in particular who have drawn upon legal records of similar jurisdictions to examine the role women played

[288] Tim Stretton, 'Social Historians and the Records of Litigation', in Sølvi Sogner, ed., *Fact, Fiction and Forensic Evidence* (Oslo: University of Oslo, 1997), pp. 15-34.

in early modern legal culture. Specifically, their emphasis on the narrative construction of legal texts and the multi-vocality of depositional evidence is illuminating. Whilst plenty of historians have used depositional evidence as a means by which to get at the experience of ordinary people in early modern England, few explicitly engage with what this entails historiographically. That is to say, it is often assumed that depositional evidence offers us relatively unfettered access to the words of people from relatively humble backgrounds when they were deposed before the courts.[289] In what follows it will be demonstrated that interrogatories, which have received far less attention in the scholarship, can be used to illuminate just as much, if not more, than the depositions given in answer to them; indeed, it will be argued that the depositions themselves cannot be fully understood without being examined in the context of their related interrogatories.[290] I am concerned to illustrate the value interrogatories have as evidence, as opposed to the artificial proofs we find in the pleadings; to examine which voices are recorded in interrogatories and what constraints may be placed upon them. We will also consider how to interpret interrogatories like this more generally; as we discussed in Chapter One, there are complex hermeneutics and questions of interpretation to consider when approaching legal records.

Let us return to a set of cases we examined in Chapter Two: the manumission litigation initiated by Sir Henry Lee in the 1570s.[291] The underlying premise of this litigation, it will be remembered, was that Sir Henry had been granted a commission to go and trawl through properties held by the Duchy of Lancaster in order to find whether or not there existed any people still bound by the terms of their tenure to provide service to their lord. If Sir Henry could identify such inhabitants, he could charge them a fee for their manumission - that is, to

[289] This is certainly how they are used by the majority of social historians.

[290] The most important discussions here are by Heather Falvey. See: Falvey, 'The Politics of Enclosure in Elizabethan England Contesting Neighbourship in Chinley (Derbyshire)', pp. 67-84; Heather Falvey, 'Depositional Evidence', in C. Griffin and B. McDonagh, eds., *Remembering Protest in Britain Since 1500: Memory, Materiality and the Landscape Since 1500* (Basingstoke: Palgrave, 2018).

[291] See above, Chapter Two.

be released from their feudal obligations - or, similarly, force them to undertake their obligations. In practice, however, anyone who could be proved to be still bound by a feudal tenure would simply pay for their manumission rather than be obliged to undertake feudal dues.[292] Lee's pleadings before the Duchy Chamber, as we saw in Chapter Two, therefore, attempted to establish that certain inhabitants of Gimingham were bound to the Crown. Whilst we can identify the pleadings for five instances of manumission litigation in Gimingham initiated by Lee in the Duchy Chamber, the interrogatories and depositions only survive for one case; moreover, we only have the interrogatories and corresponding deposition of one witness for the defendants.[293] Our examination will, then, illustrate the opposite argument to that which we examined in Chapter Two: we will see how these interrogatories were designed to elicit testimony that would repudiate Lee's narrative of how the inhabitants of Gimingham wilfully concealed their status out of greed and low cunning.[294]

Perhaps the most obvious point to note when we turn to the interrogatories and their related depositions is that it is clear they are not structured like a judicial speech. They are quite simply lists of questions to be posed to witnesses and then the corresponding answers of those witnesses. They are not made up of distinct technical parts, as is the case with the pleadings. That being said, these interrogatories were crafted by attorneys for a specific reason, in order to elucidate specific details from witnesses that would support the arguments advanced in the pleadings. Similarly, the deponents themselves knew that they were being deposed for a specific reason and would have had at least a vague - but probably intimate - understanding of the details of the case. These questions and answers were not launched into a cultural or social void. The participants were aware of the stakes and both the interrogatories and the answers reflect this. These texts, then, despite not being structured in the same way to their related

[292] See the discussion in MacCulloch, 'Bondmen Under the Tudors', pp. 91-110.
[293] TNA, DL4/27/68
[294] TNA, DL1/101/L7

pleadings, are nevertheless complex heteroglossic legal instruments that need to be set in their rhetorical context if we are to grasp what it is they were designed to do.[295]

The following are the first five interrogatories (out of a set of fourteen) pertaining to a manumission case initiated by Sir Henry Lee in the manor of Gimingham in 1574. Out of the five manumission cases we have pleadings for in the archives, only this set of interrogatories survive; these were drawn up by the defendants' attorney in an attempt to rebut the arguments advanced by Lee (which we examined in Chapter Two). The strategy employed in these interrogatories centres around establishing whether the Sir Henry Lee's commissioners (John Green and Francis Legate) entered into various lands around the manor as part of the commission, presumably to challenge the findings of the commissioners.

1. Whether do you know John Grene and Francis Legate
2. Whether did you see or know that any commission was sent or directed to the said John and Francis or either of them out of the court of the Duchy whereof the one or either of them were commanded to take a survey of regardant bondmen
3. Whether the said John or Francis or either of them by virtue of the same commission were commanded to enter upon any mans house to execute the said commission
4. Whether you or either of you were required by the said Legate to go with him to the house of Thomas Grene
5. Whether do you know that the said Francis Legate by virtue of the same commission come to the house of the said Thomas Grene at Knapton and there required that he might come into the said Grene's house and searched there with any evidence that concerned the said manor of Gimingham[296]

Whilst these interrogatories clearly are not made up of multiple formal parts prescribed in the rhetorical literature, this does not mean that they are without rhetorical structure. They are clearly designed to establish the facts of the case in favour of the defendant: did the deponent

[295] I am here guided by the approaches pioneered by Garthine Walker and Laura Gowing in particular. See Gowing, *Domestic Dangers*; Walker, *Crime, Gender and Social Order in Early Modern England*.

[296] TNA, DL4/27/68

know the men who acted as commissioners and was the witness aware of whether the commission (if it existed) granted them the authority to enter upon private property in their execution of the commission. Once these foundational facts could be established, questions four and five begin to establish more specific circumstances of events. We need not examine each interrogatory individually to see that they relate directly to the arguments advanced in the DL1 material and serve to elucidate non-artificial proofs in support of the claim. The key point to emphasise here is that it is precisely this relationship between argument and evidence that illustrates the rhetorical dimension of these texts. That is to say, it is in examining the intertextual relationship between the complaints, answers, replications, interrogatories and their corresponding depositions which allows us to perceive how attorneys sought to prove a case at equity before the Duchy Chamber. Whilst I am not concerned here to illustrate the forensic links between pleadings and interrogatories in this particular piece of litigation, it should be noted that this *is* what the rhetorical advice suggests in terms of establishing non-artificial proof in support of the artificial rhetorical arguments.[297]

Aristotle had argued that the most important methods of non-artificial confirmation are by means of legal documents - especially laws and contracts - and the testimony of trustworthy witnesses. Quintilian agrees but stresses importance of witnesses.[298] This reflection is strengthened when we recall that, while forensic arguments may be more or less ingenuous, witnesses will usually be giving their testimony under oath; the importance of written documents is stressed throughout the rhetorical literature, not just in the classical and neo-classical Ciceronian tradition but also in the Ramist tradition. The fundamental point, however, is that these non-artificial proofs are to be advanced *in conjunction with* artificial rhetorical devices. With *loci communes*, with figures and tropes of speech designed to move the audience

[297] [Cicero], *Ad Herennium*; ibid.

[298] Quintilian, *Institutio oratoria,*vol. 1; John O. Ward, 'Cicero and Quintilian', in Glyn P. Norton, ed., *The Cambridge History of Literary Criticism: Volume III, The Renaissance* (Cambridge: Cambridge University Press, 1999), vol. 3, pp. 77-88.

to our side of the case. If we put this point the other way round we bring out its significance: written documents and sworn testimony are not in and of themselves sufficient to prove a case at law, they are materials to be interpreted and the fundamental task of anyone going to law is to make their interpretation appear legitimate. This is the absolutely elemental move that is made in sixteenth-century jurisprudence and it is in equity that we first see this shift being made. What John Baker has characterised as an evolution of older forms of legal learning, specifically regarding legal proofs, into a more jurisprudential understanding of the law: 'a shift in emphasis from *doctrine* (or common learning) to *jurisprudence* (or judge-made law)'[299]

The questions with which we are presently concerned in this section are historiographical.[300] The interrogatories posed to John Bacon in Anne Read's enclosure litigation of 1571 can be used alongside those of Lee's litigation to illustrate the value of examining interrogatories as evidence.

1. Do you know Anne Reade widow farmer unto the manor and soken of Gimingham?
2. Whether do you know a Stephen Powle of Southreppes within this year now last past did ever trap or kill coneys or hares within the soken of Gimingham?
3. Whether do you know or hath heard that any tenant of the soken might enclose any ground within the soken without licence?[301]

Discussions of the jurisdictional overlay in Gimingham in the scholarship have drawn upon depositional evidence to illustrate that the memory of the old Anglo-Saxon jurisdiction remained in the popular consciousness. The implication, in particular in Wood, is that the memory of the Soke is used by inhabitants to legitimate their somewhat subversive attitudes in

[299] Baker, *Spelman Reports*, pp. 23-51.

[300] I will, however, undertake a forensic illustration of a specific case in a subsequent publication on the enclosure litigation of Peter Read. For our present purposes it is sufficient to illustrate that there *are* forensic links, which can be examined subsequently in later work.

[301] DL4/14/55

the face of assertions of seigneurial authority by lessees like Peter Read.[302] These questions illustrate, however, that the jurisdiction of Soke was recognised even by attorneys working in other jurisdictions. This insight has serious implications for how we understand and interpret competing jurisdictional claims: it suggests an awareness and active encouragement of competing identities by institutions, as well as individuals. What is more, however, is that this insight could not be gained through the depositional evidence; one must examine the interrogatories in order to grasp this context.

Both of these sets of interrogatories illustrate the wider value to be gained from an explicit engagement with interrogatories as well as other instruments of litigation. For legal historians they throw into sharp relief numerous aspects of the legal context which cannot necessarily be gleaned from an examination of the pleadings or the depositions. For instance, they give an insight into the process by which manumission commissions may have gone about their investigations; the first two questions in Lee's litigation in particular highlight the importance litigants placed on due process in law: the emphasis on the commission being lawfully sent; that this is not taken as self evident is indicative of the suspicion with which local inhabitants received interference in their affairs.[303]

If we set interrogatories alongside their related depositions we gain an even greater insight. Bacon's deposition, for instance, has been used in the two other discussions of Gimingham in the scholarship. Nicola Whyte recently to used Bacon's testimony to illustrate how enclosure litigation was negotiated in sixteenth century Norfolk; Andy Wood demonstrated how memory could be deployed to assert or challenge local customs.[304] Neither Wood nor Whyte make any mention of the interrogatory Bacon answered in giving his deposition, however. Whilst this is indicative of the wider neglect of interrogatories within the scholarship as a valuable source of

[302] Wood, *Memory of the People*.
[303] This issue has received some attention in the scholarship. See, for instance,ibid.
[304] Whyte, 'Enclosure, common fields and social relations in early modern Norfolk', pp. 63-76. Wood, *Memory of the People*.

evidence, it also illustrates the limitations of examinations which rely on depositional evidence alone.

> He hath heard that the tenants of the Soke could not enclose any grounds without licence, for he says at a certain time about five years since Peter Reade going a hawking having in his company Mr George Duke Mr Peter Beverley, this examinant and diverse others went down to a covert called Bradfield Carres, and as they went they did see Richard Wortes inclosing a certain piece of ground lying on the East side of Sowthwood, with whom the said Peter found great fault and asked him who gave him licence, to whom the said Wortes said none, and desired him to be content and that he should sustain no loss thereby, to whom the said Peter said that by means of that Inclosure he could not have his foldcourse in shack time upon the said ground, and then the said Wortes answered that all shack time the said ground should be open, with which answer the said Peter Reade was pacified and went his way.[305]

This deposition it has been rightly noted, for instance, is a narrative account of John Bacon's memory concerning enclosure in sixteenth century Gimingham.[306] There is, however, something absolutely critical missing from this characterisation if it is not also recognised that Bacon, in giving this deposition, was responding to a particular question. Whilst no one in the scholarship would assume that this deposition was given in a cultural void - Bacon is rightly seen as making an intervention into contemporary debate and discourse on enclosure and seigneurialism - it must also be recognised that nor was it given in a legal void. An attorney for Anne Read had asked Bacon 'whether do you know or hath heard that any tenant of the soken might enclose any ground within the soken without licence'.[307] This was a question specifically designed to elicit the testimony Bacon then gave, in order to offer a piece of non-artificial proof which would confirm the forensic argument Read had advanced in her pleading. In other words, what is lost by not considering the interrogatory alongside the deposition in this case is the fact that Bacon was doing a number of things - some of which were, for instance, supporting Anne Read's seigneurial claims over the manor, repudiating the testimony of

[305] TNA, DL4/14/55
[306] Whyte, 'Enclosure, common fields and social relations in early modern Norfolk', pp. 63-76.
[307] TNA, DL4/14/55

witnesses for the defendants, offering an interpretation of local custom which privileged the manorial jurisdiction and the political authority of the lessee over that of the old jurisdiction of the soke, which privileged the rights of individual inhabitants over their lands - in giving this deposition.

To assume that uneducated tenants and labourers were aware of Roman rhetorical theory is surely erroneous. But, as Tom Johnson has shown, deponents were capable of manipulating legal discourse to tell the stories they wanted to tell, while also telling the court what they thought it wanted to hear, whether that be in corroboration or contradiction of a particular claim.[308] This point has recently been explored by Hilary Taylor, in two particularly insightful studies she has demonstrated that plebeian deponents were often forced to testify either through intimidation or economic imperative - this is certainly evident in the testimony of tenants in cases concerning Peter and Anne Read.[309] A more detailed contextualisation of legal records, particularly of litigation across jurisdictions - such as Peter Read's litigation across the Duchy Chamber, Star Chamber, and Common Pleas - will allow historians to grasp the interdependency of the categories and relationships which constitute legal culture at any given moment. The salient point for the present argument is that the attorneys asked these specific questions and not others because they wanted specific answers. The implications of the deponents' answers and what they can tell us about society and politics in early modern England will be addressed in Chapters Four and Five. For the present argument, the point is not how the questions were answered but rather that these questions were the questions that were asked in the first place. Why were these the questions posed? What were they designed to elucidate from the deponents? It is in asking these questions, in asking what *attorneys* - not

[308] Tom Johnson, 'The Preconstruction of Witness Testimony: Law and Social Discourse in England before the Reformation', *Law and History Review*, 32 (1: 2014), pp. 127-47.

[309] See below, Chapter Five for a more detailed discussion of the Read litigation. For Hillary Taylor's insightful examination see: Taylor, '"Branded on the Tongue" Rethinking Plebian Inarticulacy in Early Modern England'; Taylor, 'The price of the poor's words: social relations and the economics of deposing for one's 'betters' in early modern England'.

litigants - may have been doing in these texts, that we can excavate an aspect of these texts that tells us something about law, the legal profession, and legal culture in sixteenth-century England.

That these interrogatories correlate with the arguments advanced earlier in the case and they were constructed by attorneys in order to substantiate specific claims is, I hope, self evident once we situate them in their broader context. That attorneys crafted the interrogatories carefully and with a specific purpose is clearly brought out in Heather Falvey's illuminating work on enclosure litigation in sixteenth-century Derbyshire.[310] What is interesting, however, is that in the existing scholarship historians have tended not to examine the interrogatories and depositions alongside the related material held in DL1. They have, for the most part, been interested not in what these texts can tell us about the law, the legal profession, or forms of legal argument; but rather with what depositions can tell us about society, or culture more broadly. Indeed, social and cultural historians have generally eschewed the use of complaints and answers, preferring instead to concentrate on depositions which allow them to hear what ordinary people had to say about a subject. Unfiltered, so far as transcribed testimony can be said to be unfiltered. Even legal historians, somewhat paradoxically, maintain that legal records are of little value to the study of the law; often claiming that complaints, answers, replications, even depositions contain little analytical value relating to the substantive content of English law.[311] Indeed, much of the same scholarship denigrates the insularity and sterility of English law in the sixteenth century while it, rather ironically, simultaneously excludes texts produced within the legal system and by the legal profession from legal historiography. That legal records are utilised at all in the wider scholarship owes more to the social and cultural historiography of the past twenty years than it does to the legal scholarship of the past century.

[310] Falvey, 'The Politics of Enclosure in Elizabethan England Contesting Neighbourship in Chinley (Derbyshire)', pp. 67-84.

[311] For a good summary of the legal historiography see Brooks, *Law, Politics and Society*.

I hope that this chapter has demonstrated that a critical engagement with interrogatories along the lines undertaken in this chapter is mutually beneficial to historians of English law and legal culture as it is to historians of English society and culture broadly speaking.

I began this chapter with three general aims. In the first instance we have sought to banish the notion, endemic within the scholarship, that English law in the sixteenth century was insular or sterile, through illustrating the prodigious influence that an essentially Roman theory of rhetorical argument wielded over the construction of legal records created by the equity court of Duchy Chamber. My second concern has been to contend that the influence of this rhetorical understanding of legal argumentation was so pervasive that in order to explicate these records to a satisfactory degree we need to do so with reference to humanist rhetorical theory and culture. My third main concern has been to suggest that historians have struggled to situate these texts in their appropriate contexts. Historians of all different creeds have thereby are asked too narrow a set of questions of them; it is this flawed hermeneutic, in the legal historiography especially, which has perpetuated the misleading characterisation of these texts as being of little analytical value to the study of law. These texts, properly contextualised, illuminate the vibrancy of English law and the legal profession in the sixteenth century. Social and cultural historians have shown us that through depositional evidence we can hear the voices of ordinary people and how they organised their experience and talked about it to each other. If we are prepared to listen, however, we may find that as well as telling us what the participants of a case may have thought or believed, we can also hear what the people who actually created these texts may have been saying. The silent partners who shaped the texts and guided the cases through the courts on behalf of the litigants.

In the existing scholarship surrounding legal records of this nature there is a tendency to fudge the question of authorship. There is an appreciation of the fact that the litigants

themselves did not write these texts, and that what is written in the depositions probably does not reflect what a witness may have said verbatim. But this is chalked up to being as close as we can get to what ordinary people were saying. We may get the information second or third hand, but it is still better than not getting it at all. There is, therefore, a tension in much of the historiography between a somewhat misguided desire to make these texts fit within a Foucaldian or Derridian philosophy of authorship, and a desire to acknowledge that these texts may in fact be multi-vocal. It is this multi-vocality to which we now turn.

CHAPTER FOUR: LAW AND EQUITY IN THE ELIZABETHAN STAR CHAMBER

This chapter will demonstrate that, rather than being a set of abstract institutional rules and principles, the ways in which people interpreted the law had a fundamental impact on its substantive content. The central contention of this chapter will be that explicating how people interpreted the law and why they engaged with it are two distinct, but closely related, analytical exercises; they were both critical to substantive legal development. This chapter will, therefore, investigate the relationship between the substantive content of the law and how people attempted to engage with the law. This represents an epistemological shift from prevailing approaches in the scholarship. In what follows it will be shown that legal engagement, whilst having a variety of social and political dimensions, was also an intellectual exercise.

By focusing on the intellectual content of texts created within courts of Equity, this chapter exposes the sterility of doctrinal legal history and the limitations of social history. It is no longer a sufficient condition of a satisfactory analysis of the law merely to clarify the institutional structure and procedural habit of jurisdictions.[312] Nor is a restricted account of the social motivations for litigation any more satisfactory if we aim to understand the nature of the relationship between law and social practice.[313] Rather, these two analytical enterprises are each one side of the same coin. Legal historians have largely ignored the social, political and cultural contexts out of which litigation arose. They have preferred to try to 'tell the story of each aspect of the law as it developed under the stimulus of legal decision'.[314] Social historians have, by contrast, not considered the law itself to be a 'worthwhile or rewarding' subject of investigation.[315] Consequently, social historians have made mined the texts created by equity

[312] W. J. Jones, *The Elizabethan Court of Chancery* (Oxford: Clarendon, 1967); J. A. Guy, *The Court of Star Chamber and its Records to the Reign of Elizabeth I* (London: H.M.S.O, 1985).
[313] Guy, *Cardinal's Court*; Brooks, *Pettyfoggers and Vipers*.
[314] Jones, *The Elizabethan Court of Chancery*, p. 7.
[315] Brooks, *Law, Politics and Society*, p. 2.

jurisdictions for the wealth of contextual information contained within the pleadings and depositions. Whilst legal historians have largely ignored them because, where they have not been lost, the decisions reached in Equity did not share the common law's reliance on precedent and, therefore, did not build up a codified body of law upon which future judicial decisions were rendered.[316] This chapter argues that the legal decisions made by judges are of secondary importance when investigating legal development. A much more promising field of enquiry is to be opened up by illuminating the intellectual tools with which lawyers and litigants attempted to shape the law; in excavating different interpretations of the law and the utility of those interpretations.

The intellectual contexts of court records have been little explored in the scholarship. Intellectual historians, like legal historians, have largely ignored texts produced by courts because they are not seen as intellectually rewarding. They are considered to be indicative of legal process and not of intellectual or legal debate.[317] This is a mistake. The texts examined throughout this thesis performed multiple functions. They were administrative records of litigation: they were the primary way in which litigation before equity courts was recorded. They constituted the case itself in that they performed specific legal functions: the bills of complaint initiated the legal process and were certified by counsel in order that defendants would then be subpoenaed and bound over to make answer before the court; the defendants answer or demurrer, again certified by counsel, initiated the next stage in the legal process and so on until the case reached its conclusion.[318] They were also intellectual interventions in a wide range of debates and discourses: they arose out of specific social and cultural contexts and were intended to contribute to those contexts in identifiable ways.[319] The reputation of

[316] Even if they were of interest to the legal historian, it is often difficult to discern the outcome of a specific case at Equity. Due to, for instance, the lack of proper reporting on Chancery cases before the mid-sixteenth century and the loss of almost all of the decrees and order books from Star Chamber.

[317] Stretton, 'Social Historians and the Records of Litigation', pp. 15-34.

[318] Barnes, 'Star Chamber Litigants and Their Counsel, 1596-1641', pp. 7-28.

[319] For examples, see the discussions in John H. Baker, ed., *Legal Records and the Historian: Papers*

court records, and of pleadings in particular, as being so functionally formulaic that they are emptied of their intellectual content is misleading.[320] Their intellectual value is to be found by excavating the space around the actions they were intended to perform.

Law and Legal Development

Star Chamber was a court of justice predicated upon the royal prerogative. It was presided over by the Lord Chancellor alongside privy counsellors and common law judges, including Sir Edward Coke when he became Lord Chief Justice under James I. As Attorney General of England and Wales in 1597, however, Coke was the primary prosecutor on behalf of the Crown. Thus, in what follows, we will see Coke litigating on behalf of the Crown. Unlike the Duchy Chamber, which was limited to civil suits in which it had an interest, Star Chamber possessed a superior criminal jurisdiction that was, theoretically, limited only by itself; with the notable exception that it could not alter the common law and so had no jurisdiction over life or limb.[321] Like the Duchy Chamber, Star Chamber administered the body of rules that came to be known as Equity. Historians have struggled to precisely describe the substantive content of Equity. Whereas legal historians have been able to describe the content of common law relatively precisely through precedents established and recorded on the plea rolls of the Courts of King's Bench and Common Pleas, we have no such resource for much of Equity's history. In any event, prior to the mid-sixteenth century the ecclesiastical chancellors, of which Wolsey was the last, who presided over the great equitable jurisdictions of Chancery and Star Chamber were less bound by precedent than the common law judges. They 'decided cases without much reference to [legal precedent], making use of some analogy drawn from the

Presented to the Cambridge Legal History Conference, 7-10 July 1975, and in Lincoln's Inn Old Hall on 3 July 1974 (London: Royal Historical Society, 1978).

[320] Stretton, 'Social Historians and the Records of Litigation', pp. 15-34; Brooks, *Law, Politics and Society*, p. 2.

[321] Under English common law a person could only be put on trial for his life before a jury of his peers. Except in cases of treason.

common law and of some great maxim of jurisprudence which they borrowed from the canonists or civilians'.[322] Only with later Chancellors do we begin to see an identifiable set of rules, which slowly became known to the public through the publication of reports on procedure, being administered.[323] Prior to the mid-sixteenth century decisions made by Equity Courts were recorded only haphazardly; in the case of Star Chamber the decrees and order books have been lost entirely.[324] It is, therefore, to the procedure of Equity that we must look; as we saw in Chapter Three, that procedure was persuasion by reasoned argument and specific types of proofs. It is to the content those arguments and proofs that we should turn in order to understand equitable justice and how litigants, including the Crown, engaged with it.

Whilst Courts of Equity were courts of justice, they were not viewed in the strictest sense as courts of law. They could not modify the substance of the common law, nor could they reverse a judgement given in a common law court; whilst Equity was to be assimilated by the common law and become part of our substantive law, this was not yet so in the sixteenth century. The discrimination, by sixteenth-century common lawyers, of the common law from other forms of justice is the root of the problem that now pervades legal history. In the common law tradition Equity was seen to be in the political, rather than the legal, sphere; common law practitioners jealously resisted any encroachment.[325] Legal historians, whilst correctly identifying the distinction early modern lawyers made between common law and Equity, have largely followed the same line. This is a mistake. Such an interpretation is itself a legal fiction because it is clear that the common law was not the only form of justice being administered. Common law lawyers distinguished the common law from other forms of justice because they

[322] Maitland, *Equity*, p. 9.
[323] ibid.
[324] A small and seemingly random collection of decrees and orders are preserved in a single manuscript in the British Library: BL Harley MS 2143. Cf. K. J. Kesselring, ed., *Star Chamber Reports* (London: List and Index Society, 2018).
[325] Pocock, *Ancient Constitution*; Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge: Cambridge University Press, 1977).

wanted to defend it from what they perceived as threats. That is, they resisted what they saw as the influence of Roman law and, by extension, interference by the catholic powers of Europe in the legal safeguards provided by English law. Courts of Equity operated by compelling compliance with their decrees. If, for instance, plaintiff (X) obtained a judgement at common law and the defendant in that case (Y) brought suit in Star Chamber and asked for equitable relief. If the court found in favour of Y, the Star Chamber would have nothing to say on the judgement given at common law. It would simply compel X not to enforce the judgement obtained at common law.[326] This is why contemporaries such as Christopher St German argued that 'Equity pertained wherever the literal application of the [common] law would frustrate the object the legislator had in mind or else where it would run contrary to the dictates of natural law'.[327] Equity was always supplementary to common law, it was not a self-sufficient system in and of itself, at every point it presupposed the existence of common law. This distinction has not been particularly well handled in the scholarship to date.[328] A more sensitive treatment will allow us to investigate the relationship between Equity and common law much in much more detail. It will also demonstrate that it makes no sense to disaggregate law and politics in this period.

Star Chamber was peculiar in that, with its superior criminal jurisdiction based upon the royal prerogative, it was the only court that had the power to create new offences. This made it a popular jurisdiction for litigants, including the Crown, who sought punitive damages for perceived wrongs; its use by the Crown in this way is partly why Star Chamber is often described in the scholarship as the judicial arm of the privy council.[329] Many of the offences it

[326] Maitland, *Equity*, pp. 19-20.

[327] Mark Beilby, 'The Profits of Expertise: The Rise of the Civil Lawyers and Chancery Equity', in Michael Hicks, ed., *Profit, Piety, and the Professions in Later Medieval England* (Gloucester: Sutton Publishing, 1990), pp. 72-90; G. R. Elton, ed., *The Tudor Constitution: Documents and Commentary* (Cambridge: Cambridge University Press, 1982) p. 157; J. A. Guy, *Christopher St. German on Chancery and Statute* (London: Selden Society, 1985).

[328] Maitland, *Equity*, p. 19.

[329] See below. Also Cf. Guy, *Cardinal's Court*; Guy, *The Court of Star Chamber*. See also <https://www.nationalarchives.gov.uk/help-with-your-research/research-guides/court-star-chamber-records-

created were actions that were familiar in local courts but which were not as yet pleas of the crown. The legal innovation of Star Chamber was that, like local courts, it treated wrongs as injuries to be compensated *as well as* offences to be punished. It was, for instance, the first royal court to undertake punishment for fraud when it was not previously a plea for the crown.[330] The litigation examined in this chapter, which pertains to Edward Coke's Star Chamber prosecution in 1587 of some of the inhabitants of Gimingham, will demonstrate how new legal principles could be developed through active litigation.[331]

I: Approaches to Legal Development and the State in Existing Scholarship

Legal development in early modern England is inextricably linked with the formation of the early modern English state.[332] There is an unusually distinguished literature surrounding the state and its formation; a historiographical war continues to rage in the scholarship around how to approach a discussion of the State. There is, however, a distinction that needs to be drawn at this point, between the state, government and civil society. They are not synonyms, despite all three being conflated in the scholarship.[333] The tendency in social history in particular to use the term 'the State' as a shorthand for government is particularly misleading because social history has not, generally speaking, been concerned with civil society in its wider philosophical sense. In the philosophical literature, historically, the term 'the State' has been used specifically in contrast with 'government'.[334] This is, for instance, deeply important in seventeenth-century political discourse where theorists such as Hobbes sought to argue that the State was immortal,

1485-1642/> [accessed 16.09.19]

[330] Milsom, *Historical Foundations*, p. 418.

[331] TNA, STAC5/A2/40

[332] The most recent comprehensive historiographies remain Braddick, *State Formation*; Hindle, *State and Social Change*.

[333] See, for instance, Braddick, *State Formation*.

[334] Quentin Skinner and Bo Stråth, eds., *States and Citizens: History, Theory, Prospects* (Cambridge: Cambridge University Press, 2003); Hent Kalmo and Quentin Skinner, eds., *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2010).

in contrast to governments which live and die.[335] When we, as historians, investigate the early modern state we should picture it holistically, as the totality of civil society. Government, in all its forms, is but an aspect of civil society. Three *methodological* approaches to the State stand out as being particularly influential in the scholarship.[336] In this section we will discuss each of them in turn, before proceeding to examine them in relation to some litigation in the next section.

The first approach, which I will call the philosophical approach, is the one taken by historians of political thought. Studies in conducted in this vein tend to examine philosophical works of political theory. These treatises, which continue to inform so much of our political discourse, approach civil society in relation to the problems posed in the politics of that society. Thus, in the early modern world, Machiavelli discussed the virtues of republican government after the fall of the Florentine Republic to the Medici in the early-sixteenth century; Hobbes's *Leviathan* is an irenic work produced in conditions of seventeenth-century revolution; Rousseau's *Social Contract* discussed the nature of eighteenth-century civil society in a changing commercial context. Such treatises have conceptualised political authority vertically; they are concerned with the theoretical basis of political power.

The canonical texts of early modern political thought have generally conceived of political power in one of two ways.[337] The first analysis is that political authority descends, in varying degrees from God or the sovereign through the aristocracy and gentry through to the most humble sort. This is the argument made by advocates of the divine right of kings and theorists of absolute monarchy.[338] This notion of the civil society clearly underpinned the Tudor

[335] Thomas Hobbes, *Leviathan* (London: 1651).

[336] I am not presently concerned with how the State has been conceptualised in the scholarship, which is the focus of most discussions of the State. I am, instead, concerned with the hermeneutics adopted by scholars in their conceptualisations of State. I am interested in the methodological premises of their discussions.

[337] The present discussion does not include the sociological writings of Marx and Weber, which are later nineteenth and twentieth century contributions to political discourse. Marx and Weber have, admittedly, informed much of our modern discussions of the State, but they would not have been recognised in the sixteenth century. It would, therefore, be anachronistic to include them in the present discussion.

[338] Quentin Skinner, *The Foundations of Modern Political Thought, Volume II: The Age of Reformation*

monarchy, but it found its most forceful apologists in the defence of the Stuart monarchy in the 1640s. On the other side of the coin, the alternative conception was that power ascended through society from the people. This is the view eloquently expressed by John Milton in his *Ready and Easy Way to Establish a Free Commonwealth* (1660) at the Restoration of the Stuart monarchy.[339] This philosophical approach, concerned with the theoretical roots of political power and authority enjoyed a hegemony in historical scholarship until the mid-twentieth century; it remains widely discussed in the history of political thought.[340]

The second approach, which I will call the empirical approach, shattered the geography of mid-twentieth century historiography in 1953 when Geoffrey Elton published his *Tudor Revolution in Government.*[341] In this paradigmatic work, Elton made two major contributions to the scholarship. The first was a double-edged methodological assault upon the practice of professional historians. Elton broke with the early twentieth century Whig aspiration to locate the constitutional origins of modernity, which presupposed the philosophical approach we have just discussed. He insisted, instead, that the past should be studied 'in its own right, for its own sake'.[342] At the same time, he rejected 'a philosophic concern with such problems as the reality of historical knowledge or the nature of historical thought only hinders the practice of history'.[343] Elton thus advocated an approach that amounted to a strict adherence to historical

(Cambridge: Cambridge University Press, 1978), pp. 3-112.

[339] John Milton, *The Ready and Easy Way to Establish a Free Commonwealth* (London: 1660).

[340] Walter Ullmann, *The History of Political Thought in the Middle Ages* (London: Penguin, 1965); Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (London: Methuen, 1966); Walter Ullmann, *The Individual and Society in the Middle Ages* (Baltimore: John Hopkins University Press, 1966); J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975); Skinner, *The Foundations of Modern Political Thought*; Brett, Tully and Hamilton-Bleakley, eds., *Rethinking the Foundations of Modern Political Thought*.

[341] Elton, *The Tudor Revolution in Government: Administrative Changes in the Reign of Henry VIII*. My quotations later in this paragraph are taken from Elton's explicitly methodological texts. Whilst these texts were written later, the methodological premises set forth in these later works clearly underlie the original polemical argument in *Tudor Revolution in Government*

[342] G. R. Elton, *The Practice of History* (London: 1969), p. 18. This was a direct repudiation of the then dominant scholarship of A.F. Pollard, Lewis Namier, and Sir John Neale. Cf. Albert Frederick Pollard, *Wolsey* (London: 1929); Lewis Namier, *England in the Age of the American Revolution* (London: Macmillan, 1930); John Neale, *The Elizabethan House of Commons* (London: 1949).

[343] Elton, *The Practice of History*, p. vii. This was a reaction against the historiographical approaches being articulated by Christopher Hill and Richard Southern in the 1940s and 1950s. Hill and Southern were both

empiricism.[344] His second, perhaps more important, contribution was a corollary of this stringent empiricism. When combined with a narrow focus on financial accounts, court cases, and statutes, which were 'far and away the most important' sources of evidence, this empirical hermeneutic produced a picture of society that levelled the historiographical landscape.[345]

History, for Elton, was the explanation of events and the deducing of consequences that may follow. A vertiginous investigation into the roots of political power was, in Elton's analysis, to confuse the proper explanatory task of explicating events with the explanation of things that simply are.[346] Thus, he located the foundations of the early modern state in the creation of a centralised bureaucracy during the Henrician administration of Thomas Cromwell. Whether or not they agreed with Elton's identification of a critical moment in the 1530s, historians largely adopted the premise of Elton's approach; late-twentieth century scholarship on the state is overwhelmingly based on an empirical reading of sources drawn almost entirely from institutions. This created a dichotomy in the scholarship between 'central' and 'local' institutions and, consequently, between 'central' and 'local' government. This empirical approach to sources has underpinned, to varying degrees, numerous historiographical traditions, from political history as exemplified by Elton, to Revisionism in the 1970s and 1980s,[347] and even the New Social History of the 1980s and 1990s.[348] Whilst an emphasis on bureaucratic institutions is no longer seen as a credible way to approach questions of state formation, not least because it has been shown to be just as problematically teleological as the

foundational to the new disciplines of social and intellectual history. Cf. Christopher Hill, 'Marxism and History', *The Modern Quarterly*, 3 (1948), pp. 52-64; Christopher Hill, 'The Materialist Conception of History', *University*, 1 (3: 1951), pp. 110-4; Richard W. Southern, *The Making of the Middle Ages* (London: Hutchison, 1953).

[344] For a critical appraisal of Elton's methodology see Skinner, 'The Practice of History and the Cult of the Fact', pp. 8-26.

[345] Elton, *The Practice of History*, p. 101.

[346] Skinner, 'The Practice of History and the Cult of the Fact', pp. 8-26.

[347] J. S. Morrill, *Revolt in the Provinces: The People of England and the Tragedies of War 1630-1648* (London: Longman, 1976).

[348] Whilst the New Social History is known for its use of anthropological and sociological approaches, in the 1980s and 1990s it used the vocabulary of 'centre/locality' heavily and much of the early work in that school is predicated upon that paradigm. Cf.Keith Wrightson, *English Society, 1580-1680* (London: Hutchinson, 1982).

Whiggism Elton sought to repudiate, the unhelpful division between centre and locality has endured as a misleading shorthand in the scholarship.[349]

The third approach we will examine is the one we see in some of the more recent social history on the early modern state. This scholarship has attempted to move beyond investigating the theoretical and administrative roots of the State. Steve Hindle has, for instance, demonstrated that state formation was a process that took place in tandem with developing social structures; for Hindle, the State is centred around local governors and officeholders who mediated and implemented royal policy and bureaucracy in localities.[350] Much of the recent social history in this vein has owed much to the sociological work of Marx, Weber and Gramsci.[351] It has emphasised the participatory nature of the early modern state, demonstrating how notions of officeholding, reciprocity and credit created a more inclusive State than is often depicted in older scholarship.[352] This is, however, to shift the emphasis of the analysis away from the location of political power within civil society to the *type* of political power. That is to say, it is a shift away from analysing whether political power and authority ultimately resided in the monarchy, commons, or administrative bureaucracy, towards an analysis of the forms of power that were exercised throughout civil society. The question that consumes this aspect of the scholarship is one of legitimacy; not legitimacy in the sense of theoretical or empirical justification of political power but, rather, in the sense of belief: under what circumstances did contemporaries believe political power to be legitimate.[353]

Crucially, social history has demonstrated how contemporary political discourse, and the

[349] A much more incisive conception is found in Mike Braddick's seminal study on early modern state formation, but it too tends to think along centre/local premises despite arguing against the use of such vocabulary. Braddick, *State Formation*.

[350] Hindle, *State and Social Change*.

[351] For a recent summary of social historians' scholarship on the state see Andy Wood, 'The Deep Roots of Albion's Fatal Tree: The Tudor State and the Monopoly of Violence', *History*, 99 (336: 2014), pp. 403-17.

[352] See tha valuable discussions in Phil Withington and Alexandra Shepard, eds., *Communities in Early Modern England: Networks, Place, Rhetoric* (Manchester: Manchester University Press, 2000); Tim Harris, ed., *The Politics of the Excluded, c.1500-1850* (Basingstoke: Palgrave, 2001).

[353] The debt to Marx and Weber is here clear.

early modern conception of the State, was contested. This makes the scholarship in social history stand out against a backdrop which, due to either its focus on texts either over a long chronological space, as in the history of political thought, or its too narrow a spatial context, as with the focus on central bureaucracy in traditional political history, struggles to grasp the scope contemporary engement with early modern politics and political discourse. Recent scholarship in history of political thought, for instance, has failed to acknowledge the contested nature of key political concepts: the term commonwealth, which was deployed by Jack Cade as early as 1450, was deployed in the sixteenth century in a treatise extolling the virtues of monarchical government, by Sir Thomas Smith, *and* by rebels against monarchical government in Kent, Sussex and Norfolk during the commotion of 1549.[354] Meanwhile, it possible to read Mike Braddick's seminal study without ever encountering the idiosyncratic ideologies and practices of the people who inhabited local office because, for Braddick, the State functioned through its dissemination of hegemonic ideas.[355]

What the scholarship lacks is a history of contemporary theories of state which takes into account not only variations over time and space but also over social class. We need a history of political discourse which can account for all the participants in that discourse; which recognises the many interventions made by ordinary people instead of just the few interventions made by the intellectual and social elite. Such a history is beyond the capacity of this thesis, but in what remains we will examine how it might be achieved in future research.[356] This chapter will demonstrate how a focus on litigation and the consequent development of

[354] Noah Dauber, *State and Commonwealth: The Theory of the State in Early Modern England, 1549-1640* (Princeton: Princeton University Press, 2016). Dauber makes no mention of this context, and misses key aspects of the social history of politics. For a useful corrective see Wood, *The 1549 Rebellions*, pp. 143-84; David Rollison, *A Commonwealth of the People: Popular Politics in England's Long Social Revolution, 1066-1649* (Cambridge: Cambridge University Press, 2010); Andy Wood, 'State and Commonwealth: The Theory of the State in Early Modern England, 1549-1640, by Noah Dauber', *The English Historical Review*, 134 (567: 2019), pp. 443-5.

[355] Braddick, *State Formation*; Wood, 'The Deep Roots of Albion's Fatal Tree: The Tudor State and the Monopoly of Violence', p. 404.

[356] This is something I would hope to pursue in a future research programme.

English law can illuminate that wider engagement with political discourse by ordinary people in their everyday lives; how their conceptions of key political concepts inflected their lives and shaped the ways in which they organised their world; how, when they deployed those ideas in litigation, ruling ideas were shaped through the conflict contrasting ideologies, all of which exerted a formative influence on the development of early modern English law, politics and, consequently, civil society.

II: Intellectual Contexts - *Coke v Bateman*

In 1597 the Queen's Attorney General, Sir Edward Coke, brought a suit in Star Chamber against several inhabitants on the manor of Gimingham. The suit alleged that, among other things, the defendants had unlawfully entered into several parcels of land around the manor and converted them into pasture for their own profit. In doing so Coke claimed they had pulled down several cottages which stood on the lands in question and displaced the deserving poor.[357] The defendants in this case argued that they were lawfully seised of the lands in question and that putting their lands to better use allowed them to provide for the poor more adequately.[358]

The pleadings in this case are particularly rich and highlight the tension between royal government and local inhabitants. This tension has been of perennial interest to historians, who have sought to excavate the relationship between the State and its citizens by examining the points of contact between national and local institutions.[359] In this section we will concentrate first on the arguments advanced by Edward Coke, in order recover how officeholders at the heart of government interpreted the law and how their interpretations reflected royal policy. This will illustrate how equity courts were often the jurisdictions most suited to legal

[357] TNA, STAC5/A2/40, Bill of Information from Edward Coke
[358] TNA, STAC5/A2/40, Answer of Robert Bateman
[359] Paul Slack, *Poverty and Policy in Tudor and Stuart England* (London: Longman, 1988); Hindle, *State and Social Change*; Braddick, *State Formation*; Steve Hindle, *On the Parish? The Micro-Politics of Poor Relief in Rural England c. 1500-1750* (Oxford: Oxford University Press, 2004).

innovation. In doing so we will suggest that the existing scholarship on equity jurisdictions, and on Star Chamber in particular, over emphasises their use as a weapon of royal ministers.[360] Detailed attention will then be paid to ways in which the defendants responded to the exercise of political power in their answers. This will illuminate the other side of the coin: how people outside the trappings of high office interpreted the law, and how such interpretations reflected the attitudes of ordinary people to the everyday exercise of political power, which are indicative of different currents in contemporary political thought beside those of the ruling elite. In short, by examining the intellectual content of these texts, we excavate more than the history of institutions and social relations: we can illustrate the climate of past politics. The history of law is, in large part, wrapped up in the social, cultural and political discourses that surround it because 'law was an arm of politics and politics was one of its arms,' it was a battleground on 'which alternate notions of law were fought out'.[361] By focusing on the actions performed in litigation we will get a greater sense of the ruling ideas that underwrote the structures of the early modern State as well as conceptions of the State that are socially grounded.

Edward Coke's information in Star Chamber in 1597, against the inhabitants of Gimingham, began with the standard formula we examined in Chapter Two. It was addressed to 'the Queen's most excellent majesty' and it introduced the speaker, 'Edward Coke esquire your highness attorney general'.[362] It then, in a concerned and supplicating tone, proceeded to offer a brief description of the issues identified and provides a narration of the facts as Coke identified them. This opening was common to most bills of complaint before the Star Chamber and it has been rightly identified in the scholarship as a legal formula. Despite its generic appearance, this form of beginning was in fact a highly technical and rhetorical exercise that

[360] G. R. Elton, *Star Chamber Stories* (London: Methuen, 1958); Guy, *Cardinal's Court*; Guy, *The Court of Star Chamber*.

[361] E. P. Thompson, *The Poverty of Theory* (London: Merlin, 1978), p. 96; Hindle, *State and Social Change*, p. 32.

[362] TNA, STAC5/A2/40, Bill of Information from Edward Coke

performed a set of specific functions.[363] The forensic structure should, therefore, be kept in mind, as it throws into relief the performative nature of the text, while this chapter will primarily focus on the later parts of the texts in which arguments are advanced.

Coke used the vocabulary of classical humanism to argue that a balanced commonwealth resulted from the greater and the poorer members fulfilling their roles in society.[364] In Ciceronian vein, he emphasised the participatory nature of the English state. The first substantive section began with a description of the state of the commonwealth telling how 'a very great and substantial part of this realm consists of houses of habitation and husbandry' wherein many poor people dwell.[365] It described how many 'wealthy and great families' including 'your highness as well' have provided for the 'bodies and goods' of the poor.[366] The poor inhabitants of these houses of husbandry and habitation are described as 'good members of that realm not having any other trade or course of life but by taken to farm some lands without tenants'.[367] There they maintained 'houses for the dwelling and abiding of them peoples and their families'.[368] By converting these tenantless lands to 'husbandry and tillage' there was 'great abundance and plenty of corn and grain … whereof famine dearth and starvation hath been avoided and also the people of this your highness realm being exceedingly enriched thanks be to god'.[369] The poor are thus described in positive terms, living in balance with the wealthier members of society. In these circumstances they are 'generally set out to work and employed to profitable labour by the said principal farmers and tenants'.[370] Thereby 'idleness unlawful games and infinite other' instances of undesirable behaviour have been

[363] See above, Chapter Two.
[364] Cf. Thomas Smith, *De Republica Anglorum*, ed., Mary Dewar, (Cambridge: Cambridge University Press, 1982); Skinner, *Foundations, I*, pp. 215-42; Hindle, *State and Social Change*, pp. 23-8.
[365] TNA, STAC5/A2/40, Bill of Information from Edward Coke
[366] ibid.
[367] ibid.
[368] ibid.
[369] ibid.
[370] ibid.

prevented.[371] The body politic was seen to be in good health when the poor were maintained on the waste: they were able to feed themselves while the propertied members of society provided employment as wage labourers on their estates, which contributed to the maintenance of the social order by setting the idle to work. This was, as Thomas Smith argued, the place of the 'fourth sort or class'.[372]

Coke developed this argument along distinctly Tacitean lines. The immediate context for this case was, according to Coke, the failure of the defendants to maintain this equilibrium. This mirrored a wider debate within later sixteenth century humanist political thought between the more sceptical ideas of Tacitus, which emphasised a descent into vice and ambition over the Ciceronian ideals of wisdom and virtue when participating in politics.[373] Immediately after his description of the commonwealth, Coke argued that several wealthier inhabitants had displaced the poor in order to enlarge their own estates.[374] He described the defendants as 'being without god goodness and your majesties peaceable and politique governance'.[375] Coke argued they thought 'only of themselves to attain greater wealth and substance within the several communities in which they inhabit'.[376] Within those communities they had 'of late years not only decayed or suffered to decay divers and many houses of habitation and husbandry having of ancient time until of late divers arable land and other grounds thereunto belonging'.[377] The defendants were also said to 'have of late years taken from other like houses the same land or ground or the greatest part thereof into their own hands'.[378] They were then faced with a choice to 'either suffer the same [their seizure of lands] to stand void or else place some poor people in the same wherein they live' in poverty, 'without anything to sustain

[371] ibid.
[372] Smith, *De Republica Anglorum*, pp. 76-7.
[373] Skinner, *Foundations, I*, pp. 215-42.
[374] Only the answers of 'Robert Bateman the elder of Southreppes' and 'Robert Langward' of Thorpe Market survive in the archive.
[375] TNA, STAC5/A2/40, Bill of Information of Edward Coke
[376] ibid.
[377] ibid.
[378] ibid.

themselves and their families or work'.[379] It was for these 'offences and misdemeanours divers and sundry years last past' that Coke prosecuted the defendants in Star Chamber.[380] The [legal] problem Coke faced was that those offences and misdemeanours did not yet exist in common law.

The defendants, on the other hand, drew upon vocabulary more reminiscent of ancient constitutionalism than classical humanism.[381] They disputed the facts of the case as they were recounted by Coke and argued that they had acted in full accordance with the laws of the land. Robert Bateman traced his claim to the title of the lands back twenty-nine years, where at the beginning of Elizabeth's reign his father in law, Nicholas Warye, 'was owner of divers houses lying and adjoining together in Southreppes'.[382] Attached to these houses Bateman estimated that there were 'nine or ten acres of land or ground thereabouts'.[383] He conceded that, long before these houses and lands came into his possession, around 'fifty years last past' they may have been 'termed or taken to be several cottages'.[384] But 'whether the same were at any time three cottages for habitation or not' he could not say, other than 'the said Nicholas Warye did in his life time about thirty-five years now last past make of the said houses or supposed cottages one messuage or one dwelling house for habitation and husbandry and did so use and enjoy the same during the term of his natural life'.[385] Warye bequeathed the lands and houses to the defendant's wife, Agnes Bateman, in the first or second year of Elizabeth's reign and the Bateman claimed he had continued to enjoy them in the same state since her death. Indeed, he had 'not only maintained and kept the same' in good condition but he had also 'bettered [them] with divers new buildings … upon the premises'. In his view, he had 'rather used and kept the

[379] ibid.
[380] ibid.
[381] Pocock, *Machiavellian Moment*, pp. 333-61.
[382] TNA, STAC5/A2/40, answer of Robert Bateman
[383] ibid.
[384] ibid.
[385] ibid.

said house and lands as one entire house of habitation and husbandry' because that is all he had known it to be 'by the space of forty years past'. Coke had, according to Robert Bateman, got it completely wrong.

He had got it so wrong that Bateman offered yet further arguments to the contrary. Again, they were all premised on legal right, rather than civic duty. Bateman claimed he held another cottage on a piece of land on the adjoining manor of Bruisyard, also near Southreppes. He held this land 'by copy of court roll' and 'occupied and used it for the maintenance of himself, his wife, children and family,' as well as a 'very poor woman of the age of four score years or thereabouts to have her dwelling in the said cottage' along with the 'most part of her food and fuel there with for the yearly rent of eight half shillings'.[386] This was particularly generous because 'this defendant might as he think yearly let for the rent of twenty-five shillings'.[387] But he had 'rather suffered the said poor woman to dwell in the said cottage' because it had not been a house of husbandry before and the 'poor woman hath for the most part had her dwelling there in the said cottage by the space of fifty years now past'.[388] If he should be forced to put her out, however, 'the town and inhabitants of Southreppes should at their charge be constrained to find some other dwelling' for her.[389] Bateman claimed that he would forced to do this unless he 'be permitted to occupy the lands before mentioned' in order to maintain himself and his family.[390] What we see in this defendant's answer, then, is a vehement rejection of both the facts as they were presented by Coke, and of the essential premise of Coke's information. Bateman argued that he should be permitted to continue to occupy the lands in question primarily because he had demonstrated his legal right to them. That this would allow him to continue to provide for the poor was of secondary importance to the substance of the

[386] ibid.
[387] ibid.
[388] ibid.
[389] ibid.
[390] ibid.

claim.

This was not an unusual defence. Another defendant in this case, Robert Langward, argued along similar lines to Bateman. Langward's answer was more formal than Robert Bateman's; it was shot through with the vocabulary of the common law. Langward argued that he 'had been lawfully seised of one capital messuage or tenement in Thorpe Market,' along with 'one small tenement adjoining with three score and ten acres or thereabouts of arable land and pasture which without the remembrance of any man hath been used and occupied with the same capital messuage and also of one small cottage with a yard'.[391] Langward had inherited these properties from his father, William Langward, and when he died they 'did descend unto the said defendant as son and right heir unto the said William Langward, whereby the said defendant did enter into the said premises for his necessary use and dwelling'.[392] According to Langward, there were some small buildings dotted around his lands, but those small cottages wherein he kept 'hay straw and other fodder for cattle in the time of winter and hard weather … [none of which] is nor at any time was to the knowledge of this defendant a house of habitation or husbandry'.[393] Langward went further and, like Bateman, asserted that he was in fact providing for the poor in the community. He claimed that he 'doth suffer one William Slappe sometime this defendant's tenant to dwell in part of the said tenement and the houses and buildings situated upon all the said premises now being in good and sufficient [condition] having been from time to time repaired maintained and kept without wasting or decaying any of them.[394] This had, according to Langward, allowed him to convert more of his land to tillage and, in so doing, employ some sixteen persons; whom, because of the income derived from the land in question, he could afford to continue to let dwell in a cottage that had, from time out of

[391] TNA, STAC5/A2/40, answer of Robert Langward
[392] ibid. Cf. Milsom, *Historical Foundations*, pp. 99-116.
[393] TNA, STAC5/A2/40, answer of Robert Langward
[394] ibid.

mind, been used for the dwelling of poor persons.[395] For Langward, as for Bateman, there was no question of title; he argued that the law allowed him to dispose of his lands as he wished, while the improvements he made allowed him maintain himself and fulfil his obligations in the community.

This case raises some profound questions for the scholarship and historiography. Social historians have, for a long time now, used cases such as this to investigate the institutions of the State in relation to government broadly conceived. That is, how the apparatus of government operated in a wide variety of national and local contexts. But, more significantly, cases like this have fundamental implications for any historian concerned with legal culture.[396] This case demonstrates that the judiciary was a key avenue through which social and political agendas were prosecuted. It demonstrates how those in high office viewed the role of the State. Coke and Bateman each present contrasting views of civil society. This in itself is significant and demonstrates the vibrancy and breadth of early modern political discourse. More substantially, however, the pleadings in this case demonstrate contemporary conceptions of the early modern state in action; how they inflected everyday life; how substantial officeholders like Coke and more ordinary subjects like Bateman drew upon contemporary intellectual discourse to justify and defend their behaviour in their everyday life. People in early modern England could conceptualise and deploy different notions of the State and civil society in a wide variety of contexts outside of academic discourse and abstract works of political theory. The stakes were real in sixteenth century litigation; what this demonstrates is that contemporaries debated the epistemic premises of political power when they challenged the exercise of political power in a wide variety of contexts. That is to say, debates over the nature of civil society took place in litigation across the country. Whilst this is not to suggest quite as

[395] ibid.
[396] It seems to me that, in the sixteenth century, legal culture in was, in large part, inescapable.

broad a definition of politics as is found in the anthropological work of Adrian Leftwich and the associated scholarship.[397] It is to suggest that ordinary people in early modern England were much more involved in politics and political discourse in a traditional sense than is often allowed for in the scholarship.

The litigation between Coke and Bateman also forces us to question some of the prevailing assumptions surrounding the intellectual tools available to lawyers and litigants in the advancement of their agendas. It is, for instance, not of small significance that Edward Coke is here shown to have deployed the vocabulary of classical humanism in 1597, when he is primarily known in the scholarship as a jealous defender of the common law and the greatest exponent of ancient constitutionalism in the following decade.[398] This distinction, while important, is often misunderstood in the scholarship. Classical humanism and ancient constitutionalism were modes of discourse, they were ideologies with political vocabularies; they were a means by which people could grasp and conceptualise society.[399] What is often elided in the scholarship, however, is that they were both strands of Humanism. There has been little appreciation of the fact that common lawyers were steeped in the humanist tradition and that they used those tools in their defence of customary antiquity. Ancient constitutionalism was 'a peculiarly English brand of legal humanism' and its proponents, even as 'they began undermining it, were humanists of a very special sort'.[400]

Two things follow from this. On the one hand, it is important to explicitly recognise that the distinction between classical humanists and ancient constitutionalists is a distinction to be made *within* Humanism. This is crucial to understanding court records and it directly relates to one of the central concerns of this thesis. That is, to examine the influence of humanist rhetoric

[397] Adrian Leftwich, *Redefining Politics: People, Resources, Power* (London: Methuen, 1983); Wood, *Riot, Rebellion and Popular Politics in Early Modern England*.
[398] Pocock, *Ancient Constitution*; Baker, *Spelman Reports*.
[399] Peltonen, *Classical Humanism*, p. 7.
[400] Pocock, *Machiavellian Moment*, p. 341.

on English law and legal culture. The second point that follows is perhaps more significant for the scholarship more generally, if not for this thesis specifically, in that when we discuss Humanism, the appropriate contrast should not be with vocabularies such as ancient constitutionalism, absolutism, contractarianism, or republicanism. Rather, the distinction to be drawn is between Humanist and Scholastic thought.[401] The fundamental question is still what Coke, Bateman and Langward were doing with these vocabularies, but it is crucial to remember that they were both humanist vocabularies. Using customary arguments did not preclude Bateman from using classical forms in a different discourse later. Nor did Coke's use of classical tropes in this information commit him to a defence of humanism in its entirety. Legal instruments were highly specific interventions in contemporary intellectual debates over the nature of civil society; the attempt to recover their specificity will occupy us for the remainder of this thesis, because those details are what enable us to understand not just *what happened* when early modern men and women litigated, but *what was going on*.[402] Coke's argument, in short, that it was wrong to seize lands upon which the poor rely for their livelihood and that such a wrong should be *punishable* under law, even if the law did not prohibit it verbatim, was an attempt to establish a precedent in Equity on which other jurisdictions, including common law jurisdictions, may have drawn.[403] This is to affect the substantive content of the law.

This certainly illustrates how the Star Chamber *could* be used by the privy council to enact royal policies. But this does not mean we should relegate the jurisdiction itself, in the sixteenth century, to an instrument of government.[404] Crucially, such an emphasis elides the contested nature of royal policy and, therein, the struggle within contemporary political discourse around

[401] For a thorough and incisive account of the intellectual debate between Humanism and Scholasticism in the context of renaissance thought see Rummel, *Humanist-Scholastic Debate*. See also Skinner, *The Foundations of Modern Political Thought*.

[402] The emphasis here is borrowed from Hindle, *State and Social Change*, p. 238.

[403] Maitland, *Equity*, p. 9. By the later sixteenth century we do begin to see a defined body of rules emerging; this is an example of how those rules were arrived at.

[404] As in Guy, *Cardinal's Court*; Guy, *The Court of Star Chamber*. This description is really only valid for the Jacobean Star Chamber. See also <https://www.nationalarchives.gov.uk/help-with-your-research/research-guides/court-star-chamber-records-1485-1642/> [accessed 16.09.19]

the early modern state. Coke may have attempted to enforce royal policy on provision for the poor through Star Chamber, and thus asserted an authoritarian notion of the State upon the inhabitants of Gimingham. But the key point to remember is that the inhabitants challenged this attempt in court. They deployed counter arguments and, through rhetorical structure, forensically argued that, far from being avaricious opportunists, they were attempting to provide for the poor on their own terms. What is more, in pursuing their line of argument the inhabitants of Gimingham articulated an alternative view of civil society; which, contrary to Coke's innovation in attempting to force provision for the poor upon the inhabitants, was conservative in emphasising the liberties and rights of lawful title. It is this contestation of key political concepts and assumptions through litigation which illustrates the varied and vibrant politics of subaltern life in early modern England.

III: The Development of Jurisdictions

Jurisdictions were key to the development of English law; they were also of fundamental importance in considering where to litigate.[405] It is, therefore, necessary at this point to examine the significance of equity jurisdictions, and in particular that of Star Chamber, in the development of English law. The genesis of criminal law was in those wrongs which were matters for royal justice, in pleas of the crown. In the twelfth century Glanvill distinguished criminal and civil pleas. Civil pleas were the old real and personal actions; criminal pleas concerned wrongs.[406] English jurisprudence, however, and the common law in particular, developed extremely slowly. Throughout the sixteenth century, criminal law was still in its infancy. There were no direct means under common law by which the Crown could prosecute its wealthier subjects for failing to provide for the poorer ones.[407] Pleas of the crown were

[405] See, for instance, the discussion in Brodie Waddell, 'Governing England through the Manor Courts, 1550-1850', *The Historical Journal*, 55 (2: 2012), pp. 279-315.

[406] Milsom, *Historical Foundations*, pp. 119-65,285,403.

[407] Successive legislation throughout the sixteenth century was generally punitive and arose out of

originally matters in which the Crown had an interest, as opposed to common pleas.[408] This is why the Court of Common Pleas held no criminal jurisdiction, yet the Court of Kings Bench did. Pleas of the Crown took two forms: felonies, which were capital offences where property was forfeited to the Crown upon conviction, and trespasses against the King's peace for which neither life nor property was forfeit, but which carried some other penalty. These trespasses, which were prosecuted on behalf of the Crown, were known as misdemeanours, in order to avoid confusion with civil actions of trespass.[409] The twin pillars upon which criminal pleas of the crown were based were the principles of *vie et armis* and *contra pacim regis*.[410] Coke could not prosecute Robert Bateman's case under the common law because the Crown could not have a theoretical interest in it: the defendants neither broke the royal peace nor used force of arms. There was no plea the defendants could answer.

Other jurisdictions were more versatile.[411] What Coke needed in his 1597 litigation against Robert Bateman was the ability to argue that something that did not fall under the strict letter of the law could nevertheless be shown to fall under it. Equity pleadings, as we have seen, allowed Coke to demonstrate this because they were structured according to a specifically Ciceronian theory of rhetorical invention. Two particularly influential contemporary rhetorical and legal authorities even draw explicit connections between theories of forensic rhetoric and pleading before equity courts. The first, Thomas Elyot, who, it will be remembered, was a clerk in Star Chamber during the 1530s, wrote that

> there seem to be in the said pleadings certain parts of an oration, that is to say for Narrations, Confirmations and Confutations, named of some Reprehensions, they have Declarations, Barres, R and Rejoinders, only they lack pleasant form of beginning, called in latin Exordium, nor it make great mater they that haue studied rhetoric shall perceive what I mean. Also in arguing their ca

government fears of riot and rebellion, rather than a concern to provide relief for the poor. Statutory provision for the poor was only provided for in 1601.

[408] This is the theoretical basis for public and private litigation.

[409] Smith, *De Republica Anglorum*, p. 90; Milsom, *Historical Foundations*, pp. 403-18.

[410] With force and arms; contrary to the King's peace.

[411] The classic study on the development of English common law remains Milsom, *Historical Foundations*. However, a more accessible introduction to the subject can be found in Baker, *Introduction to Legal History*.

> opinion, they very little do lack of the whole art; for therein they do diligently observe th Confirmation and Confutation, wherein rests proof and disproof, having almost all the places wh shall fetch their reasons, called of Orators loci communes, which I omit to name, fearing to be too matter.[412]

The second authority, Thomas Wilson, Master of the court of Requests, argued in his *Arte of Rhetorique* that litigants should

> first express our minde in plaine words, and not seek these ropey terms, which betray rather a command a wise man: and again if we orderly observe circumstances and tell one thing after a neither should we suffer our tongue to, run before our wit, but with much awareness, set forth our speak our mind ever more with judgement. We shall make our sayings appear likely, if we speak the cause require, if we show the purpose of all the devise, and frame our intention according as we them most willing to allow it, that have the hearing of it.[413]

Eloquence, according to the humanist rhetorical tradition, depended above all else on a clear and logical structure of argument, rather than on the ornamentation of that argument. The ability to argue a point of view, rather than to plead to the facts, is where equity derives its immense significance; for it was in the equity jurisdiction of the Elizabethan Star Chamber, for instance, that the 'vague and under-developed statutory offences of trespass and fraud were extended into wide-ranging and substantive crimes'.[414] Furthermore, whilst 'conventional wisdom tells us that most of Star Chamber's innovation was absorbed into common law after its abolition. In fact, it happened in parallel because the judges and councillors who sat in Star Chamber were, more often than not, practicing common law judges and attorneys. What was done in one place was extended to another. Star Chamber was just the best place for

[412] Elyot, *The Book Named the Governor*. fo. 53 That Cicero was the proximate source of Elyot's rhetorical theory is confirmed later in the passage: 'And verily I suppose, if there mought ones happen some man, hauying an excellent wytte, to be brought up in suche fourme as I haue hytherto written, and maye also be exactly or depely lerned in the arte of an Oratour, and also in the lawes of this realme, the prince so willyng and therto assistinge, undoughtedly it shulde nat be impossible for hym to bring the pleadyng and reasonyng of the lawe, to the auncient fourme of noble oratours; and the lawes and exercise therof beyng in pure latine or doulce frenche, fewe men in consultations shulde (in myne opinion) compare with our lawyars, by this meanes beinge brought to be perfect orators, as in whome shulde than be founden the sharpe wittes of logitians, the graue sentences of philosophers, the elegancie of poetes, the memorie of ciuilians, the voice and gesture of them that can pronounce commedies, which is all that Tulli, in the person of the most eloquent man Marcus Antonius, coulde require to be in an oratour'.

[413] Wilson, *The Arte of Rhetorique, 1560*, p. 107.

[414] Thomas G. Barnes, 'The Making of English Criminal Law: Star Chamber and the Sophistication of the Criminal Law', *Criminal Law Review*, (1977), pp. 316-26.

innovation'.[415] This thesis has been centrally concerned with what made Star Chamber the best place for innovation. That is, the classical premises of equity itself; based as it is on contextual arguments from both sides of a case through the formally rhetorical structure of its pleadings and instruments.

The influence of Roman law upon the common law is primarily discussed in terms of the substantive content of the law.[416] That is, in terms of rules or maxims borrowed from the law. The scholarship has little to say on the procedures of equity and how they may have existentially influenced the substantive content of english law. The argument made throughout this thesis is that by borrowing procedure from Roman jurisprudence lawyers necessarily altered the common law because the common law and Roman law are predicated on completely different bases. That is, in simplest terms, the common law procedure was predicated on a formal logic of pleading, with its own artificial logic and reason which necessarily ignored context; while, in Roman law, reason was universal and thus necessarily took the contextual detail of each case into account.

This is nowhere more evident than in the development of Star Chamber's criminal jurisdiction. Star Chamber has received some attention in the scholarship in terms of its development from the fifteenth century as the King's Council developing a judicial capacity out of its executive capacity, and in the development of the court itself in the early sixteenth-century.[417] Some work has also been conducted on Star Chamber from the closing years of the sixteenth century up to its abolition in 1641, in the crisis of the Stuart monarchy and English

[415] Ibid.
[416] The foundational discussions are in Maitland, *English Law and the Renaissance*. and Baker, 'English Law and the Renaissance', pp. 23-51.
[417] Guy, *Cardinal's Court*; Guy, *The Court of Star Chamber*.

Revolution.[418] Remarkably little work has been done on the Elizabethan Star Chamber.[419] Our understanding of the court under Elizabeth is generally based on extrapolating the differences between Star Chamber in the early sixteenth century and what it was to become under the Stuarts. The only work to attempt a large scale quantitive analysis of Star Chamber litigation in the later sixteenth century is to be found in an unpublished thesis by Elfreda Skelton.[420] Written nearly a century ago, it also needs to be contextualised and be understood in the historiographical context out of which it arose.[421] That is to say, while it is an invaluable source of empirical data due to the amount of archival work undertaken, it essentially buys into Lewis Namier's thesis that political ideas bear no causal relation to political actions.[422] This, coupled with an extremely narrow definition of politics, led to conclusion that 'the court was not being used, as in later times, as a tyrannical means of extorting money, and confounding subjects that dared question the royal will, but that the court of Star Chamber was in fact the very obvious but still just instrument of paternal despotism.'[423] This hypothesis, which echoes throughout some of the more recent social history that has made use of Star Chamber litigation, obscures the development of the court and the effects that development precipitated in English law because it does not consider how litigants went about preferring a case in star chamber, or why they may have chosen to do so.[424]

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[418] Thomas G. Barnes, 'Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber: Part II', *The American Journal of Legal History*, 6 (4: 1962), pp. 315-46; Thomas G. Barnes, 'Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber: Part I', *The American Journal of Legal History*, 6 (1962), pp. 221-49; Thomas G. Barnes, 'Star Chamber Mythology', *The American Journal of Legal History*, 5 (1: 1961), pp. 1-11; Barnes, 'The Making of English Criminal Law: Star Chamber and the Sophistication of the Criminal Law'; Knafla, *Law and Politics in Jacobean England*.

[419] That is not to say that historians have not made use of Star Chamber records, it is only to say that there is little work on Star Chamber as an institution in Elizabethan England.

[420] Elfreda Skelton, 'The Court of Star Chamber in the Reign of Queen Elizabeth' (Unpublished MA Thesis, London, 1931). Skelton was married to the eminent Elizabethan historian Sir John Neale.

[421] Pocock, 'The Politics of Historiography'.; See above Chapter Four.

[422] Namier, *England in the Age of the American Revolution*, pp. 3-4. Namier's thesis is now generally considered to be erroneous.

[423] Skelton, 'The Court of Star Chamber in the Reign of Queen Elizabeth'.

[424] McDonagh, 'Making and Breaking Property: Negotiating Enclosure and Common Rights in Sixteenth-Century England'. Diane Strange, 'From Private Sin to Public Shame: Sir John Digby and the use of Star Chamber in Northamptonshire and Bedfordshire, 1610', *Midland History*, 44 (1: 2019), pp. 39-55.

The development of Star Chamber's criminal jurisdiction, out of what was ostensibly a civil one, is one of the fundamental moves that is made by the Elizabethan legal profession. It is in examining the means by which this development was achieved that we can come to understand the influence of rhetoric on English law more widely, for the way in which the law was practiced had a substantive impact on the law itself. The equity jurisdiction and *ex parte* nature of English Bill procedure in Star Chamber meant that the focus of pleading shifted from a dialectical exercise into a rhetorical one.[425] It is this shift from dialectic to rhetoric, from apodeictic proof to reasoned persuasion, which facilitated the explosive development of English criminal law in the Elizabethan Star Chamber.

This movement from apodeictic proof to reasoned persuasion had far reaching consequences. The question behind litigation ceased to be 'has person X committed the crime of Y; if yes the punishment is Z.' Instead, the question shifted to one of legitimacy: 'is X a legitimate response to Y?'. This was the nature of Equity in that it provided redress for litigants who could not find justice at common law. Once the question turned to what was legitimate, however, the whole enterprise of litigation shifted and the point became not whether something was legal or illegal, but rather could something be legitimately described as legal. This is, for instance, what we see the litigation we have just examined between Edward Coke and Robert Bateman. This is the absolutely fundamental move made in the Elizabethan Star Chamber and in English jurisprudence more generally at the end of the sixteenth and beginning of the seventeenth centuries. Furthermore, this is how Star Chamber's jurisdiction widened from the narrow statutory basis for crimes such as forgery and fraud to what was seen as an almost limitless and arbitrary reach by the time of its abolition in 1641. The coalescence of Roman forms of judicial argument designed to persuade a judge to accept the legitimacy of a particular

[425] Giuliani, 'The Influence of Rhetoric on the Law of Evidence and Pleading'; Barbara Shapiro, 'Classical Rhetoric and the English Law of Evidence', in Lorna Hutson and Victoria Ann Kahn, eds., *Rhetoric and Law in Early Modern Europe* (New Haven: Yale University Press, 2001), pp. 54-72.

interpretation, rather than 'proving' an issue to be true or false as in common law, with the common law reverence for precedent and custom as a legitimate form of proof, facilitated the rapid expansion of criminal law. As successive rulings built upon one another, central jurisdictions expanded with every judgement; they rarely, if ever, contracted.[426]

One can grasp the scale of how English law developed in Star Chamber by examining changes in the type of litigation brought before the court. John Guy has argued that 821 cases can be accurately dated as having been brought to Star Chamber during Wolsey's chancellorship (1515-1529).[427] Of these 821, however, it was only possible to discern the subject of 473.[428] Similarly, Elfreda Skelton, in her thesis on the Elizabethan Star Chamber, found and identified the subject of seventy-three cases preferred in Star Chamber in the first year of Elizabeth's reign, while identifying and dating a further 713 to the forty-forth year of the reign.[429] Broadly speaking, the subject of the cases Guy and Skelton excavated can be placed into four categories: (1) cases pertaining to title, (2) cases pertaining to offences which include the use of physical force, (3) cases which concern some form of fraudulent behaviour and finally, (4) cases concerning corruption of officers of the Crown.[430] The table below collates the quantitive findings of Guy and Skelton.

Category and Subject	**Henry VIII: 1515-29**	**Elizabeth I: Year 1**	**Elizabeth I: Year 44**
Title	194	7	9

[426] Wood, *Memory of the People*, p. 33.

[427] Guy estimates that there may have been as many as 1,685 cases preferred in Star Chamber during Wolsey's ascendancy, but as many are undated it is impossible to say with any degree of accuracy and so they have been discounted from his figures: Guy, *Cardinal's Court*, p. 51.

[428] Guy notes that this is due to the state of the archive: only some instruments of a case are extant and these may not give us a reliable indication as to the subject of the litigation: ibid. pp. 51-2.

[429] Skelton, 'The Court of Star Chamber in the Reign of Queen Elizabeth'.

[430] Guy specifies five categories, but for my argument those five can be condensed into three. Cf. Guy, *Cardinal's Court*, pp. 52-3.

Force	98	40	313
Fraud	109	21	313
Corruption	72	5	78
Total	**473**[431]	**73**[432]	**713**[433]

These figures have been used to illustrate a number of legal developments in the sixteenth century.[434] In the first instance they illustrate the movement of Star Chamber from a civil and a criminal jurisdiction to a primarily criminal one. This has been the focus of work conducted by Thomas Barnes and John Guy.[435] The movement from a civil to a criminal jurisdiction can be seen in the decline over the course of the sixteenth century in the number of cases preferred in Star Chamber concerning title, and a corresponding rise in litigation involving an allegation of force.[436] That is, a decrease in litigation wherein the question to be adjudicated was the lawful possession of property, and an increase in litigation where the question concerned the legality of an action which may constitute a breach of the peace. In the early sixteenth century, when the Star Chamber held a mixed jurisdiction, cases concerning title made up 41%. By the beginning of Elizabeth's reign twenty-nine years later, however, they made up only 9% and, by the end of her reign, forty-three years later they made up only 1% of all cases heard before Star Chamber that year.

The second, and perhaps more significant, point these figures have been used illustrate is

[431] Ibid.
[432] Skelton, 'The Court of Star Chamber in the Reign of Queen Elizabeth'.
[433] Ibid. p. 195.
[434] They underpin, for instance, the analysis in Hindle, *State and Social Change*.
[435] Barnes, 'Star Chamber Mythology'; Barnes, 'Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber: Part I'; Barnes, 'Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber: Part II'; Barnes, 'The Making of English Criminal Law: Star Chamber and the Sophistication of the Criminal Law'; Barnes, 'Star Chamber Litigants and Their Counsel, 1596-1641', pp. 7-28; Guy, *Cardinal's Court*; Guy, *The Court of Star Chamber*.
[436] Litigation over real property was an existentially civil matter because the issue at hand was property, not breach of the peace.

the growth in the volume of litigation throughout the sixteenth century.[437] This has been well documented in the historiography and there have been studies on the growth of the legal professions,[438] on the Inns of Court,[439] on the growth of business in particular courts,[440] and on the gender of litigants.[441] In their preoccupation with the increase in the volume of litigation and its effects on the legal profession, particular courts, and the gender balance of litigants, however, these studies have often paid less attention to the effects this increase in volume may have had on the substantive content of English law. While it has not gone unremarked in the scholarship that these figures illustrate a dramatic increase in a specific types of offences prosecuted before Star Chamber. The significance of this increase has been consistently downplayed. It is, for instance, often noted that the allegations of riot in Star Chamber were more of less fictitious. John Guy devotes an entire chapter to explicating the 'real' issues litigated before Star Chamber and concludes that 'two thirds of the suits … which complained of riotous and violent demeanour were in reality about unquiet titles'.[442] Thomas Barnes similarly concluded that the majority of Star Chamber litigation was merely 'civil ends in criminal rament'.[443] This dismissive sentiment echoes through some of the more recent studies to have made use of Star Chamber records.[444] Too often this is the extent of the attention given

[437] This is the enduring legacy of Chris Brooks' work on the history of English Law. See the essays in Joanne Begiato, Adrian Green and Michael Lobban, eds., *Law, Lawyers, and Litigants: Essays in Memory of Christopher W. Brooks* (Cambridge: Cambridge University Press, 2019). Especially Michael J. Braddick, 'Christopher Brooks's Contribution to Early Modern History', in Michael Lobban, Joanne Begiato and Adrian Green, eds., *Law, Lawyers and Litigants in Early Modern England* (Cambridge: Cambridge University Press, 2019), pp. 11-31.

[438] Brooks, *Pettyfoggers and Vipers*; Prest, *Rise of the Barristers*.

[439] Robert Megarry, *Inns Ancient and Modern: a Topographical and Historical Introduction to the Inns of Court, Inns of Chancery, and Serjeants Inns* (London: Selden Society, 1972); Prest, *The Inns of Court Under Elizabeth I and the Early Stuarts, 1590-1640*.

[440] Stretton, 'Women, Custom and Equity in the Court of Requests', pp. 171-99; Ingram, *Church Courts, Sex and Marriage*.

[441] Jennifer Kermode and Garthine Walker, *Women, Crime and the Courts in Early Modern England* (London: UCL Press, 1994).

[442] Guy, *Cardinal's Court*, p. 53.

[443] Barnes, 'Star Chamber Litigants and Their Counsel, 1596-1641', pp. 7-28.

[444] Strange, 'From Private Sin to Public Shame: Sir John Digby and the use of Star Chamber in Northamptonshire and Bedfordshire, 1610'; McDonagh, 'Disobedient objects: material readings of enclosure protest in sixteenth-century England'; Steve Hindle, 'Self-image and public image in the career of a Jacobean magistrate: Sir John Newdigate in the Court of Star Chamber', in Michael J. Braddick and Phil Withington, eds., *Popular Culture and Political Agency in Early Modern England and Ireland: Essays in Honour of John Walter*

to the type of offences prosecuted before Star Chamber. Having recognised that most people were interested in litigating over property historians have been content to assume that is the extent of what may have been going on in litigation. That story, however, surely does not take us very far. If most people were interested in litigating over title to property, an existentially civil claim, but were able to do this through an ostensibly criminal jurisdiction, the area of interest to the historian is surely the circumstances in which this was made possible. This has, however, received little attention in the scholarship. It is to a specific analysis of these circumstances, and what they illustrate, to which we now turn.

IV: Riot, Rebellion, and the Ordinary Litigant - *Anguishe v Nicholas*

Ordinary people across England also attempted to influence the law through the arguments they pleaded before the courts. Granted, in the following case, Emme Anguishe did not attempt to reform the poor laws of England when she brought a suit against several inhabitants of Walsingham in 1592, but the means by which she attempted to achieve her desired outcome were strikingly similar to those employed by Coke in his litigation against Bateman. Herein lies the extraordinary value of the Star Chamber, for arguments of this sort were commonplace. In 1592 Anguishe alleged several of her neighbours had broken into a field on the edge of a wood belonging to her and ransacked all the wood, minerals, and livestock therein.[445] In their answer the defendants replied that the land in question did not belong to Anguishe and that they possessed certain rights to the wood and minerals on it. They also argued 'the said complaint exhibited is, for the most part, very uncertain untrue and insufficient in the law'.[446] It is tempting to take this as a simple denial, a matter of course in any court case; indeed, it is commonplace in almost all of the answers examined while conducting research for this

(Woodbridge: Boydell, 2017), pp. 123-44.

[445] TNA, STAC5/A47/8, bill of complaint of Emme Anguishe

[446] TNA, STAC5/A47/8, answer of William Nicholas, John Rame and John Craddock; see also the related interrogatories and depositions in the same bundle.

thesis.[447] But this would be to miss that they were actually correct insofar as the common law had little to say on the matter. Minor disputes over use-rights and land were generally matters that would be decided in local jurisdictions: Manorial Courts and Courts Baron.[448] What made the case attractive to Star Chamber was that Anguishe argued the accused had 'in most riotous and outrageous manner, and armed and arrayed with bowes, pikes, knives, long poles, piked staves, pitchforks and divers other such like weapons … in most riotous manner, drove out of the said wood of right belonging your said subject'.[449] She argued that their actions were committed by force of arms, *vie et armis*, and as Star Chamber was, by this point in the century, primarily a criminal jurisdiction, it took the case.[450]

Star Chamber litigation is often treated with a level of suspicion in the scholarship. It has been argued, to the point where it is perhaps even uncritically assumed nowadays, that an allegation of riot was essentially par for the course in Star Chamber litigation. It was, we are told, device to remove a suit into 'the domain of royal jurisdiction, and beyond the claims of the local courts'.[451] The hegemony of this belief about Star Chamber litigation in the scholarship is such that historians go in search of 'the real issue' in a case.[452] This is problematic on a historical as well as a historiographical level. In the first instance it commits the historian to assuming that the text must be saying something other than what it said. For instance, by arguing that Emme Anguishe's suit was not *really* about riot because what she was really complaining about had to do with land. The historian is then forced to go in search of the motivation for the litigation rather than to examine the litigation itself. This, then, removes the law from the historical enquiry. What the historian then ends up analysing is not

[447] See, for instance, TNA, STAC5/R35/17; TNA, STAC5/F22/19; TNA, STAC5/F2/1; TNA, STAC5/C14/12; TNA, STAC5/A47/12; TNA, STAC5/A2/40; TNA, STAC5/A40/27; TNA, STAC5/A2/2; TNA, STAC5/A55/36; TNA/STAC5/B7/12; TNA, STAC5/F3/5; TNA/STAC7/12/37

[448] Wood, *Memory of the People*.

[449] TNA, STAC5/A47/8, bill of complaint of Emme Anguishe

[450] For the courts movement from a civil into a criminal jurisdiction see below.

[451] Barnes, 'The Making of English Criminal Law: Star Chamber and the Sophistication of the Criminal Law'; Guy, *Cardinal's Court*.

[452] Guy, *Cardinal's Court*, p. 51.

what the text may say, but what it does not say. This is, as we saw in Chapter One, a circular argument with problematic results.[453]

The accusation of riot was one of several legal vehicles by which criminal law developed. It has, however, been weakly conceptualised in the scholarship. Its use, whether founded or not, gave Star Chamber an interest in cases that it would otherwise have passed over. This, coupled with its equitable basis, gave Star Chamber unprecedented legal manoeuvrability. By the first decade of Elizabeth's reign Star Chamber had given up its civil jurisdiction and refused most applications for it to hear matters relating to title.[454] However, it could, hear cases of an ostensibly civil nature - that is, in Anguishe's case, a dispute that centres around title to and rights in land - if there was a criminal element to the claim.

Whilst it is certainly interesting and important to note the fictitious nature of allegations of riot in sixteenth-century Star Chamber litigation, it is misleading to suggest we should treat such litigation as essentially 'civil ends in criminal raiment'.[455] To do so is to elide the *nature* of the litigation. That is to say, we need to remember that *legally* the issue at hand was the - the *contitutio* or *quaestio* - around which the allegation turned. In other words, legally, the scope of the enquiry centred around the allegation of riot; we should, then, pay more attention to the development of the legal principles around allegations of riot and spend less time trying to read between the lines of a case to "get at" the issues in which we think litigants were really interested. If our goal is to understand the role of the law in early modern society and to grasp how it developed, we need to approach it on its own terms. That is to say we need to approach it with its own artificial logic in mind and treat allegations of riot as *logically* factual, even if we know them to be fictitious. This may seem counter-intuitive but it is extremely important to grasp we wish to excavate the development of English law.

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[453] See above, Chapter One; also Quentin Skinner, *Visions of Politics, I: Regarding Method* (Cambridge: Cambridge University Press, 2002).

[454] Barnes, 'The Making of English Criminal Law: Star Chamber and the Sophistication of the Criminal Law'.

[455] Barnes, 'Star Chamber Litigants and Their Counsel, 1596-1641', pp. 7-28.

CHAPTER FIVE: POLITICS

This chapter will challenge the prevailing orthodoxies in social and legal history which, respectively, treat court records as epiphenomenal with respect to the study of political theory and law. Through an examination of the pleadings before the prerogative courts of Duchy Chamber and Star Chamber, we have seen how litigants and attorneys constructed narratives in order to manipulate the law and engage in legal feuds. In what follows, we will see how third-party participants attempted to influence proceedings. We will examine the testimony of witnesses deposed to give evidence in cases before these courts, and we will see that they were affected by the conflicts raging around them. They constructed their own narratives. Through their testimony they intervened in litigation in order to advance their own interests, or the interests of their friends, or even the communal interests of the locality as they saw them. In examining the views of witnesses alongside those of litigants and attorneys we become sensitive to the the nature of civil society. That is, not just the social context that might shape the preoccupations of those party to a particular piece of litigation. But also the strategies and wagers involved in engaging with the epistemic discourses which surround political action; what Sophie Smith has recently described as 'the politics of political theory'.[456] Politics consists in civil society. But civil society is more than just a lived experience. It is an intellectual experience as well. This chapter will reconcile the social and the intellectual facets of politics. In doing so it will demonstrate that politics is more than the sum of power relations.

Power and Politics

The life of Peter Read, who sub-leased the manor of Gimingham through Edward Fisher from

[456] Sophie Smith, *Okin Rawls, and the Politics of Political Theory.* Paper delivered to the Foundations of Political Thought section of the American Political Science Association, June 2018.

1549 until his death in 1568, is a colourful one, wrought with fraud, theft, bribery, and extortion.[457] In 1566-7 he was a plaintiff before the Star Chamber where he prosecuted his tenants for forgery. He was at the same time a defendant in Common Pleas, where his tenants were prosecuting him for theft and extortion. At the time of his death in 1568, he was involved in no fewer than three separate legal cases in three different courts.[458] While he held the lease of the manor of Gimingham he was, for all intents and purposes, lord of the manor and he exercised seigneurial power over its inhabitants.[459] He was intimately involved in every aspect of life on the manor, everyone who lived there would have known him, and most would have interacted with him through the annual collection of rents. His position as lessee also required inhabitants to seek his permission before various activities such as enclosing land, hunting game, or collecting resources from around the manor. When we think of Gimingham and its inhabitants in the 1560s we should think of a relatively small community of inhabitants, clustered around a larger landholder - the lessee - who possessed certain legal powers over them. Peter Read's attempts to exercise those powers over the manor often brought him into conflict with its other inhabitants, and these conflicts form the immediate contexts for the litigation examined here. The instruments of litigation - pleadings, interrogatories and depositions - are more than textual records of litigation. They had specific juridical functions.[460] In this chapter we will use them to excavate more of the political context of litigation which took place in late-Elizabethan Gimingham.

By the mid-sixteenth century one of the primary ways through which people exercised and, consequently, experienced political power was through litigation. Developments in early modern society opened up the central courts and put them within reach of people for whom

[457] After Read's death the lease continued to be held by his widow, Anne, until her death in 1577.

[458] At the time of his death in 1568, Read was party to litigation in the courts of Common Pleas, Star Chamber, and the Duchy Chamber.

[459] Cf. David Thomas, 'Leases of Crown Lands in the Reign of Elizabeth I', in R. W. Hoyle, ed., *The Estates of the English Crown, 1558-1640* (Cambridge: Cambridge University Press, 1992), pp. 169-90.

[460] See above, Chapter Four.

they had previously seemed a distant and unreachable form of justice.[461] Spurred on by the lucrative revenue generated through fees and perquisites, the courts and the legal professions actively sought and encouraged people to litigate in their jurisdictions rather than traditional manorial courts. For the first time, large numbers of people below the status of gentry were able to seek redress at common law and in the prerogative courts, rather than being restricted to local courts.[462] This offered them access to more impartial justice, central courts were staffed by professional lawyers and judges in Westminster and were unlikely to be intimately familiar with the particulars of individual cases prior to a suit being brought. Manorial courts, by contrast, were made up of individuals from the locality out of which the suit arose and were much more likely to be partisan.[463] Putting the central courts within reach of ordinary people had a number of effects, many of which have been discussed at length in the scholarship, but the most significant for the present argument was that it triggered a precipitous rise in business for the central courts.[464] The cumulative effect of these developments was a diffusion of agency through the social hierarchy, by giving the lower orders access to national jurisdictions in which they could assert themselves. Peter Read's attempts to exercise political power in Gimingham and the subsequent reactions of inhabitants are set against the backdrop of these broader developments in early modern society. Over the course of the sixteenth century, then, power was increasingly mediated through an active engagement with the law.

The relationships between lords and their tenants were primarily relationships of power. They were marked, in various ways, by domination and dependence in respect of property rights. They were, however, in a perpetual state of existential flux, because they were constantly being redefined. This, in turn, is why power relations have been described as

[461] Brooks, *Pettyfoggers and Vipers*; Brooks, *Law, Politics and Society*.
[462] Brooks, *Lawyers, Litigation and English Society Since 1450*, pp. 63-128.
[463] Barnes, 'Star Chamber Litigants and Their Counsel, 1596-1641', pp. 7-28; Barnes, 'The Making of English Criminal Law: Star Chamber and the Sophistication of the Criminal Law'; Guy, *The Court of Star Chamber*.
[464] Brooks, *Pettyfoggers and Vipers*; Brooks, *Lawyers, Litigation and English Society Since 1450*; Brooks, *Law, Politics and Society*; Braddick, 'Christopher Brooks's Contribution to Early Modern History', pp. 11-31.

inherently political in the scholarship, for 'politics occurs with any attempt to extend, reassert or challenge the distribution of power'.[465] In the Anglo-Saxon period these relationships were known institutionally as a Soke, which, put simply, was the congregation of smaller landowners around a larger landowner who provided protection in exchange for services. They were the product of practical necessity more than anything else. After the Conquest, and throughout the medieval period with the development of the manorial system, they evolved into species of a legal and administrative genus, which gave rise to different types of tenure.[466] Throughout the thirteenth, fourteenth and fifteenth centuries, and well into the sixteenth century, property rights so predominated English society that they could dictate almost anything from ownership of land and enfranchisement, to the regulation of the daily tasks required to subsist, or even freedom of movement in instances of villeinage.[467] They were, in short, the bonds which held society together: they were the foundation upon which trade and market relations rested; they also formed the bedrock of civil society by being the determining factor of the franchise.[468] To understand the nuances of these relationships is to get at the heart of what was at stake when they broke down.[469]

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[465] Wood, *Riot, Rebellion and Popular Politics in Early Modern England*, p. 13.

[466] Paul Vinogradoff, *The Growth of The Manor* (London: Allen and Unwin, 1920), p. 303; Charles Gray, *Copyhold, Equity, and the Common Law* (Cambridge, Mass: Harvard University Press, 1963); R.J. Fisher, 'Tawney's Century', in R.J. Fisher, ed., *Essays in the Economic and Social History of Tudor and Stuart England* (Cambridge: Cambridge University Press, 1961), pp. 1-14.

[467] E. P. Thompson, *Customs in Common* (London: Merlin Press, 1991); Phil Withington, *The Politics of Commonwealth: Citizens and Freemen in Early Modern England* (Cambridge: Cambridge University Press, 2005); Andy Wood, 'The Loss of Athelstan's Gift: The Politics of Popular Memory in Malmesbury, 1607–1633', in Jane Whittle, ed., *Landlords and Tenants in Britain, 1440-1660* (London: Boydell Press, 2013), pp. 85-99.

[468] The classic work which brings out the importance of property rights for trade and market relations is Craig Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (Basingstoke: Macmillan, 1998). This has recently been further developed in Alexandra Shepard, *Accounting for Oneself: Worth, Status, and the Social Order in Early Modern England* (Oxford: Oxford University Press, 2015). For contemporary works which bring out the importance of property rights for the maintenance of society see William Lambarde, *Eirenarcha* (London: 1581); Thomas Smith, *De Republica Anglorum*, ed., Mary Dewar, (Cambridge: Cambridge University Press, 1982); Charles Calthorpe, *The Relation between the Lord of a Manor and the Coppyholder his Tenant* (London: 1635). For contemporary works in political theory that elucidate the significance of property rights as a basis for civil society (*civitas*) see Thomas More, *Utopia* (London: 1516); Thomas Hobbes, *Leviathan* (London: 1651).

[469] R. W. Hoyle, 'Tenure and the Land Market in Early Modern England - or a Late Contribution to the Brenner Debate', *Economic History Review*, 43 (1: 1990), pp. 1-20; Phillipp R. Schofield, 'Lordship and the Peasant Economy, c.1250–c.1400: Robert Kyng and the Abbot of Bury St Edmunds', *Past & Present*, 195 (suppl 2: 2007), pp. 53-68; Diarmaid MacCulloch, 'Bondmen Under the Tudors', in Claire Cross, D. M. Loades and J. J.

The texts in which the conflicts between Peter Read and his tenants are described depict the breakdown of these relationships. Such relationships between lords and tenants in sixteenth-century England were dynamic, but they were also porous. They had limits. The discrepancy between Read's assertion of seigneurial power and the ways in which his tenants responded help us to identify those limits. It indicates a break between the way lordship was perceived and the way in which it was being experienced. This is not necessarily surprising; in a century on the cusp of modernity there were many competing visions of the social order, of politics.[470] What is surprising, however, is historians' relative lack of exploration of this terrain in recent years. These texts allow us to recover how people organised their experience and talked about it to each other; how they understood the complex web of relations they were locked into with their social betters, inferiors, and neighbours. To trace this web is to draw the map of politics and society in Gimingham in the 1560s.

Legitimate Power

In 1565 Peter Read initiated a suit in Star Chamber against several of his tenants. In his bill of complaint Read claimed that one of the inhabitants of the manor had forged a writ in order to remove a suit from the manorial court at Gimingham to Common Pleas at Westminster.[471] The crux of the matter was that Read was less likely to receive a favourable verdict in Common Pleas, a court over which he held no sway, than he was in the manorial court over which he could exercise considerable influence. The litigation before Star Chamber is, therefore, multi-faceted in that it performed two distinct functions. On the one hand, it attempted to influence the case in Common Pleas: if a verdict was rendered in Star Chamber before the case at Common Law reached its conclusion, the outcome of the Star Chamber case could be

Scarisbrick, eds., *Law and Government under the Tudors* (Cambridge: Cambridge University Press, 1988), pp. 91-110.

[470] Wood, *The 1549 Rebellions*, pp. 1-18.

[471] TNA, STAC7/5/4, bill of complaint.

submitted as evidence in support of Read's action at Common Law.[472] Cross-litigating in multiple courts in an attempt to influence the outcome of other cases was a common tactic in sixteenth-century litigation, especially for those with greater resources than their opponents.[473] On the other hand, however, it was in and of itself a targeted assault upon the tenants, and it typifies a number of ways in which power in Gimingham was contested.

A close reading of the bill of complaint before Star Chamber highlights the stratagems deployed in this power struggle. Before he mentioned anything about forgery, Read recounted the original conflict with his tenants: that 'about whitsunday last past [Read's servants] distrained certain cattle of one Robert Howse' for damage the tenant had allegedly caused to part of the demense.[474] Howse had allegedly responded to the seizure of his cattle by making reply in the manorial court and Read 'was compelled to answer, and thereunto pleaded […] that he lawfully may' distrain Howse's cattle.[475] According to Read, the matter then 'proceeded orderly until it was ready to receive a verdict at trial'.[476] Only after setting the scene does he come to the central allegation of this particular case: that 'Thomas Grame and Humphrey Britton being common attorneys in the said county […] believing that the matter was like to pass against them […] knowing that a writ of amicus certiorari would both stay the said trial in the said court of Gimingham and remove the suit out of the same […] contrived, forged, and secretly made a counterfeit warrant in the name of the sheriff of your majesties country of Norfolk'.[477] In forging this writ and removing the case to Common Pleas, Read argued that Britton was maliciously attempting to subvert the customs of the manor by scheming to prevent Robert Howse from being compelled to pay for the damage he had caused; and that he was, in

[472] As discussed above in Chapter Four, this was the means by which English criminal law developed at incredible speed to extend to previously civil issues such as the settlement of real property. Cf. Barnes, 'The Making of English Criminal Law: Star Chamber and the Sophistication of the Criminal Law'; Giuliani, 'The Influence of Rhetoric on the Law of Evidence and Pleading'.

[473] See above, Chapter Four. See also Brooks, *Pettyfoggers and Vipers*, pp. 48-131.

[474] TNA, STAC7/5/4, bill of complaint.

[475] ibid.

[476] ibid.

[477] ibid.

real terms, depriving Read of income he was lawfully entitled to and which he had the authority to collect.[478]

There are two distinct interventions here that highlight the extent to which political thought and political action permeated early modern society. The initial conflict between Read and his tenant generated the original suit in the manorial court and the subsequent action before Common Pleas. That was a conflict over the exercise of power in Gimingham specifically. It was an attempt to maintain social order. The case before Star Chamber, however, was premised not on the maintenance of social order, but the destabilisation of it. The initial case, which ended up before Common Pleas, if read alone, conceals the level of agency ordinary people in Gimingham possessed. Read's complaint to Star Chamber, however, makes clear that he did not perceive the conflict in terms of a disagreement over the extent of his seigneurial powers in Gimingham.

He presented it as a much more serious challenge to the basis of his authority to seize his tenant's property in the first place. Read escalated the conflict by elevating the struggle out of the specific circumstances of the initial disagreement, and out of common law jurisdiction, into the realm of political theory. The matter Read wanted adjudicated before the prerogative court was not whether he could exercise seigneurial power in this way.[479] He had in fact already exercised it. It was instead concerned with whether or not he should be able to; whether he had the authority to do it. That is to say, the question to be adjudicated before Star Chamber was the extent to which Read's actions were legitimate. Read may have hoped that the judges in Star Chamber, sensitive to attempts to disturb the the social order, would find in his favour and strengthen his administrative grip on the manor. A favourable verdict would trickle down and be admissible as evidence in the action before Common Pleas. But, his tenants could also

[478] My quotations up until this point have all been taken from the *narratio* of Read's complaint and fall within the first third of the bill.

[479] This would be decided at common law in the litigation before Common Pleas.

manipulate this discourse and cast Read as the disturbing force upsetting the social order. Both cases were part of the same political struggle, but they each made distinct interventions in that struggle. The action in Common Pleas is indicative of a seigneurial disagreement in Gimingham; the case before Star Chamber demonstrates, however, that politics was more than just a lived experience, it was also premised on an intellectual experience.

Perhaps one of the best examples of this is a metaphor that can be found in almost every instrument of litigation, and which echoes throughout renaissance political discourse. That is, the visualisation of a commonwealth or civil society as 'a politique body,' with the sovereign functioning as the head and the people as the body.[480] This was a common feature of legal texts and political treatises and is, for instance, the theoretical basis that underpins Read's claim. Before delving too deeply into the language of the complaint in greater detail it is worth unpacking this recurrent trope and how it has traditionally been handled in the scholarship. One of its enduring strengths is that it could be used as a prism through which one could refract society into its constituent parts. As in John Norden's early-seventeenth century survey of English manors, which he referred to as 'little commonwealths.'[481] Or even more precisely in Thomas Smith's mid-sixteenth century account of English society, wherein he dissolved it into what he saw as its smallest parts - the family - to show in what it consisted, in order to then to give a causal account of how it came about and to what ends it was ordained.[482] The crux of the matter, the controversy surrounding Read's litigation, for instance, is that the body politic was said to be in good health if and only if power was exercised in the interests of the commonwealth. If power was exercised against the interests of the people the whole constitution of the body politic was thrown out of balance and disorder would ensue.[483]

[480] The classic study remains Ernst Hartwig Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957).

[481] John Norden, *The surveyors dialogue* (London: 1607), p. 28; Waddell, 'Governing England through the Manor Courts, 1550-1850'.

[482] The account in Thomas Smith is essentially Aristotelian. See Smith, *De Republica Anglorum*, pp. 49-77.

[483] Wood, *The 1549 Rebellions*, pp. 1-18,143-84.

Essentially, this metaphor was invoked when there was disagreement over the means by which authority was exercised *and* the ends for which it was meant to be exercised. Given this ubiquity in contemporary legal and political texts, it is safe to say that the practical and the epistemic premises of power were in continual contestation in our period.

Patriarchal Authority

Authority in early modern England is often taken to be patriarchal. In the scholarship, broadly speaking, patriarchal authority has generally been examined in the context of the family and defined along the lines of 'a cluster of related and unrelated dependents living under the authority of a household head who was usually, although not always, an adult male.'[484] England was 'a patriarchal society in that authority was vested in adult males generally and male household heads specifically.'[485] This is certainly true but, due to the lack of attention historians have paid to the nature of authority in early modern England more generally, this has been the primary focus for most of the recent work on the concept itself. That story, however, does not get us very far. Social historians have thus far failed to give a convincing account of the process by which early modern lawyers and politicians were able to dissolve the *civitas* into its constituent parts and locate it throughout society, thereby devolving a measure of power to each constituent part and situating operational authority in its head. There is, in other words, something missing from the current scholarship on the social history of politics.

Patriarchal authority is the term given to power exercised by one person over a multitude of dependents by virtue of their position in a social hierarchy. The family is, naturally, the

[484] Keith Wrightson, 'The Politics of the Parish in Early Modern England', in Paul Griffiths, Adam Fox and Steve Hindle, eds., *The Experience of Authority in Early Modern England* (Basingstoke: Palgrave, 1996), pp. 10-46; Adam Fox, Paul Griffiths and Steve Hindle, eds., *The Experience of Authority in Early Modern England* (Basingstoke: Palgrave, 1996); Hindle, *State and Social Change*; Steve Hindle, Alexandra Shepard and John Walter, eds., *Remaking English Society: Social Relations and Social Change in Early Modern England* (Woodbridge: Boydell, 2013); Hindle, *On the Parish?*

[485] Wrightson, 'The Politics of the Parish in Early Modern England', pp. 10-46.

smallest unit of analysis in this equation. It is not, however, the sum itself. In order to solve it we must find the value of units greater than that of the family. We need, that is, to look upward through, not across and over, society from the vantage point of the family. We should therefore extend our analysis beyond simply familial relations to include manorial tenants.[486] The inhabitants of Gimingham were a cluster of people who were dependent upon Read, not in respect of personal freedom - as in a wife or child being subject to her husband or father - but in respect of property rights: Read held the manorial lease from which the tenants ultimately derived their copyholds, leaseholds and attendant rights. The patriarchal figure in the family literally possessed their dependants: women became the property of their husband upon marriage; the notion that a person was subject to the authority of another because they were a copyholder or a tenant at will was equally important in common law. Moreover, Read ultimately held his lease from the Queen and, therefore, derived his authority from the Crown.[487] The manor was, like the family, a constituent part of the *civitas*.

The salient point that is brought out in the forensic arguments of litigation is that ordinary people were active participants in this dynamic. They understood, on their own terms, what it meant to be subject to authority; how power was meant to be exercised in order to keep the body politic in good health. Authority is distinct from power in that we do not speak of authority in the absence of power. If a person simply lacks the power to do something we do not speak of them not having authority. Conceptually, then, in a positive sense authority is the right to exercise power in a given context with impunity because it has been sanctioned by the agent or agency from which the power is derived. If we put this point the other way around we bring out its significance for the present argument: the experience of authority is the experience

[486] There have been analyses of units greater than that of the family, but they have confined themselves to specific jurisdictions. They have generally resisted trying to view authority holistically in the sense I am describing. Vinogradoff, *The Growth of The Manor*; Wrightson, 'The Politics of the Parish in Early Modern England', pp. 10-46; Waddell, 'Governing England through the Manor Courts, 1550-1850'.

[487] For an analysis along similar lines, but in an urban jurisdiction, see Withington, *Politics of Commonwealth*.

of being obliged to behave in a certain way. It is the experience of political obligation. The relationships between lords and tenants were, just as much as familial relations, lived experiences and intellectual affairs of domination and dependence with respect to property rights; they were the essence of civil society and of politics. They were, in other words, the local expression of civil society.[488] In order for *the commonwealth* to be maintained so too did the little commonwealths, *e pluribus unum.*

Read's complaint offers us a rich insight into his perception of one such relationship. It presents a particular view of life in Gimingham, of the nature of politics and obligation, and of how legitimate power should consequently be exercised. As lessee, Read held a degree of authority over the manor and had access to significantly more resources than most people in Gimingham. By sending his servants to distrain his tenant's cattle, Read asserted his authority over a subordinate tenant. From this we can infer how he perceived his position and seigneurial powers; from his assertion and justification of it, first in the manorial court, then in Common Pleas, and then again in this Star Chamber complaint, we can infer that his perception was to some extent normative. Indeed, Read claimed that the majority of the manor would agree with him. The defendants in the original suit were the exception; and when they came to realise 'that the matter was like to pass against them' in the manorial court, 'contrived, forged, and secretly made a counterfeit warrant' to remove the suit to Westminster.[489] Humphrey Britton, the defendant in the Star Chamber litigation, however, evidently did not agree with Read. Britton does not seem to have been directly involved in the original conflict between Read and his tenant, but his answer offers a radically divergent account of the events described by Read, and thereby throws into sharp relief how authority was contested in Gimingham in the 1560s.

Relationships based on domination and dependence were existentially competitive.[490]

[488] Patriarchal authority within the family then, on this analysis, was the familial expression of civil society.
[489] TNA, STAC7/5/4, complaint of Peter Read
[490] For a different view, which treats similar relationships as processes of negotiation, see Michael J. Braddick and John Walter, eds., *Negotiating Power in Early Modern Society* (Cambridge: Cambridge University Press,

Britton's vitriolic repudiation of Read's complaint underlines the fervour with which people jockeyed for position and sought to gain the upper hand. Britton, it will be remembered from Chapter Four, completely rejected Read's narrative of events and began his answer by forcefully stating that the complaint and 'the matter therein contained are the forged imagines of a certain private matter and troublesome disposition of the said complainant for that the said defendant hath issue by good warrant served divers persons upon the said complainant'.[491] His answer offered a radically different account of the original dispute between Read and Howse, the events immediately preceding Read's allegation of forgery; it also offered a polemical account of how seigneurial authority was being exercised in Gimingham in the 1560s. The persuasive force of Britton's answer lay in that he did not completely jettison the idea of patriarchal authority Read had sought to exude, he qualified it.[492] Where Read appealed to the judges in Star Chamber to confirm that he should have the power to distrain his tenants' property because this allowed him to maintain the social order. Britton, by contrast, argued that 'he hath offended no court of law but rather that he did necessarily' answer and refute 'the evil practice of this complainant'. The courts, not lords, maintained the social order.[493]

This distinction emptied Read's argument of its content and reversed its meaning. Whereas Read's complaint emphasised obedience as the essential criteria for the maintenance of the commonwealth, Britton emphasised the lawful exercise of power as the essential criteria. Read's exercise of seigneurial power was the destabilising force on the manor. He claimed that Read 'and certain of his servants […] pursued certain causes such as to the great disquiet of divers quiet persons dwelling near him'.[494] An educated common law attorney, he went on to give an example of the sorts of actions Read perpetrated in order to stir up these 'divers quiet

2001).

[491] TNA, STAC7/5/4, answer of Humphrey Britton

[492] The significance of this point is most forcefully made in Skinner, 'Some Problems in the Analysis of Political Thought and Action'. See also above Introduction and below Conclusion.

[493] TNA, STAC7/5/4, answer of Humphrey Britton

[494] ibid.

persons dwelling near him'. He alleged, for instance, that Read ignored the 'advantages of exception' with regard to enclosure for his own benefit. Essentially, he claimed that Read had enclosed land that should have been protected from enclosure.[495] The litigation against himself in Star Chamber, Britton argued, was another example of the corruption and abuses perpetrated by Read; it was part of a concerted campaign of oppression against the tenants of Gimingham, designed to confirm their subordination and silence their lawful objections. Britton attempted to remove the case to Common Pleas in order to check these seigneurial abuses and restore the social order in Gimingham. He had been successful not through the forgery of a writ, but rather through the legal naivety of Read and his client 'John Browen, understeward of the said court manorial,' who 'in the said bill of complaint entered an issue thereof very erroneously and unskillfully and by the special practice of the said complainant as this defendant suppose who doth so rule the said under steward in his said office that he will for his pleasure deal very indirectly without any regard for the justice thereof'.[496]

This is the story which, when juxtaposed with the narrative in Read's complaint, gives us the traditional picture of social relations in rural communities in the later-sixteenth century: endemic conflict between landlord and tenant over seigneurial power and property rights, in which, more often than not, landlords attempted to extract capital from tenants who resisted what they viewed as encroachments on their rights and liberties.[497] Seigneurial authority in Gimingham, was literally and epistemically synthesised through the collision of competing judicial narratives. Britton's answer, just as much as Read's complaint, gives us insight into the nature of how individuals perceived, experienced, and tried to exercise power in

[495] Neither the pleadings nor the depositions in STAC7/5/4 give specifics about which pieces of land were excepted. Although, witnesses in 1615 testified before the Duchy Chamber that they remembered Read enclosing land in order to enlarge and beautify the gardens adjoining his manor house, Gimingham Hall: TNA, DL4/63/23.

[496] TNA, STAC7/5/4, answer of Humphrey Britton

[497] R. H. Tawney, *The Agrarian Problem in the Sixteenth Century* (London: Harper & Row, 1912); E. P. Thompson, *Customs in Common* (London: Merlin Press, 1980); R. W. Hoyle, ed., *Custom, Improvement and the Landscape in Early Modern Britain* (Farnham: Ashgate, 2011); Whittle, 'Peasant Politics and Class Consciousness: The Norfolk Rebellions of 1381 and 1549 Compared'.

Gimingham. Both texts, and both narratives, offer competing views of not just what life was like but of how life in Gimingham ought to be. Whilst this means we should not take them at face value, they remain one of the most fruitful sources available to historians precisely because they are so polemical in their descriptions.[498] These texts, and this case in particular, show us how interconnected and interdependent different perceptions of authority were with the exercise of power in a given circumstance. The latter is evident, in this case, through Read's seizure of his tenant's cattle and their subsequent reply in the manorial court; the former is evident through the rhetorical confirmations both Britton and Read offer in support of their narratives.

Read's accusation of forgery required him to substantiate his claims. As we saw in Chapter Four, he provided non-artificial proofs by giving a detailed timeline of events, moving point by point from how it was 'impossible to have a writ so quickly from London,' and 'the said Britton' was so indisposed 'to abuse your majesties laws' that he 'secretly contrived and forged a warrant' which should 'remove the matter from your majesties court of Gimingham unto your highness court of Common Pleas […] therefore by the issue of the said forged warrant, it was commanded to the said bailiffs that the same should be executed with effect'.[499] Britton, in his answer, claimed that other matters had been dealt with so unjustly in the manorial court that 'the fear and dread of such like bid me […] to expedite out of the Queen's majesties court of Chancery a writ of amicus ad certiorari for removing of the said suit out of the said court wherein there was always like to follow very disordered proceeding […] as by the instances of these and other misdealing most many'.[500] Furthermore, Britton claimed that there could be no act of forgery *ex hypothesi* because he and Thomas Grame 'by composition and agreement with the said undersheriff [were] licensed' to make such warrants that 'were to be executed

[498] Stretton, 'Social Historians and the Records of Litigation', pp. 15-34.
[499] TNA, STAC7/5/4, complaint of Peter Read
[500] TNA, STAC7/5/4, answer of Humphrey Britton

within a certain limit of the Duchy within which the said Court of Gimingham was holden and for that purpose [the Sheriff] did always leave divers and sundry blanks sealed with his seal of office to the intent that by force of such writ were to be executed'.[501] These two narratives demonstrate the litigious inflection of sixteenth-century society and the judicial strategies by which people sought to manage their lives and engage with the world around them; with regard to what one literally could or could not do, the devil was, theoretically, buried in the detail.[502]

Intellectual Contexts

These texts also demonstrate an intellectual struggle over the nature of civil society broadly conceived. Such contestation need not imply an analytical engagement in politics along the lines of More's *Utopia* (1516),[503] Machiavelli's *The Prince* (1532),[504] or Calvin's *Institutes* (1536).[505] Neither Peter Read nor Humphrey Britton were likely to have been particularly familiar with the political literature of the period. Their understanding of civil society was grounded in their experience of society, in the everyday comings and goings of life in Gimingham; in what they and their neighbours could do and what they could not. It was a lived experience in that Read and Britton fought over whether Read could distrain his tenants property; over the enclosure of common land; over the customs that governed everyday life in Gimingham. It was also an intellectual experience, however, in that they both argued over the reasons why Read should or could distrain property; they argued over the conditions upon which enclosures could or should be made; they even argued over which jurisdiction it was

[501] ibid.

[502] See above, Chapter Four.

[503] More's text, composed in Latin, appeared in print immediately upon its completion in 1516, but was not translated into English until 1551.

[504] Machiavelli's text, composed in 1513, was widely available in manuscript form in the original Italian and other European languages including Latin well before it was first published in print in 1532. It did not appear in English manuscript form until the mid 1580s and the first printed English edition appeared in 1640. Cf. Quentin Skinner, *Machiavelli: A Very Short Introduction* (Oxford: Oxford University Press, 2000).

[505] Calvin's text was composed in Latin and first published in 1536, with a definitive edition appearing in 1559. It was widely available in England from its first date of publication, but was not translated into English 1561.

appropriate to decide these questions in.

Whilst investigating the middling and lower sorts of people on their own terms has become one of the central concerns of social history, posterity is still enormously condescending.[506] The scholarship has diversified in that, broadly speaking, we no longer accept a focus on elites and the apparatus of government they operated as an adequate account of politics.[507] But, somewhat paradoxically, individual studies have narrowed their focus and become less holistic in vision and scope.[508] Themes of analysis have displaced periodisation as the distinguishing feature of the scholarship. Within social history, for instance, there are studies of 'popular' politics, culture and society, which use the vast majority of their source material concerning the lower orders to look through society from the perspective of ordinary people.[509] In the same school, there are also studies of politics that, using similar sources, tackle larger processes of social and political change by focusing on the state.[510] Similarly, within intellectual history, there are studies of politics that focus on the expression of ideas in a given moment in order to recover the ideological makeup of a particular section of society.[511] While other studies focus on political theory more abstractly in order to identify the limits of the intellectual props available to political actors.[512] Myopic analyses, then, have been replaced by hyperopic ones.

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[506] The paradigmatic studies of the Wrightson School have set the agenda for much of the work done in social history over the last thirty years. These studies, however, generally privilege material experience over intellectual experience.

[507] We no longer accept as valid the views taken in George Macaulay Trevelyan, *English Social History: A Survey of Six Centuries, Chaucer to Queen Victoria* (London: Pelican, 1944); G. R. Elton, *The Future of the Past* (Cambridge: Cambridge University Press, 1968); John Robert Seeley, *The Expansion of England*, ed., John Gross, (Chicago: University of Chicago Press, 1971).

[508] It is striking, for instance, that so little work has been done on the nature and experience of authority in recent years. The extent of disciplinary segregation is blazingly evident in three of the most influential collections, and one full length study, on the subject. There are no references - not even a footnote - in the latter collections to either of the earlier works. Cf. Fox, Griffiths and Hindle, eds., *The Experience of Authority in Early Modern England*; Alison Wall, *Power and Protest in England 1525-1640* (London: Arnold, 2000); Braddick and Walter, eds., *Negotiating Power in Early Modern Society*; G. W. Bernard and S. J. Gunn, eds., *Authority and Consent in Tudor England: Essays Presented to C.S.L. Davis* (London: Ashgate, 2002). See also Thompson, *Making*, pp. 1-12.

[509] Wood, *Riot, Rebellion and Popular Politics in Early Modern England*.

[510] Hindle, *State and Social Change*.

[511] Tim Harris, *London Crowds in the Reign of Charles II: Propaganda and Politics from the Restoration until the Exclusion Crisis* (Cambridge: Cambridge University Press, 1987).

[512] Annabel S. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton: Princeton University Press, 2011).

These analyses have been enormously enriching on their own terms. But, we must take stock of the slower and often more profound changes in the ways in which people thought.[513] Attempts to locate among the lower orders some of the ideological roots of broader political and social developments have thusfar been unconvincing.[514] A persuasive account of political processes that is also social should understand politics holistically; not in terms of a false dichotomy of 'popular' and 'high' politics; nor in terms of social history versus political or intellectual history.[515] Whilst there is a connection between the lived and the intellectual experience of politics, it would be wrong to assert the priority of one over the other.[516] Ideas might *ultimately* be derived from lived experiences, but they are not reflections of the societies out of which they arise. Nor are they necessarily determined by material contexts.[517] It is not possible, for instance, to identify a person's beliefs by scrutinising their class background or income. The ideas that made up the intellectual experience of politics in Gimingham were the product of a series of choices individuals made in given circumstances. They were, in short, both a form and product of deliberate social action.

To correctly identify those actions is to solve the equation of politics in sixteenth-century Gimingham. The utterances people made when litigating before the courts performed multiple actions simultaneously.[518] They were launched into a volatile political contest - in this case, the dispute between Read and his tenant, and now this defendant - and drew upon a distinct range of normative vocabulary in order to legitimate their behaviour. Read's seizure of his tenant's cattle, his subsequent defence of it in the manorial court, and the way in which he prefaced his case against Britton with the context of the seizure of cattle, suggest a view of

[513] Christopher Hill, *The World Turned Upside Down* (London: Temple Smith, 1972), p. 310.
[514] See, for instance, Withington, *Society in Early Modern England*.
[515] Harris, *London Crowds*, pp. 14-36.
[516] Such assertions are reductive and based upon a misreading of both Marx and Weber. See, for example, C.B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962).
[517] Cf. Hill, 'Marxism and History'.
[518] See above, Chapter Four, for the legal context.

seigneurialism and lordship that embodied a more traditionally feudal understanding of landlord-tenant relations. One which, in part due to the rapid coeval development of proto-capitalist market forces and innovations in the common law, struck a chord that did not chime with the way in which poorer inhabitants had come to understand civil society.[519]

Once we put the language of Read's complaint side by side with Britton's answer, the conflict over the extent of seigneurial power in Gimingham, and over the nature of civil society more broadly, becomes clearer. Britton did not begin his defence by refuting the charge of felony forgery. Instead, he vehemently attacked Read as an unjust and corrupt seigneurial lord. He described Read as a tyrannical landlord, who exercised seigneurial power not for the good of the people, but rather in his own interests. He claimed that, due to his unscrupulous nature, merely dealing with him filled his tenants with 'fear and dread.'[520] Even without being juxtaposed with the language of Read's complaint, this suggests that the tenants of Gimingham did not perceive the landlord-tenant relationship to be one in which lords were free to distrain their property without recourse to the common law.

This was a multidimensional conflict, fought across the manor as well as in the minds of its inhabitants. When he claimed that the tenants had shown 'contempt for the laws and customs of her majesties realm,' and called upon the judges in Star Chamber to 'grant your majesties gracious writ of subpeona to be directed to the said Thomas Grame and Humphrey Britton commanding them' to appear before the court, Read performed two distinct but closely related actions. First and foremost, he characterised their behaviour as criminal; but in doing that he also locked front and centre a particular view of civil society in which they were subject to his authority. The emphasis on the tenants' 'contempt for the laws and customs of her majesties

[519] Craig Muldrew, 'Interpreting the Market: The Ethics of Credit and Community Relations in Early Modern England', *Social History*, 18 (2: 1993), pp. 163-83; Muldrew, *Economy of Obligation*; Baker, *Spelman Reports*; J. S. Cockburn, ed., *Crime in England 1550-1800* (London: Methuen, 1977).

[520] TNA, STAC7/5/4, answer of Humphrey Britton.

realm,' and 'commanding them to appear before the court' underscores this.[521]

In describing the tenants as contemptuous, Read suggested malice and cast the tenants as ideologically opposed to the social order vis-a-vis seigneurialism; which, on this formulation, he was taken to embody. The use of rhetorical figures and tropes of speech amplified the argument and elevated what might appear as a relatively minor local conflict to the realm of political theory. They were the artificial forms of confirmation we examined in a legal context in previous chapters in relation to the development of English jurisprudence. When we examine them in this light what we see is how, in addition to having a juridical dimension, they also had a political one. They were the ideological hooks that tied the specificities of a case, that is the step by step account of who did what when, which to us might seem idiosyncratic or parochial, to a range of normative motivations that justified the litigants' actions politically; which we can identify in the printed political literature of the period. Among the weapons available to the weak the pen may have been the mightiest sword after all: the figures and tropes of speech are what the rhetoricians claimed would stir the emotions of judges in such a way as to move them around to their side of a case.[522] They illuminate politics as an intellectual exercise and experience in tandem with a lived material experience.[523]

Politics is, then, the experience of a complex web of relationships. At the very least it encompasses the social relationships between individuals, the semantic relationships within and between complex concepts and ideas, and the relationships that govern the dynamics of thought and action in any given context.[524] We should, therefore, think of it as being made up

[521] TNA, STAC7/5/4, complaint of Peter Read

[522] See above, Chapter Three. The view that the figures and tropes of speech were weapons with which litigants could do battle was a in fact one of the original metaphorical puns of classical rhetoric. Cf. Quentin Skinner, ''Scientia civilis' in classical rhetoric and in the early Hobbes', in Nicholas Phillipson and Quentin Skinner, eds., *Political Discourse in Early Modern Britain* (Cambridge: Cambridge University Press, 1993), pp. 67-94.

[523] This connection is explicit in the rhetorical literature. The Latin verb *movere* is used by Cicero and Quintilian. The aim was to *move* your audience so deeply with your words that they *moved* to your side of the case. See above, Chapter 3.

[524] See above, Introduction.

of a number of distinct but connected actions. What I have tried to excavate with this case is how ordinary people perceived this and, through a mixture of intuition, advice, and judgement, navigated these relationships. This case demonstrates that Peter Read and Humphrey Britton were able to draw upon and intervene in a broad contemporary discourse surrounding civil society, with specific reference to its application in Gimingham. It identifies in ordinary people much more political agency than is usually acknowledged in the scholarship. It asks the scholarship to expand its definition of politics beyond the exercise of power, but it still locates politics within agency and thereby maintains its analytical precision. The rhetorical confirmation of a judicial narrative, which is often overlooked in the scholarship, links theory with practice in that it draws upon theory in order to legitimate practice. This makes legal pleadings political actions in and of themselves. They were specific interventions in contemporary discourse surrounding authority and civil society, which were intended to legitimate social actions within the locality of Gimingham. These texts show us how national political discourse inflected the lives of people from across the social spectrum, and how ordinary people engaged with and intervened in that discourse through the shared language of the law. Taken together, then, politics is the process by which civil society is literally and epistemically brought into being. In other words, Politics is artifice. Civil society is not God-given, it is man made; these texts show us how people experienced it in the making, physically and intellectually.

Memory

Throughout the early modern period, one of the most common of ways to influence politics was to manipulate the discourse of popular memory.[525] In what follows we will examine two cases from Gimingham, one from 1572 and the other from 1615. The case from 1572 pertains

[525] The foundational recent work on this subject is Wood, *Memory of the People*.

to an enclosure dispute; the 1615 litigation concerns the boundaries of land around Gimingham Hall, the manor house once occupied by Peter Read. Both cases therefore had questions of land at their core. I will take each case in turn, beginning with the litigation in 1572 and moving forward chronologically to the case in 1615. In this section, however, we will be primarily concerned with the interrogatories administered to, and depositions given by, witnesses in these cases. Litigation was, in more ways than one, a communal affair.

In 1572, four years after her husband's death, Anne Read, then widow farmer of the manor of Gimingham, was engaged in an enclosure dispute on the manor. She, like her late husband, seems to have taken a relatively hands-on approach to lordship in the years leading up to her own death in 1577, nine years after the death of her husband. Between 1568 and 1577 she was involved in no fewer than five suits before the Duchy Chamber, where she accused tenants of poaching and enclosing land around the manor, or where they alleged she had deprived them of their tenurial rights with regard to the same. This is to say nothing of the case in Star Chamber she inherited and continued to pursue upon the death of her husband.[526] In 1572 Read claimed before the Duchy Chamber that her tenants had unlawfully enclosed part of the foldcourse. She argued that they needed licence to enclose land around the manor; licence she had refused to give. The defendants, Stephen Powle, Thomas Nuttall, Nicholas Allen - all familiar names by now - argued that not only did they not require any licence to enclose land, but that the foldcourse Read claimed had been enclosed was situated on the other side of the manor; far from the land allegedly enclosed.[527]

Within this case, then, we see another conflict between landlord and tenant over the nature of authority and civil society in Gimingham. Unlike the litigation examined in the previous section, however, this case centred around whether the tenants had the authority to enclose land

[526] TNA, DL1/80/R2; TNA, DL1/83/R7; TNA, DL1/94/R4; TNA, DL1/113/S11; TNA/DL1/118/S21; TNA, STAC7/5/4.
[527] TNA, DL4/14/32

on the manor. It was not, on the face of it, concerned with the exercise of seigneurial power but, as we will see, preventing action was just as much an exercise of seigneurial power as compelling it by force.[528] Where the case examined in the previous section was concerned with the positive exercise of seigneurial power by a lord, this case was in some ways the inverse: it was concerned with the exercise of power by tenants. Both cases were, however, substantively a contest over political obligation. In what follows we will examine how individuals adjacent to the litigants themselves influenced politics and political discourse through an active participation in the legal process.

As we have seen, power relations in the late-sixteenth century were still largely determined by property rights. When the defendants described the geographical and topographical features of the manor in 1572, they did so because they were the physical markers that divided up the landscape. Land was held by different forms of tenure; the use-rights attached to land were dependent upon the type of tenure by which it was held. Witnesses were asked to recall the topography of Gimingham in order to establish the attendant rights attached to different parts of the manor. The ways in which people chose to remember these details in their depositions before the court, then, had the potential to affect the outcome of a case. They were, therefore, discrete interventions in the political contest constituted in the case, and indicative of how political engagement through litigation was not limited to the litigants on either side. From the depositions we can sketch, in greater detail, the legal and political landscape.

The partisan nature of the depositions need not surprise us. In response to a question posed by Read asking whether tenants could enclose land around the manor, one old witness deposed that about twenty-five or twenty-six 'years past he was Under Steward of Gimingham to Sir Edward Wyndham Knight, deputy to the Earl of Surry, then being High Steward of the Duchy'. The witness remembered how Thomas Gryme, a farmer on the manor, petitioned the Steward

[528] As in compelling payment of damages by distraining property.

to be permitted to enclose part of the foldcourse for his own use. To which Wyndham replied 'that he would not grant any licence to the tenant to make enclosures within the liberty of foldcourse of Gimingham'. The witness went on to add that 'further, as he remember, that all the time he was Under Steward no tenant did enclose within Gimingham'.[529] Another witness, in response to the same interrogatory, deposed that 'he doth know upon sight of the record and hath heard that it is not lawful nor stand the enclosure of any ground within the manor of Gimingham'.[530] While yet another witness testified that 'of his own knowledge he can say nothing, but at whereof court holden for the manor of Gimingham he hath heard the Steward of the said court upon his charge to the tenants there to inquire for any enclosures made within the said liberty of foldcourse, to the incidence thereof without the licence of the Queen's officers or farmers'.[531]

On an elementary level, what these depositions show are witnesses confirming Anne Read's version of events: that enclosures required seigneurial licence. What they also encapsulate, however, and what is often acknowledged but little explored, is the complexity of social relationships on a manor. Whilst this might be a legal case primarily between two interested parties, it was not confidential; nor was it conducted in a void. People often had a significant interest in the litigation happening around them. Why did these witnesses testify as they did? Why did they remember these things and not others? What, broadly conceived, did they get out of testifying? In other words, what was really going in this case? A comprehensive account of the motivations behind each utterance in each deposition is beyond the scope of this thesis but, in order to underscore the potential richness of the image these texts can offer us in relation to what historians have thus-far primarily used them to illustrate, the point need only be made that it is possible to think with them in this way.

[529] TNA, DL4/14/32, examination of Thomas Grene
[530] TNA, DL4/14/32, examination of Richard Lovedaye
[531] TNA, DL4/14/32, examination of Christopher Cotton

The value of thinking in this way with these texts is brought out clearly when we contrast the testimony of witnesses for the plaintiff with those of witnesses for the defendants. When asked about the validity of foldcourse rights in Gimingham, one witness for the defendants deposed that 'he did never know the farmer or farmers of the manor of Gimingham […] to pasture or feed their sheep within the liberty and boundaries of South Reppes, North Reppes or any other towns thereunto adjoining but only within part of the townships of Gimingham, Mundesley and Trunch, which in the north east part of Gimingham fold, Mundesley in the west part, and in the north part of Trunch in the time of Thomas Gryme and Peter Read then farmers there'. The deponent went on to say that both Read and Gryme kept around four or five hundred sheep 'and that non of the said farmers did use at any time to pasture their sheep in the time of shack in any of the enclosures of any of the inhabitants within the said towns which hath been enclosed within his own remembrance, and this he knoweth to be true for he was born within the said town of Gimingham and hath dwelt all his life time there'.[532] The same witness, when asked whether the inhabitants of Gimingham could enclose their lands, deposed that 'the tenants and inhabitants dwelling and inhabiting within the townships of North Reppes, South Reppes, and other towns thereunto adjoining the lordship and soken of Gimingham, have at their will and liberty from time to time during all his remembrance, used to enclose as well their copyholds as freeholds lying and being within the aforesaid towns, without any let or denial of any of the Queen's majesties farmers, until that Peter Read late farmer denied them so to do'.[533]

What we see in these depositions, again on an elementary level, is how the defendants solicited testimony in order to refute Read's narrative and legitimate their enclosures. On this account, the legitimacy of enclosures around Gimingham rested not on the grant of licence, but

[532] TNA, DL4/14/32, examination of John Cogle
[533] ibid.

in the customs of the manor as they were contained in the memory of its inhabitants. When examined alongside the earlier depositions this testimony exposes the tension surrounding enclosures on the manor specifically, and concerning seigneurial authority more generally. In recalling the topographical features of Gimingham as they did, these witnesses refuted the plaintiff's narrative and suggested that Read's late husband had subverted the customs of the manor by denying them their customary right to enclose their own lands. Depositions, however, like the related pleadings, allow us a glimpse not of how the world was but of how people wanted it to be. It is, therefore, ancillary to the present investigation whether or not the tenants in fact needed permission to enclose their land. What is of primary concern is how the litigants appealed to the memories of deponents in the questions they posed, and what the witnesses were doing in recounting those memories in their depositions. This was not a passive exchange of ideas. In recalling specific details and omitting others, in choosing to confirm the plaintiff or the defendants' version of events, witnesses made two distinct interventions in two closely connected discourses. They intervened in the political contest embodied in the litigation by situating it in a discourse they could relate to: a discourse of custom, memory, and experience.[534]

Memory in early modern England is often seen as essentially utilitarian. It was ubiquitous and inescapable in the mentalities of early modern people for the simple reason that it covered all manner of sins; it could be called upon to legitimate almost any distribution of power.[535] This is certainly borne out by the 1572 litigation. The litigation between Anne Read and

[534] Cf. Wood, *Memory of the People*.

[535] Thomas, *The Perception of the Past in Early Modern England*. Suggests that memory was deployed most useful in legitimating pre-existing power relations. More recent scholarship, however, suggests that this was not necessarily the case and has given memory a more dynamic role in the power relations of domination and dependence that marked early modern society. Cf. Andy Wood, 'The Loss of Athelstan's Gift: The Politics of Popular Memory in Malmesbury, 1607–1633', in Jane Whittle, ed., *Landlords and Tenants in Britain, 1440-1660* (London: Boydell Press, 2013), pp. 85-99; Jonathan Healey, 'The Fray on the Meadow: Violence and a Moment of Government in Early Tudor England', *History Workshop Journal*, (2017), pp. 1-22.

Giminham's tenants was a substantive disagreement over the distribution of power in Gimingham. As with Peter Read's Star Chamber litigation, the conflict in 1572 was not over freedom of action *per se,* but rather a conflict over property rights; the prevailing distribution of which did affect the freedom of action of inhabitants. Read, and the defendants, appealed to the memory of witnesses in an attempt to assert and challenge the distribution of power in Gimingham.

This suggests a number of things about power relations in Gimingham over the course of the sixteenth century generally, and about seigneurialism and lordship as political institutions more specifically. At the beginning of the sixteenth century the privatisation of the medieval open field system of agriculture, which began with Statute of Merton in 1235, was in full swing. Whilst the roots of the social tension engendered by this gradual process of enclosure have their origins at least as far back as the fourteenth century, by the mid-sixteenth century tensions were beginning to boil over.[536] Contemporary criticism of enclosure had two distinct aspects to it.[537] On the one hand, there was a political criticism in terms of enclosing common land and thereby depriving communities of access to shared resources and land on which inhabitants could pasture their sheep and cattle. This criticism is perhaps the original criticism of enclosure and it is traditionally suggested that we should think of this as going hand in hand with the changing social relations that engendered by the gradual decline of feudalism and the emergence of more capitalist conceptions of property.[538] On the other hand, the criticism that arose later in the sixteenth century was more specifically concerned with depopulating enclosures. This line of attack developed out of the repeated periods of dearth and the weak

[536] Enclosure featured prominently in the rebel articles of 1549. Cf. Wood, *The 1549 Rebellions*.

[537] Joan Thirsk, 'The Common Fields', *Past & Present*, 29 (1964), pp. 3-25; Joan Thirsk, *The Rural Economy of England* (London: Hambledon Press, 1984), pp. 35-58,65-84; Beresford, 'Habitation Versus Improvement: The Debate on Enclosure by Agreement ', pp. 40-69; Falvey, 'The Politics of Enclosure in Elizabethan England Contesting Neighbourship in Chinley (Derbyshire)', pp. 67-84.

[538] Tawney, *The Agrarian Problem in the Sixteenth Century*; R. H. Tawney, *Religion and the Rise of Capitalism* (London: Verso, 2015), pp. 271-81. See also Tawney's introduction to Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, ed., R. H. Tawney, (New York: 1930), pp. 1-11. For a more recent restatement of similar themes see Whittle, *The Development of Agrarian Capitalism*.

economic climate that characterised the latter half of the century. This analytical paradigm has defined much of the scholarship surrounding enclosure in that the historians that have generally been concerned with enclosure have tended to approach them either in terms of popular reactions against encroachment on common land, or as popular reactions against depopulating enclosures.[539] It has even been suggested that 'enclosure (when all the sophistications are allowed for) was a plain enough case of class robbery.'[540] The 1572 litigation, however, presents a different view of popular perception around enclosure. The inhabitants of Gimingham were here defending the practice by virtue of their common rights. Set against the backdrop of fiscal seigneurialism made manifest by a rising population, rampant inflation and repeated dearth over the course of the century, this conflict brings out a number of tensions in early modern society.

Fiscal seigneurialism, that is the process by which lords attempted to squeeze capital and services out of their tenants in response to the deteriorating economic climate, is itself pejorative. It is indicative of the endemic tension between lords and tenants across England, brought on by inflation and a rising population over the course of the century. Lords faced the problem of having a fixed income from copyhold rents and entry fines in a century with high levels of inflation for protracted periods. Which, in real terms, meant a personal economic deficit. Consequently, in order to maintain their income in real terms they exploited every legal avenue open to them.[541] Tenants, meanwhile, faced the more appealing prospect of paying the same amount of rent as was customary and perhaps even having more disposable income if they produced more than they needed to subsist. Tenants, then, jealously defended their newfound wealth and the liberties it brought, while lords sought to maintain themselves and their position in society. Considered against this backdrop, Anne Read's litigation in 1572 is

[539] The foundational texts are Thompson, *Making*; ibid. pp. 237-43.
[540] Ibid. p. 237.
[541] For a recent discussion of themes surrounding this topic see Jane Whittle, ed., *Landlords and Tenants in Britain, 1440-1660* (London: Boydell Press, 2013).

part of that endemic struggle; as in the previous section, litigation demonstrates how seigneurial relationships broke down and intellectually prised apart.

Historians generally paint the broader strokes of this struggle as the gradual decline of feudalism and the exponential growth of capitalism.[542] The image I have in mind is more *pointillist*. Legal historians, for instance, have demonstrated that English contract law developed rapidly in the late fifteenth and sixteenth centuries, through innovations in the common law actions of *assumpsit* and *trespass*.[543] Both of these forms of action governed how people could seek redress before the law with regard to their property, both moveable and real.[544] As the concept of absolute ownership of property slowly extended from those with freehold tenure to those who held copyhold tenures, people required legal remedies for a tenant to claim in virtue of *their* estate. The salient point is that it was theirs and not held of some other identifiable agent or agency.[545] Legal historians have traced the development of these forms of action through the arguments and outcomes of specific cases, because, as we saw in Chapter Four, English common law is based upon precedent and developed piecemeal, one ruling at a time.[546] Some of the best work in social history has drawn upon this scholarship and argued that these developments in the common law are indicative of the emergence of a capitalist market economy.[547] The emergence of capitalist market relations in early modern England can, therefore, be seen in the legal culture of sixteenth-century England.[548] If feudalism withered on the vine of capitalist market relations, what we need is a detailed account

[542] Thompson, *Making*.

[543] Baker, *Spelman Reports*, pp. 255-98; John H. Baker, 'New light on Slade's Case', in John H. Baker, ed., *The Legal Profession and the Common Law* (London: Hambledon Press, 1986), pp. 213-36; Milsom, *Historical Foundations*, pp. 283-360.

[544] In legal terms movable property refers to wealth while *real* property refers to land.

[545] The same process repeated itself when copyhold gave way to leasehold. The key distinction being that tenure by copyhold and leashold formed part of the tenants estate, not that of the lords.

[546] Baker, *Spelman Reports*, pp. 255-98; Baker, 'New light on Slade's Case', pp. 213-36; Milsom, *Historical Foundations*, pp. 283-360.

[547] Muldrew, 'Interpreting the Market: The Ethics of Credit and Community Relations in Early Modern England'.

[548] Brooks, *Pettyfoggers and Vipers*, pp. 67-71.

of those relations.[549]

It would be quite wrong to assume that any of the participants in the litigation we are examining were not in possession of a coherent understanding of civil society.[550] The forensic arguments laid out in the pleadings as well as the interrogatories administered to and the depositions given by witnesses, illustrate a rich and occasionally idiosyncratic view of contemporary society and culture. Whilst on the one hand, in legal terms, civil litigation such as this can be seen as one of the means by which local disagreements over the nature of society and culture were resolved, with the "truth" or "facts" of the matter pronounced in the decrees and orders of the court. This underdetermines the agency of the ordinary people involved by eliding both the political impetus of litigation and the interventions people made through their participation in such litigation. The cases we have examined so far in this chapter, against the tenants of Gimingham by Peter Read in 1567 and by Anne Read in 1572, are flash points that illuminate specific moments of a larger and longer struggle between lords and tenants. It is clear that Peter and Anne Read, for instance, used patriarchal ideology to cast themselves in the paternal roles of those with authority to care for and maintain the social order amongst otherwise childlike and petty tenants: people who the gentry and yeomanry traditionally viewed as too base and low to have a more positive role in civil society; 'the fourth sort or classe' who Thomas Smith claimed 'have no voice nor authority in our common wealth, and no account is made of them but only to be ruled'.[551] How this section of society engaged with that characterisation, however, has been explored in much less detail.

Viewing instruments of litigation as social actions, as interventions in legal and political

[549] Until recently Craig Muldrew has been one of the only historians to attempt a serious study of economic social relations in an attempt to engage with the scholarship around the emergence of capitalism. Cf. Muldrew, *Economy of Obligation*. The strongest call for writing history in this way was made by Patrick Collinson. Cf. Patrick Collinson, *Elizabethan Essays* (Manchester: Manchester University Press, 1994), pp. 1-30.

[550] The litigiousness of sixteenth-century English society has been well documented in the scholarship. See, for instance, Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge: Cambridge University Press, 1998); Brooks, *Law, Politics and Society*; Wood, *Memory of the People*.

[551] Smith, *De Republica Anglorum*, p. 76.

discourse, allows us to traverse this terrain. Witnesses deposed during legal cases were drawn from a variety of backgrounds within a local community, including the 'fourth sort or classe'. Therefore, by treating depositions as interventions in a legal case that was itself part of a wider political intervention, we can excavate how people who were thought to be excluded from politics actively participated in it. When William Arnold deposed that he remembered 'Stephen Powle did kill coneys within the manor of Gimingham and had licence of Peter Read being farmer thereof so to do paying a yearly fee for the same, [otherwise] the said Stephen did infringe the libertie of warren there[552],'he actively engaged in the immediate legal context of the case vis a vis the provision of evidence in support of Anne Read's complaint. He also made a intervention into the political context of the case apropos civil society; he claimed that seigneurial licence was required to hunt on the manor without infringing the lessee's rights. We must therefore be careful not to read the expression of memory or the act of remembrance in early modern litigation as a nostalgic recollection of the past. The past was so readily accessible in the minds of ordinary people that it could be drawn upon at will. It was a catalyst which, when used to legitimate questionable behaviour, facilitated political participation from those who were otherwise excluded from political discourse. Consequently, there are multiple levels of meaning to unpack from the numerous illocutionary actions performed within a single utterance in a deposition such as this.

The enclosure litigation of 1572 should, therefore, be broadly understood in performative terms. It was a competition over the distribution of power in Gimingham with specific reference to the right to enclose property around the manor; it was inherently political because property rights formed the basis of civil society. Litigants drew upon the past when making their arguments, and witnesses recalled the customs of the manor in support of both sides of the case. Recent scholarship on early modern social relations has demonstrated the legal weight

[552] TNA, DL4/14/32, examination of William Arnold

of custom, and located it within popular consciousness and memory.[553] It has shown that memory was discursive in and of itself; that it was a *locus* for a wide range of conflicts.[554] People remembered things differently; different people remembered different things for different reasons. The historian now needs to ask *why* people remembered things differently; what people were doing in choosing to recount something in a particular way. What we need, then, is to identify how people understood memory and attempted to influence it. The ways in which witnesses in 1615 remembered the history of Gimingham Hall, Peter Read's manor house, provide a unique insight into this.

In 1615, the Attorney General of the Duchy of Lancaster, Sir Edward Mosley, brought a suit against several inhabitants of the manor of Gimingham in the Duchy Chamber and, among other things, alleged that they had allowed the demense to decay while inhabiting and farming the land around it. The land, the Attorney claimed, belonged to the lessee of the manor and had done since the middle of the previous century when Peter Reade had enclosed it. By 1615, however, Reade was long dead and subsequent lessees John Ransom and Anthony Death (d. 1608) had lacked Reade's seigneurial ambition. Gimingham Hall, the grand manor house where Reade had dwelt, was described in a survey commissioned by the Duchy as a 'great hall with houses situated to the south and west thereof,' comprised of great hall and a little hall, as well as a 'gatehouse or stewards lodging' with a 'courtyard, orchard, gardens and entry leading from the said gatehouse'.[555] By 1615 it was a ruin, its roof collapsed and its orchards and gardens overgrown with foliage. The wider context of this case was essentially that subsequent lessees had allowed the demense to fall into decay because they could not afford to pay for the upkeep of Gimingham Hall, so enlarged by Peter Read. With the decay of the demense, the tenants had moved in and begun using the land around the manor. The Attorney had, in

[553] Wood, *Memory of the People*.
[554] Whyte, *Inhabiting the Landscape*; Wood, *Memory of the People*; Shepard, *Accounting for Oneself*.
[555] TNA, DL4/63/23

litigation elsewhere, unsuccessfully attempted to force the lessees to retroactively pay for the repair and maintenance of the Hall. By bringing suit against several inhabitants of the manor he may have hoped to suggest liability for the Hall if they were farming on the same parcel of land on which it was situated. If the tenants claimed the right to farm the land around the Hall they would, then, be responsible for maintaining it.

A set of interrogatories on behalf of the Attorney began by asking witnesses 'whether or not they know the great hall in Gimingham […] called by the name of Gimingham Hall and the houses adjoining' and whether they did 'knowe Peter Reade Esquire, John Ransom, Anthony Death Esquire, all late of Gymyngham' were ever resident within the great hall. Two of the witnesses, Edmund Gryme and Thomas Wafye, deposed that they knew the successive lessees and that 'the said Mister Reade did dwell in the place mentioned in the said interrogatory'. Witnesses were then asked 'is there not a wall or partition between the said great hall and the […] houses aforesaid at the south end […] and also a partition wall between the said hall and the houses of the west side'? Having asked a question to which he presumably already knew the answer, the Attorney further posed 'how long the same walls or partitions to be there and whoe hath repayred and kept the same during [their] knowledge thereof'? One witness testified that the lessee Peter Read had erected walls separating the houses adjoining the hall from the land around them. In recounting this before the court, however, he recalled that there was also an 'ancient ditch have been heretofore cast downe […] In the time of Mr Reade for the Beutifieng or enlarging of his garden […] for the fitting the groundes to his pleasing,' and it was this 'ancient ditch' which 'hath bene accounted, reputed and taken […] to be the ancient boundarie' of the land upon which they were farming, not the remnants of Read's walls or partitions.[556]

In the eyes of this old witness, then, the tenants did have the right to use the lands in

[556] TNA, DL4/63/23

question because they were not part of the same parcel of land as Gimingham Hall. Peter Read's expansion of the Hall was illegitimate. Customarily, lands adjoining the manor house had been much smaller. Tenants could, therefore, make use of the lands up to the point of the ancient ditch this witness remembered because that ditch, not Read's walls, distinguished the land attached to the Hall from the lands around it. The physical markers of Read's lordship over the manor had decayed in the time since his death, and the memory of his seigneurial authority had withered along with them. By 1615, in the absence strong lordship, the communal memory - and, consequently the legitimacy - of the changes Read had made to the manor had been overwritten by the more convenient memory of the way things had been in the more distant past[557] The inhabitants of Gimingham used the past to undermine the Attorney's argument and reassert their position on the manor.

Just by examining a few of the interrogatories and depositions we can see that it touches on issues of seigneurial authority over time in how Read expanded the hall in the 1550s and the conflict over how the inhabitants began farming around the manor in the early seventeenth century. It also touches on the physicality of Gimingham, the topography of the manor in a material sense. The 1615 litigation was brought by the Attorney General of the Duchy of Lancaster because the Duchy ultimately owned the manor and, despite leasing it out to different lessees over the course of the sixteenth and seventeenth centuries, after a survey of the manor early in the reign of James I it was found to be in a state of decay. Subsequent lessees after Read had failed to maintain the manor house, Gimingham Hall, and it had fallen into a state of disrepair while the land around it was repurposed by other tenants. By bringing suit against the tenants the Attorney tried to stem the tide of decay and force the tenants to pay for the repair of Gimingham Hall. What we see in these depositions is an attempt by the Attorney to demarcate the boundaries of the hall and the surrounding land and establish who was

[557] TNA, DL4/63/23; Cf. Wood, *Memory of the People*, pp. 72-3.

responsible for its upkeep. While the tenants on the other hand argued that Gimingham Hall had been enlarged by previous lessees unlawfully and that they should not be liable to pay for its upkeep, as traditionally the boundaries of the land had looked rather different.

These depositions let us see how people remembered the past. How the discourse of memory was not for most people written down in documents but carved into the land. How people's rights, liberties and obligations were not solely conceptualised through documents such as leases, or attached to court rulings, but they were also attached to the physical attributes of the landscape; rather, people used the material markers of what they saw as their rights, liberties and obligations to influence what was written in the records. Ordinary people viewed the land as a patchwork of customary entitlements, with each individual field or pasture differing slightly and telling a different story. We can see this in the 1615 depositions where the witnesses talk about the ancient boundary of the land, and we can also see it in the 1572 depositions where the witnesses recall historical instances of enclosure around the manor. Memory is defined by what people choose to remember and what they forget.[558] It is a dialectical discourse. The physical markers of Gimingham and the customary entitlements they denoted were how subalterns embedded contemporary discourses into the land. By carving the memory of customary entitlements into the landscape people embedded the prevailing distribution of power into the land and gave themselves a vocabulary with which to express their understanding of society in material terms. This allowed them to engage in discourses which they may have lacked the technical vocabulary to debate in an academic sense, but which they nevertheless understood on their own terms.[559]

Historical memory inflected the very nature of civil society. Peter Read remembered the

[558] Paul Connerton, *How Modernity Forgets* (Cambridge: Cambridge University Press, 2009).

[559] For an interesting discussion of similar themes surrounding plebeian inarticulacy see Taylor, '"Branded on the Tongue" Rethinking Plebian Inarticulacy in Early Modern England'.

practice of enclosure differently to the other tenants; Anne Read remembered the foldcourse differently to the other inhabitants. These sorts of memories were shaped by individual experience. What we also see with a run of depositions like we get in 1572, with multiple witnesses being asked the same set of interrogatories, is the collective nature of memory. How groups of people, in this case the tenants of Gimingham, remembered the customary status of pieces of land differently to the lessee. A multitude of remembrances came together to make one memory. The point is starkly illustrated in 1615 when we see how the inhabitants of Gimingham recalled the ancient boundary of the land being an ancient ditch instead of Peter Read's more recent walled expansion of Gimingham Hall. Litigation like this is indicative of a contest over people's memories as well as a contest over the memory of the people.[560] There are, therefore, multiple levels of discursive engagement taking place in the recollection of events before a court.

At its heart this analysis presumes a deliberate intentionality in remembering and forgetting. This is indicative of an active participation in contemporary discourses, debates, and legal processes, all of which are inherently political in nature. One of the most interesting ways to think about memory, especially if we accept the premise that it is essentially a utilitarian concept, is as a form of social action; both in terms of how it was constructed and how it was utilised. What we see in the testimony of witnesses in 1572 and 1615 is the range of ways people in sixteenth and seventeenth century Gimingham understood the world around them. That is, we see competing visions of politics and civil society in how people attempted to assert, challenge, and maintain the prevailing distribution of power.

[560] That is to say, custom; consequently politics and civil society broadly conceived.

CONCLUSION

I began this thesis with three principal aims. The first was to simply interrogate the form and structure of legal records pertaining to the equity courts of Duchy Chamber and Star Chamber. The second was to use those texts to illustrate a more general historical theme, namely the effects of classical forms of rhetoric on English law and politics. My third principal aim was exemplify a particular way of interpreting historical texts by approaching pleadings and depositions before courts of equity, which have generally been considered the exclusive province of social historians, with the tools of intellectual history. In what follows we will draw together the analyses conducted through previous chapters by examining these general aims in relation to the more specific aims of Chapters Two, Three, Four and Five.

I

The investigations conducted in Chapters Two and Three, into the form and structure of the pleadings before the Duchy Chamber and Star Chamber, served two closely connected purposes. The first was historiographical; the second, historical.

We began by examining some of the orthodoxies in social and legal history. The first is one we find in legal history. That is to say, the central notion that English law has historically been somewhat insular; removed from the jurisprudential developments in continental Europe. This is a view of English law, rooted in the immemorial common law, which has been perpetuated by English lawyers for centuries. The notion that English law has existed since before the memory of man; that English common law is the common custom of the realm, legitimated by its continuous use since ancient times before the Norman Conquest. This was central to sixteenth-century common lawyers. It found its most zealous proponent in the early-

seventeenth century with Sir Edward Coke and his colleagues.[561] The second is the notion, voiced by Chris Brooks, that most 'British historians would probably maintain that whilst legal records are a useful source of evidence, "the law" itself is not a very worthwhile or rewarding subject of investigation'.[562] This has thesis sought to contest the first assumption and to demonstrate that the second was the result of historians asking the wrong questions of legal records.

Chapters Two and Three demonstrated how some key legal records, the pleadings before the equity courts of the Duchy of Lancaster's Court of Duchy Chamber and the Star Chamber were structured according to a Ciceronian theory of forensic rhetoric. We examined rhetorical theory, in its classical origins in the key texts of Cicero's *De inventione* and *De oratore,* Quintilian's *Institutio Oratoria*, and the anonymous *Rhetorica ad herennium*. We saw how an essentially Ciceronian theory of invention was to be found in sixteenth century rhetorical treatises, its chief advocates being Leonard Cox (1495-1550) with his *The Art of crafte of Rhetoryke*, first published in 1532; Richard Rainolde (1530-1606) with his *The Foundacion of Rhetorike* (1563); and most importantly Thomas Wilson (1524-1581) with his *The Arte of Rhetorique*, first published in 1553. These texts give explicit advice on how one should argue before a court of law and were in wide circulation in sixteenth-century England.

Chapters Two and Three demonstrated that, if one examines pleadings before the equity courts along side the rhetorical literature, it is possible to see they follow the structure set out by the rhetoricians. We even saw how the connection between rhetoric and pleading was explicitly acknowledged by the rhetoricians, two of whom, Thomas Elyot and Thomas Wilson, held office in equity jurisdictions; Elyot as a clerk in Star Chamber and Wilson as a Master of the Court of Requests. The connection between what is essentially a classical theory of forensic

[561] Pocock, *Ancient Constitution*.
[562] Brooks, *Law, Politics and Society*, p. 2.

rhetoric and pleading before English courts, which have emphasised their historical insularity from classical influences, flies in the face of the notion that English law was insular and devoid of any Roman influence. It was argued that this insularity was the product of sixteenth century common law discourse; the deployment of arguments based upon english historical ideas, of concepts such as custom and memory, is causally linked to latent assumptions within that discourse. They are the product of English history itself and contingently limited the way in which lawyers thought; they have, in turn, limited the ways in which scholars have approached English law. In other words, scholars have not given sufficient critical attention to the influence of humanism on English law and legal culture because so much of the legal literature has emphasised the insularity and independence of English law.

The point of demonstrating that pleadings before the Duchy Chamber and Star Chamber were constructed according to rhetorical theory was to suggest that we should question some of the assumptions held in the scholarship. To illuminate the need to think about these texts in a different light. That is to say we need to stop thinking of the pleadings in equity jurisdictions as formulaic texts symptomatic of technical legal procedure. Their rhetorical underpinnings suggest they were intended to be intelligible and persuasive in a much wider context. We should, then, start thinking of these texts as rhetorical exercises; as written examples of judicial speech. If we treat pleadings as speech we can begin to ask a different set of questions. Namely, what is the value of a rhetorical oration in judicial speech? The value is, following the rhetoricians, found in the persuasive force associated with eloquent speech. Eloquence, however, was not, as we are so often told, the ornamentation of language with the figures and tropes of rhetorical speech. Both the classical and early modern rhetorical authorities saw eloquence as being embodied in structure. That is, in the invention of appropriate arguments and their deployment in a logically concise manner which emphasised reasoned persuasion over the apodeictic proofs associated with common law jurisdictions. The very fabric of

pleadings before equity courts, then, the form and structure they took, was determined not by the technicalities of law but by the precepts of rhetoric.

Once we see the rhetorical dimension of these texts, rather than *just* legal formulae serving a juridical function, we begin to see their multivalence. This brings us to the historical significance of the form and structure Chapters Two and Three have been concerned to demonstrate and explicate. Chapter Three demonstrated how, by contextualising all of the instruments in a particular piece of litigation, the whole process of equity litigation can be seen as a rhetorical exercise. That is to say, when we contextualise the plaintiff's complaint or information alongside their rejoinder and the interrogatories and depositions drawn up for their witnesses, we perceive the forensic argument holistically; we see the narration of the facts in the pleadings and we see how the litigants attempted to use artificial proofs to confirm their argument through the replication and rejoinders, we then see how the interrogatories depositions were designed to utilise non-artificial proofs to confirm the artificial proofs deployed in the pleadings. What this amounts to is a completely different legal tradition than that of the common law jurisdictions but which nevertheless operated in tandem with the common law.

The historiographical point Chapters Two and Three were concerned to explicate was that English law was neither insular nor devoid of Roman influence. Equity was premised on an existentially Roman understanding of jurisprudence. English lawyers, educated through a humanist curriculum in the grammar schools and the universities and Inns of Court, were saturated in an essentially classical theory of forensic rhetoric. This theory lay out a set of precepts which lawyers were to follow when producing a legal argument. Scholars, while noting the influence of the humanist curriculum on legal education have, it was argued in Chapters Two and Three, made a mistake in their analysis. They have tended to reverse the emphasis we see in contemporary treatises and concentrate on the more specific rhetorical

figures and tropes at the expense of the more general advice advocated at the beginning of the rhetorical textbooks.[563] The salient point to grasp about rhetoric, which both the classical and early modern rhetoricians want their readers to grasp, is that rhetoric is not just 'a care for words, but a deep concern for the subject'.[564] That is to say, the specific words, the syntax, the figures and tropes of speech - *dispositio* and *elecutio* - are not as important as understanding which arguments are appropriate for that particular moment. If we search for words without first thinking about subject matter, Quintilian argues, 'we shall merely do violence to what we have found out', rather than enhancing our speech.[565] The historical point these chapters have been concerned to make, which is closely connected to the historiographical in that it requires us to first jettison the notion of legal exceptionalism and insularity in order to recognise the classical form and structure of these texts, is that the very nature of arguing both sides of the case *necessitates* a substantive effect upon the content of English law. This recognition of classical, and essentially Roman, styles of argument in English legal culture is what is missing from the scholarship and without this recognition we are liable to misunderstand the development of English law in the sixteenth century. It is, therefore, a central contention of this thesis that 'the law' itself is a worthwhile and rewarding field of enquiry. We just need to illuminate it with a different set of questions.

II

The second main aim of this thesis has been to illustrate the value in thinking about English law and legal culture with this classical context in mind. The first point we considered in Chapters Two and Three was that we should think of these texts as written examples of judicial speech; in doing so we should explicate them as we might any speech-act. Approaching

[563] Murphy, *Renaissance Eloquence*; Vickers, *In Defence of Rhetoric*; Mack, *Elizabethan Rhetoric*.
[564] Quintilian, *Institutio oratoria,*vol. 1, pp. 318-9.
[565] Ibid.

pleadings and depositions in this way highlights their performativity and forces us to ask a different set of questions of the texts. Namely, what were lawyers and litigants doing in these texts. In short, Chapter Four argued that the forensic arguments we see in litigation, and in particular those made before Star Chamber, were intentionally designed to directly affect the content of English law. This is in direct tension with the conventional wisdom in the scholarship, which, since Maitland, holds that 'English law is not where we look for humanism or the spirit of the Renaissance'.[566] It also flies in the face of much more recent scholarship, which suggests that pleadings and depositions are poor sources for historians interested in the substantive content of the law.[567]

In Chapters Two and Three we saw how in modern scholarship surrounding rhetoric there is a tendency to reverse this emphasis and concentrate on the more specific rhetorical figures and tropes at the expense of the more general advice advocated at the beginning of the rhetorical textbooks.[568] Chapter Four demonstrated the significance of the forensic foundation of equity litigation for the development of English law. We saw how Equity gave lawyers and litigants the flexibility to *argue* their case; thus attempt to demonstrate how matters which did not fall within the scope of the law verbatim might nevertheless be seen to be within its scope. This is the analysis we saw through the lens of the *Coke v Bateman* litigation in Star Chamber, wherein Coke attempted to show how provision for the poor did fall under the scope of the law even before the Elizabethan Poor Law was introduced. We saw how the criminal law developed in Star Chamber in response to the forensic arguments deployed there. At its heart the development of English criminal law through the equitable jurisdiction of Star Chamber reflected the inadequacy of common law jurisdictions to account for contextual variations. As

[566] Maitland, *English Law and the Renaissance*, p. 3.

[567] Baker, ed., *Legal Records and the Historian: Papers Presented to the Cambridge Legal History Conference, 7-10 July 1975, and in Lincoln's Inn Old Hall on 3 July 1974*; Stretton, 'Social Historians and the Records of Litigation', pp. 15-34.

[568] Murphy, *Renaissance Eloquence*; Vickers, *In Defence of Rhetoric*; Mack, *Elizabethan Rhetoric*.

Maitland argued long ago, a 'system of law which will never compel, which will never even allow, the defendant to give evidence, a system which sense every question of fact to a jury, is not competent to deal adequately with fiduciary relationships.'[569]

One of the fundamental points this thesis has been concerned to make is that scholars have struggled to grasp the role equitable litigation played in the development of English law. We 'ought not to think of common law and equity as two rival systems; Equity was not a self sufficient system, at every point it presupposed the existence of common law'.[570] The root of all errors has, however, been for scholars to suppose that because Equity could not alter judgements at common law that Equity was in some way inferior. This is a mistake. Equity at all times presupposed the common law and we should think of its decrees and and orders as, for all intents and purposes, *modifying* the common law *rather* than correcting it.

> Equity would never say of X in relation to common law "no, that is not so you have made a mistake, your rule is absurd, an obsolete one". It would instead say "yes, of course that is so, but it is not the whole truth. You say that A is the owner of the land; no one doubts that is so, but I must add that his is bound by one of those obligations know as trusts".[571]

The judgements given at Equity thus do affect the substantive content of the common law. Moreover, this thesis has sought to emphasise how this process took place over the course of the sixteenth century. We see this through the development of Star Chamber's criminal jurisdiction and the extension of misdemeanours with a narrow statutory basis into wide ranging crimes. Thus, the notion that Star Chamber was in some way ancillary to the equitable jurisdiction of the Chancery and of 'little importance for fundamental legal change' is deeply misleading.[572] Equitable jurisdictions, and Star Chamber in particular, began to have a substantive effect on the common law as soon as it began to administer an established set of

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[569] Maitland, *Equity*, p. 7.
[570] Ibid. p. 19.
[571] Ibid.
[572] Charles Gray, *Copyhold, Equity, and the Common Law* (Cambridge, Mass: Harvard University Press, 1963), p. 3.

rules and procedures. We begin to see this in the later-sixteenth century; well before the abolition of the court in 1641, when it is commonly held that much of the legal innovation in Star Chamber's criminal jurisdiction was adopted in bulk by the common law courts.[573] The judges that sat in Star Chamber invariably also sat in the common law jurisdictions and Equity steadily bled into the common law with each successive judgement. Again, the fundamental point to remember here is that it was the rhetorical premise of Equity which allowed lawyers and litigants to argue their position rather than simply pleading to the facts of a case. This, in turn, allowed them to describe events as riotous or fraudulent, for instance, when the common law would perhaps not have initially recognised them as such.

In Chapter Four we saw how humanist discourse inflected more than the form and structure of the pleadings. We saw how lawyers and litigants drew upon the vocabularies of Cicero and Tacitus, as well as ancient constitutionalism, in the substantive content of their arguments. We saw them attempt to legitimate their behaviour by deploying contrasting visions of civil society. The litigation between Sir Edward Coke and Robert Bateman, for instance, illustrated how a government minister used an authoritarian notion of civil society to attempt to enforce royal policy through the prerogative courts; we saw how the inhabitants of Gimingham attempted to repudiate that vision of civil society with recourse to their ancient rights and privileges enshrined in the common law. This conflict between Coke and the inhabitants of Gimingham was used to demonstrate how key political concepts, such as the nature of civil society, were contested through litigation; how relatively ordinary rural inhabitants contested the ruling ideologies of their governors. We see how the inhabitants of Gimingham understood, for instance, politics and the role of the State through a legal lens.

[573] Barnes, 'The Making of English Criminal Law: Star Chamber and the Sophistication of the Criminal Law'; Barnes, 'Star Chamber Litigants and Their Counsel, 1596-1641', pp. 7-28; Barnes, 'Star Chamber Mythology'.

III

This thesis has sought to approach the interpretation of court records, generally seen to be the province of social history, with the tools of intellectual history. In doing so it has developed a polemical argument which has sought to criticise various aspects of existing scholarship surrounding early modern law, politics and society. The aim has not necessarily been to pursue all of the arguments advanced here to their logical conclusions. This would be far beyond the scope of a doctoral thesis. Rather, it has been to suggest that historiographies should be more interdisciplinary. Social historians have, for instance, generally sought to explicate equity court records as evidence for the beliefs of people in early modern England. At its core has been the notion that the act of historical interpretation should be centrally concerned with the explication of actions. It has been argued that, by correctly identifying the linguistic actions within court records, we can explicate how ordinary people in early modern England used contemporary ideas and ideologies to understand and engage with the world around them on a daily basis.

Chapter Five developed the analysis we began in Chapter Four and demonstrated how the inhabitants of Gimingham contested key political concepts through litigation. We saw how people other than lawyers and litigants used opportunities to testify in depositions to contribute to contemporary political discourse. We saw, for instance, how the inhabitants of Gimingham used the discourse of popular memory to suggest an alternative distribution of power in the manor. How authority and power could be written into the landscape and deployed to challenge the prevailing distribution of power in the manor. Chapter Five thus demonstrated what power could mean in a given context; what it meant to people in a particular context; how it inflected their understanding and engagement with their world. Power is, in one form or another, always everywhere. It is, therefore, not suited to historical analyses. What we, as historians, need to understand is how our understanding of power has changed over time. In order to arrive at such an understanding we need to examine what people have understood power to, in various ways,

affect and effect; that is freedom.

Civil society, however, is defined not by power but by the freedoms and liberties enjoyed by members of that society. The litigation around Gimingham in the later sixteenth century shows how civil society functioned on the ground in rural Norfolk. What we see in litigation around Gimingham is, following Wood, how inhabitants attempted to extent, reassert and challenge the prevailing distribution of power but, crucially, this done *in relation to* their rights, liberties and freedom within the Manor of Gimingham. In other words, the point to recognise is not that power was contested through litigation. This is surely self evident. It is, rather, how power was shaped by ideas and ideologies of liberty and freedom. How power in early modern England was mediated through the law.

What this boils down to is a simple but deceptively complex question: what is politics? Perhaps the most polemical point this thesis has suggested is that Patrick Collinson's 'new political history, which is social history with the politics put back in, or an account of political processes which is also social'[574] has yet to be realised. Social historians have argued that politics was diffused through early modern society and that power is its defining attribute. This is based largely on twentieth century anthropological investigations of power.[575] By contrast, this thesis suggests that what is to count as politics is historically specific. A notion of politics based upon the anthropological conception found in recent social history would not have been recognisable in the time to which they have applied it.[576] Such a notion is far too broad and, rather, reflects what is to count as political in modern society. In light of this, social historians should consider what it is they purport to study. That is to say, are we studying *our* politics historically, or are we considering the history of politics. History 'comes to life when we draw together the insights of social historians and historians of political thought'.[577] Thus,

[574] Collinson, '*De Republica Anglorum*: Or, History with the Politics Put Back', pp. 1-30.
[575] Leftwich, *Redefining Politics*.
[576] Skinner, *The Foundations of Modern Political Thought*.
[577] Mark Goldie, 'The Unacknowledged Republic: Officeholding in Early Modern England', in Tim Harris,

approaching the texts with which we have been concerned throughout this thesis with the tools of intellectual history illustrates how ordinary people deployed ideas and ideologies in litigation to define power and the limits of politics in *their* society; and thus constitute contemporary civil society.

In early modern England people conceptualised politics in terms of their rights, liberties and freedoms under the law. This thesis has sought to show that it is to how people used ideas and ideologies in everyday life that we should turn. A history of political process which is also social necessarily entails an account of how the majority of people in early modern England contested the nature of civil society. That is to say, it entails an account of that 'most popular of indoor sports': litigation.[578] This thesis has sought to demonstrate how the inhabitants Gimingham understood and engaged with key political concepts concerning power, authority, the state and the liberties and freedoms they enjoyed in early modern civil society. In so doing it has argued that the distinction between law and politics, as between political theory and political practice, is but a stubborn illusion.

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