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*Contact: [a.winchester@lancaster.ac.uk](mailto:a.winchester@lancaster.ac.uk)*

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## **Statute and Local Custom: village byelaws and the governance of common land in medieval and early-modern England**

**Angus J L Winchester**

**Department of History, Lancaster University, England LA1 4YG**

### **Abstract:**

The role of seigniorial courts in managing common land and overseeing the exercise of common rights in England before c.1800 is well known. Central to the work of the courts were evolving bodies of local customary law governing grazing and other use rights. These were often formalised into sets of village byelaws, which informed the courts' decisions. Such byelaws are usually interpreted as local customary law, developing at grassroots level to suit local conditions and thus providing a legal framework to common rights which was sensitive to local environmental, social and economic pressures. However, the similarity between sets of village byelaws over large parts of England suggests that they were built on a foundation of wider custom and culture. The professionalisation of the role of estate steward and the dissemination of agricultural treatises and printed manuals on the right holding of seigniorial courts across the sixteenth and seventeenth centuries would have played a part in generating a 'national' culture of commons governance. Moreover, the management of common land had a statutory basis, not only in the framework of rights of landowners and tenants laid down by the Statute of Merton (1235) but also through a series of sixteenth-century statutes which impinged on the use of common land and were policed through the seigniorial courts.

Taking surviving statements of village byelaws from the period c.1450 to c.1750 as its starting point, this paper will question the extent to which they represent purely local responses to local conditions and assess the balance between local custom, a wider agrarian culture and statutory regulation in the governance of common land. In so doing, it will contribute to the wider debate over the relationship between local communities and the state, and between internal and external perceptions, in the governance of commons.

*Key words: manor court; byelaw; common land; pasture; estate management*

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It is well established that village byelaws – an evolving body of local, customary law – often governed the management of common resources in

medieval and early-modern Europe. The CORN study of the management of common land in western Europe from the sixteenth to the nineteenth centuries explored the similarities and differences between local management systems in different countries and also demonstrated how such governance regimes fulfilled many of Elinor Ostrom's design principles for long-enduring common resource management.<sup>1</sup> This paper asks where the body of local customary law embodied in village byelaws originated and how it evolved: upon what sources did it draw, by whom and in what context was it determined? It takes as its starting point the byelaws recorded in the records of manor courts, the local seigniorial courts which oversaw the management of common land in England. What is presented below is an interim discussion, presenting some initial thoughts from the early stages of a programme of research.<sup>2</sup>

The term 'manor court' is generic. It embraced two distinct types of court, the court baron and the court leet, the latter having a hybrid nature, as it combined administration of the internal affairs of the manor with leet jurisdiction, which made it an arm of royal justice. Both were seigniorial courts, at which the tenants of a landed estate were bound to appear. Their principal functions were fourfold: (1) upholding the lord's rights, including his rights on the waste of the manor under the terms of the Statute of Merton, 1235; (2) maintaining 'good neighbourhood' in the manorial community, particularly in the management of common resources, whether open fields or the resources of the manorial waste; (3) hearing minor civil actions (pleas of debt, trespass, etc); and (4) (in the case of courts leet) having responsibility for minor criminal jurisdiction as part of the royal system of peace-keeping. The framework within which manor courts operated was spelt out from the later-medieval period in a written 'charge' to the manor court jury, identifying the court's scope of enquiry. These documents specified the matters into which the jury was to enquire but tend to be generic and to make few references to specific agrarian concerns.<sup>3</sup>

From the jury charges evolved 'pain lists', which laid out byelaws ('pains') governing affairs within the manor. In a fifteenth-century hybrid of the two types of document from Windermere (Westmorland), we can see the switch from the jury charge's injunction 'you shall inquire if ...' to the pain list's statement 'it is ordered that ...'.<sup>4</sup> Surviving pain lists exhibit a clear chronological pattern. Late-medieval manor court records imply the existence of a body of local law but contain few explicit statements of byelaws, but there is a surge in both the recording of individual pains in manor court rolls and the number of lists of pains in the sixteenth and, particularly, seventeenth centuries, coinciding with the revival of seigniorial courts in the period c.1540-

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<sup>1</sup> De Moor, Shaw-Taylor and Ward 2002; Ostrom 1990.

<sup>2</sup> I should like to record my thanks to my colleague Eleanor Straughton for constructive and particularly helpful comments on an earlier draft of this paper.

<sup>3</sup> Examples of fifteenth-century jury charges in English are those from an unnamed Midland manor (Beckerman 1974) and from Fountains Abbey's northern estates (British Library [BL], Additional MS 40,010, ff. 185v-186v). The earliest printed version of a jury charge appeared in 1510 and is reprinted in Greenwood, 1915. Jury charges continued to be copied into manor court books: see Crossley 1943, 336-8 for an 18th-century charge from Cotherston (Yorkshire North Riding).

<sup>4</sup> Winchester 2000, 152-9.

c.1660. It is this body of 'ancient pains' or customary rules, structuring the work of the court and forming the basis of the management of common land, which forms the subject of this paper. A systematic analysis of a large corpus of pain lists remains to be carried out; this paper is based on published regional studies, supplemented by a pilot study analysing pain lists from twelve northern English manors.

## 1. CREATING LOCAL CUSTOM

How and when did the byelaws recorded in and policed by the manor courts originate? It seems clear that the taproot of the body of byelaws sprang from the notion of customary law in local communities. Local diversity was acknowledged and accepted in the concept of 'the custom of the manor', which governed tenures, land transfers and inheritance, and litigation between tenants in a manor.<sup>5</sup> The rural community, in the sense of the unit of economic organisation – a settlement and its field system, including common land – bore a variety of relationships to the manor. Manor and village might coincide; manorial lordship over a single village might be split; or a manor might embrace several settlements, each with its own economic territory. Warren Ault drew attention to the existence of non-manorial village meetings in midland, open-field England, which are referred to explicitly or implied when manor courts recorded agrarian byelaws: phrases such as *statutum ville* ('township regulation'); *contra communem ordinacionem tocius ville* ('against the common ordinance of the whole township'); *consuetudines vocate belaws* ('the customs called byelaws'); *ex commune assensu omnium vicinorum* ('by the common consent of all the neighbours') imply that the village community acted separately from the manor, even if regulations were subsequently recorded by the manor court.<sup>6</sup> Indeed, manor courts sometimes devolved the power to make day-to-day orders to officials. The appointment of officials termed 'wardens', *custodes autumpni*, 'bylaw graves' etc. to police and enforce orders was widespread – and in some cases they were expected to make orders and to bring them to the court to be enrolled. At Cononley (Yorkshire West Riding) in the early seventeenth century 'bylaw men' were appointed each year to govern the township's open fields and were required to bring their orders to the court.<sup>7</sup>

In much of upland, northern England, where hill commons were extensive, the manor was frequently a large, overarching unit covering several settlements, each with its own agrarian system. In these areas there is evidence for informal, local decision-making at grassroots level through a body known as the 'byrlaw', which appears to have had its roots as a folk institution, originally separate from the seigniorial courts. 'Byrlaw' (and its variants, such as 'birle', 'burlaw', 'bireley' and 'barley'), rendered in Latin as *plebiscitum*, derived from the Old Norse *byjar-log*, a 'law community' or 'law district'. The term was used both to refer to the local law (indeed, it is the root of the standard English term 'byelaw') and to a village assembly. It was also found in Scotland. Writing in 1597, Sir John Skene defined Scottish 'Laws of Burlaw' as being

<sup>5</sup> Bonfield 1996; Poos and Bonfield 1998.

<sup>6</sup> Ault 1960; 1965, 40-54.

<sup>7</sup> Ault 1965, 43-4; Gulliver 2007, 23, 30-1.

‘ made and determined by consent of neighbours, elected and chosen by common consent, in the courts called the Byrlaw courts. In the which, cognition is taken of complaints between neighbour and neighbour. The which men so chosen as judges and arbitrators to the effect aforesaid are commonly called Byrlaw-men.’<sup>8</sup>

Close parallels are found in northern England, where there were local meetings separate from the seigniorial court but recognised by it. The fifteenth-century charge to manor court juries on Fountains Abbey estates required them to enquire whether ‘there be any man that will not come to your “birelawres” when he is warned [i.e. called] and will cast him to break your pains’ and ordered that all ‘panes birelawze constitions or usys’ that had been agreed upon ‘for good rule and profit of yourselves’ should be presented to the manor court.<sup>9</sup> In some places, the byrlaw appears to have been absorbed into the seigniorial manor court, so that courts could be described as a ‘court barron and byerlaye’; *curia sive birelagium*; or ‘the court and plebiscite of the tenants’. The term was also used of the constituent township communities in large manors, as in the parish of Dalton in Furness (Lancashire), for example, which was divided into four ‘bierleys’. The appointment of byrlaw-men (‘barleymen’; ‘bylawgreaves’; *homines Barelag*; *custodes plebicitii*) is also widely recorded in northern England. Usually four in number, these officers were appointed annually by the manor court to act on behalf of community, upholding ‘good neighbourhood.’<sup>10</sup>

In summary, therefore, a meeting or court of the local agrarian community termed the ‘byrlaw’ appears to have been a widespread phenomenon in late-medieval Scotland and northern England. Its origins may be ancient (though whether it descended directly from Scandinavian institutions is unclear – the relationship between the occurrence of the term and the areas of known Scandinavian settlement in the Viking age remains to be explored) and it appears to parallel the township meetings Ault found in lowland, midland England. The relationship between such byrlaws and the seigniorial courts spanned a spectrum, ranging from the incorporation of its name and functions into the manor court; through the continuing separate existence of byrlaw meetings at local level (including, in northern England, at the level of very small pastoral hamlets) and the enrolment of regulations made by such meetings in the manor court; to the policing of ordinances made by byrlaws or community meetings by seigniorial courts, even when they were not recorded in writing.

## **2. LOCAL CUSTOM AND COMMON CUSTOM**

A long tradition of grassroots, local custom thus underlay the byelaws recorded by English manor courts. Surviving pain lists exhibit a diversity of character. At one end of the spectrum are statements springing from the grassroots tradition of the local byrlaw meeting; these generally concentrate

<sup>8</sup> *Oxford English Dictionary*, s.v. ‘Byrlaw’ (spelling modernised).

<sup>9</sup> BL, Additional MS 40,010, ff. 185v-186v

<sup>10</sup> Winchester 2000, 42-8.

on mundane agrarian affairs specific to the circumstances of the place in question – rules such as details of grazing arrangements in common fields and pastures, the upkeep of named gates and sections of field boundary.<sup>11</sup> At the other end of the spectrum are the more formal lists of pains governing the affairs of the manor, which tend to be longer and to include byelaws protecting the lord's rights (in fisheries, game and woodlands, for example), others aiming to preserve 'good neighbourhood' in the broad area of public order, as well as specifically agrarian orders. Although a large-scale systematic analysis of pain lists from England has yet to be undertaken, it is clear from published examples that they often included byelaws which were common to many settlements and were widely distributed. Such byelaws can be thought of as a core of common custom, parts of which appear to have a national – or even trans-national – distribution, other elements reflecting the concerns of particular agrarian regions.

In order to distil a corpus of common customary rules, Warren Ault's collection of byelaws from open-field villages in midland England and my own work on byelaws from upland pastoral communities in northern England<sup>12</sup> have been supplemented by a pilot study analysing twelve pain lists from manors in northern England, divided equally between upland, hill-farming communities and open-field villages. Only byelaws which impinged on the management of grazing rights on common land have been included in this analysis. The twelve lists embrace a range of types: three are brief 'bylaw'-like sets of grassroots orders;<sup>13</sup> three are late-medieval statements of local customary law;<sup>14</sup> two are briefer, later statements of 'ancient pains';<sup>15</sup> and four are seventeenth-century collections of byelaws extracted from the manor court rolls.<sup>16</sup> They range in length from the six byelaws recorded for the small hamlet of Halton Gill, deep in the Yorkshire Dales, in 1579, to the 53 pains recorded at Isel (Cumberland) in 1662, and the 50 on the 'paine roll' of Alston Moor.

The agrarian byelaws with which this analysis is concerned naturally reflect the farming imperatives of different agrarian regions. The corpus discussed below comes from two types of farming region in which extensive commons survived until the eighteenth century: (1) open field villages, in which the bulk of the common resource took the form of communal management of open field strips and grazing on the open fields after the crop had been harvested; and (2) hill farming communities in the uplands, where extensive common

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<sup>11</sup> See, for example, the byelaws from Halton Gill, Yorkshire West Riding, in 1579 and from Outhwaite, Roeburndale, Lancashire, in 1580, printed in Winchester 2000, 172-5.

<sup>12</sup> Ault 1965; Winchester 2000.

<sup>13</sup> These are from Halton Gill, Yorkshire West Riding (1579, printed in Winchester 2000, 173; Roeburndale, Lancs. (1580), printed in Winchester 2000, 174; and Cononley, Yorkshire West Riding (1626), printed in Gulliver 2007, 30-1.

<sup>14</sup> From Windermere, Westmorland (15th century), printed in Winchester 2000, 155-8; Alston Moor, Cumberland (*temp.* Henry VII), printed in Winchester 2000, 162-4; and Cockerham, Lancs. (1483), printed in Sharpe France 1954.

<sup>15</sup> From Weardale, Co. Durham (1595), printed in Winchester 2000, 166; and Netherwasdale, Cumberland (1679): Cumbria Record Office [CRO], D/Lec, box 94.

<sup>16</sup> From the Cumberland manors of Aglionby and Cumwhinton (1641): CRO, D/Ay/3/2; Hutton in the Forest (1637-68): CRO, D/Van/1/4/2/2; and Isel (1662): CRO, D/Law/1/230.

pastures existed on the hill wastes. As will be shown, some pains are common to manors in both regions but others are specific to one farming type: byelaws from open-field villages overlap with but have a character quite distinct from those from pastoral communities in the uplands. Other regional economies (wood pasture areas, fenland and marshland communities, for example) are not represented in this limited sample, nor in the published corpora, and may well exhibit a different character again. In order to attempt to identify a core of common custom relating to the management of common land, the byelaws concerning grazing and livestock management in the twelve sample pain lists have been extracted and analysed and are discussed in the light of the published studies.

Under English law, a common right of pasture entitled tenants within a manor to graze livestock on the commons. A significant body of the manor courts' work involved policing the manor's commons to prevent those without common rights (from neighbouring settlements, for example) from trespassing on the manor's commons. Within that framework, byelaws were made to govern the exercise of grazing rights by the community. The sample suggests that a core of nine byelaws can be isolated, some common to both upland and open-field communities, others specific to one type, as follows:

**Table 1: Common custom: the core of byelaws from a sample of 12 pain lists from northern England**

| <i>Subject of pain</i>     | <i>Occurrences</i><br>(Sample size: 12) | <i>Upland manors</i><br>(Sample size: 6) | <i>Open-field manors</i><br>(Sample size: 6) |
|----------------------------|---|--|--|
| 1. Scabbed horses          | 7                                       | 3  | 4  |
| 2. Pigs to be ringed       | 7                                       | 3  | 4  |
| 3. Overcharging common     | 7                                       | 6  | 1  |
| 4. Agistment               | 5                                       | 2  | 3  |
| 5. Hounding cattle         | 4                                       | 2  | 2  |
| 6. Loose cattle in fields  | 3                                       | 0  | 3  |
| 7. Marking livestock       | 3                                       | 3  | 0  |
| 8. Control of rams         | 3                                       | 3  | 0  |
| 9. Tethering in night time | 2                                       | 1  | 1  |

1. *Scabbed horses and other infectious livestock.* The exclusion of infectious livestock, particularly scabbed horses and animals suffering from farcy (a disease akin to glanders), from the common in order to control infection appears to have been a widespread and ancient rule, found on the Continent as well as in England.<sup>17</sup> The fifteenth-century jury charge from Fountains Abbey (Yorkshire) stated that 'it is against the law' (presumably meaning the local customary law) 'if any man hold any scabbed horse out of their houses in this lordship'.<sup>18</sup> Similar clauses occur at Windermere (Westmorland) (undated, but pre-1477), where the jury was to enquire 'of scabbed horse or mare holden amongst their neighbours' cattle'; and from Cockerham (Lancashire) (1326 and 1483).<sup>19</sup> In 1416 the manor court at Lartington

<sup>17</sup> In Flanders livestock infected with certain diseases were excluded from common land: De Moor *et al* 2002, 133.

<sup>18</sup> BL, Additional MS 40,010, ff. 185v-186v. (spelling modernised).

<sup>19</sup> Winchester 2000, 156 (no. 1.27) (spelling modernised); Sharpe France 1954, 43, 48.

(Yorkshire North Riding) made a byelaw to punish anyone keeping a scabbed horse (*equum scabic*) or a 'hasald' (a bad-tempered stallion – a category of animal also widely forbidden) on the pasture.<sup>20</sup> This customary rule was clearly deeply embedded and was reinforced in 1540 by the statute on 'The Breeding of Horses' (32 Hen. VIII, c. 13), which forbade putting horses 'infect with scabbe or mange' on any common.

2. *Pigs to be kept ringed (and 'bowed' or 'yoked')*. Similarly ancient and ubiquitous was the requirement that pigs should be kept ringed to prevent them from grubbing and, often 'bowed' or 'yoked', to prevent them breaking through hedges. The byelaw was widespread across northern England and in open-field communities in the Midlands.<sup>21</sup> A similar rule is recorded in Flanders.<sup>22</sup> Again, custom was reinforced by statute in the sixteenth century, when an act of 1543 (35 Hen. VIII, c. 17, sec. xvii) forbade putting unringed pigs into woodland.

3. *Overcharging the common*. The common law concept of 'levancy and couchancy' (that no more animals could be put to graze the common than could be kept on the produce of the farm (i.e. the 'dominant tenement') over winter) limited the size of an individual's common grazing right under English law. By the fourteenth century, case law had consolidated the rule of levancy and couchancy, which appears in pain lists and manor court orders from the fifteenth century,<sup>23</sup> and the same principle was found in continental Europe.<sup>24</sup> The notion that individuals should not overcharge the common by putting to graze more livestock than their entitlement thus had deep roots and was as applicable where the common right was not limited to a specific number as it was where a numerical 'stint' applied (as it did on some commons).

4. *Agistment forbidden or restricted*. The rule of levancy and couchancy effectively forbade putting livestock belonging to others to graze on the common by way of agistment. Yet agistment (grazing stock in return for a fee) was both a fact of life and a potential problem on many upland manors with extensive wastes.<sup>25</sup> Two of the five byelaws in the limited pilot sample forbade agistment outright but the others placed restrictions on the number or species of livestock that could be brought in. On stinted commons the possibility that an individual might have insufficient animals of his own to fill his allotted stint created a circumstance in which agistment was allowed. A systematic analysis of a larger body of byelaws is required to draw conclusions about an aspect of common rights brimming with potential problems.

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<sup>20</sup> North Yorkshire Record Office, Northallerton: ZPS 1/2. For 'azzalds' see Winchester 2000, 103.

<sup>21</sup> Winchester 2000, 103-4; Ault 1965, *passim* (indexed p. 101).

<sup>22</sup> De Moor *et al* 2002, 132.

<sup>23</sup> *Year Book Edward III*: 17 Edw. III, p. 27. The phrase 'lour bestes la couchants & levants' is used explicitly in 1455-6: *Year Book Henry VI*, 37 Hen. VI, p. 34. For byelaws see Winchester 2000, 79-82; Ault 1965, 26.

<sup>24</sup> Netting 1976, 139; Ostrom 1990, 62.

<sup>25</sup> For a discussion of agistment in northern England, see Winchester 2000, 93-8.

5. *Hounding livestock on the common grazings.* Central to maintaining 'good neighbourhood' on common grazings was the need to ensure that commoners respected the livestock of others grazing the waste. A prohibition on setting dogs on livestock ('hounding' or 'baiting and slating') seems to have been general, particularly in upland manors where herding was carried out by individual commoners, as opposed to a communal herdsman employed by the whole community. Tight rules also governed the practice of 'staffherding' (where herdsman wielding staves turned away the stock of others).<sup>26</sup>

6. *Loose cattle to be kept out of the open fields until after harvest.* It was self-evident that livestock should be excluded from grazing at will among the growing crops in an open field. Tethered animals were sometimes allowed (see below, no. 9) but, across open-field England and where open fields survived in the uplands, there was a blanket ban on loose livestock in the fields until after harvest.<sup>27</sup> The focus of many byelaws was the date at which stock could be turned into the fields.

7. *Rules governing the marking of livestock.* Rules requiring the marking of animals to show ownership were widespread in agrarian systems which included extensive common wastes. They appear to have been much less common in open-field communities, perhaps because stock there were herded more closely, often by village herdsman.<sup>28</sup> Common features are found in the rules governing marking. In Cumbrian manors the marks were 'house marks', linking the flock to its farm, rather than to an individual, and thus probably stable 'signatures' of some antiquity. The repertoire of ear marks in northern England and the vocabulary used to describe them may suggest a common origin in Scandinavia.<sup>29</sup>

8. *Control of rams in the autumn.* In upland manors with extensive grazing on hill commons, where sheep were the principal source of wealth, byelaws governing the control of rams in the autumn were common. They take two forms: first, regulations preventing rams from running with the ewes until a specified date, in order to control the timing of lambing in the spring; second, rules aimed at maintaining the quality of the community's flocks by forbidding farmers from putting poor quality rams (termed 'riggalds') on the common.<sup>30</sup> The outlawing of 'riggalds' was particularly widespread across northern England but does not appear to be found in open-field villages in the Midlands.<sup>31</sup>

9. *Horses and cattle not to be tethered in the night time.* Although this regulation occurs in only two of the six sets of byelaws from open-field communities in the pilot sample, it is included here as an example of a wider body of rules concerning tethering. The grassy balks between and at the end of ploughed strips in an open field formed a valuable source of grazing,

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<sup>26</sup> See Winchester 2000, 113-16.

<sup>27</sup> Ault 1965, *passim*; Winchester 2000, 66.

<sup>28</sup> No references to rules governing the marking of livestock are indexed in Ault 1965.

<sup>29</sup> Winchester 2000, 105-9.

<sup>30</sup> Winchester 2000, 57-8.

<sup>31</sup> Ault 1965.

exploited by tethering livestock to prevent them from damaging the growing crop. The potential for damage to neighbours' corn was considerable and it is not surprising to find a plethora of regulations governing tethering in byelaws from open-field villages across England. On some manors the practice was forbidden outright (except on a tenant's own ground), the reasoning given on Fountains Abbey's estates in Yorkshire in the fifteenth century being that the balks (or 'ranes') were the lord of the manor's waste.<sup>32</sup> The specific regulation forbidding tethering at night is recorded elsewhere in northern England and in the Midlands.<sup>33</sup>

It is hardly surprising to find that different communities met the challenges of managing the use of common land by formulating similar regulations. The tethering of animals on the grassy balks between open-field strips was a potential source of conflict within the community and needed to be governed by rules, whether the open field was large or small and wherever it lay – indeed, very similar concerns over tethering are encountered in byelaws from different parts of England and from continental Europe.<sup>34</sup> Most of the nine topics above were common sense solutions to common potential problems. Many were probably ancient custom when first recorded in the manor court rolls. How deep their roots lay is difficult to judge: identical responses to common problems in communities far apart need not imply that they descended from a common rootstock. However, such trans-national links as the similarities in sheep-marking customs across areas settled by Scandinavians in the tenth and eleventh centuries hint that some customary rules may have been spread by migration. Certainly – in a later context – settlers from old England transferred the rule requiring pigs to be ringed to New England in the seventeenth century.<sup>35</sup> We should not rule out the possibility that parts, at least, of the common stock of byelaws arrived with colonists, rather than evolving locally. It would be stretching the point to suggest that Anglo-Saxon and Scandinavian colonists brought ready-made suites of byelaws to England (particularly since open-field systems in their later medieval guise are now thought to date from the later Anglo-Saxon centuries) but the settlers who carved out the new agrarian landscapes in the great wave of colonisation in the twelfth and thirteenth centuries very probably brought with them conceptions of how to organise their landed resources drawn from the customary rules governing the communities they had left.

Whether we explain the repetition of byelaws in different communities by assuming the existence of an ancient body of custom common to agrarian systems across medieval western Europe, or by the spread of agrarian custom by migration across the medieval period, a core of village byelaw appears to have consisted not strictly of local responses to particular circumstances (one of the features often assumed to have been the case and

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<sup>32</sup> BL, Additional MS 40,010, f. 185v.

<sup>33</sup> Winchester 2000, 66; Ault 1965, 74. Other examples from northern England include Shap, 168 (Whiteside 1903, 157);

<sup>34</sup> As in those from Schleswig Holstein: Rheinheimer 1999, Band 2 e.g. Nr. 21.

<sup>35</sup> As at Sandwich, Connecticut, where men were fined for not having their swine ringed in 1638: Freeman 1862, 40.

one which fulfils one of Ostrom's design principles for the management of common resources) but of common custom.

### **3. THE ROLE OF STATUTE**

Leet jurisdiction was a royal franchise, so courts leet represented a fusion of the local and the general. As well as enforcing local customary law, courts leet also performed the ancient peace-keeping role central to the 'view of frankpledge' which was the distinguishing characteristic of leet jurisdiction. Under the Statute for View of Frankpledge of 18 Edward II [1324-5], courts leet were required both to deal with specific breaches of the peace (assaults, theft, affrays) and economic matters (the assize of bread and ale, weights and measures, etc.), and to police a wide range of anti-social behaviour and common nuisance. Some of these (such as enquiring about boundaries being moved, 'ways and paths opened or closed', 'waters turned or stopped or brought from their right course' and night walkers – 'such as sleep by day and watch by night') came to be embedded into manorial jury charges and pain lists. By the sixteenth and seventeenth centuries, some statements of local custom thus drew on national, as well as local, sources.

In the mid-sixteenth century, courts leet were given additional statutory responsibilities and powers, some of which related to the management of common resources. Three statutes from the reign of Henry VIII required courts leet to police specific offences which were to the detriment of the common good in local communities:

- The Destroying of Crows, 24 Hen. VIII, c. 10 (1533): in order to prevent the destruction of crops, occupiers of land could be presented for failing to endeavour to destroy choughs, crows and rooks on their land.
- The Breeding of Horses, 32 Hen. VIII, c. 13 (1540): in order to preserve and enhance the quality of horses, no stallion under 15 hands high in specified counties and under 14 hands high in other counties was to be put to graze on 'forest chace more marrish heth common or waste ground'. As noted above, this act also forbade the putting of diseased horses on common land.
- The Watering of Hemp or Flax, 33 Hen. VIII, c. 17 (1541): because of the noxious effluent from 'retting' flax and hemp in water, this was only to be done in designated ponds or pits. Flax and hemp were not to be watered in streams, rivers or common ponds.<sup>36</sup>

Presentments and re-iterations of byelaws concerning these topics in manor court records after the date of the statute can be interpreted as absorbing statutory responsibility into the body of local law. However, the story is more complex than that. There are good grounds for thinking that some, at least, of these statutes were embodying in formal law regulations which were already part of local custom. As has been noted above, the statutory requirement to keep scabbed horses off the common had a long history before 1540; so did the desire to prevent poor quality stallions from breeding: late-medieval orders

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<sup>36</sup> The statutory duties laid on courts leet are summarised in Hearnshaw 1908, 122-31.

from Fountains Abbey's estates in Yorkshire placed lower limits on the value of uncastrated stallions put to the common.<sup>37</sup> The interplay between local custom and statutory control of common land is a central theme in the later history of English commons,<sup>38</sup> but it appears to have been complex even in the medieval period and deserves further exploration.

#### 4. FORMALISING VILLAGE BYELAWS

It is a truism to say that we can only recapture village byelaws when they come to be written down. Their roots apparently lay deep in local custom, probably evolving orally through bylaw courts and village meetings long before being recorded in manor courts rolls. However, as we have seen, local custom did not operate in a legal vacuum: elements of national law came to be embedded in the body of local law, both through the Statute for the View of Frankpledge and through the particular responsibilities laid on courts leet during the reign of Henry VIII. The conduit through which local and national law flowed and mingled was the machinery of manorial administration and a third element in the complex of processes which generated the body of agrarian byelaws was thus the role of the officers of the manor courts.

It has already been noted that the chronological distribution of pain lists shows a surge in the sixteenth, and particularly, the seventeenth centuries. This can be illustrated by looking at the dates of surviving pain lists from the West and North Ridings of Yorkshire recorded in the Manorial Documents Register.<sup>39</sup> Dated lists survive for over 120 manors in these two divisions of England's largest county and an analysis of the dates of the earliest pain lists for these manors shows a rise in the later sixteenth century with a peak across the seventeenth (Table 2). No pain lists survive from before 1500 and only a scatter date from after 1750. There is a slight difference between the two ridings, the peak being earlier in the West Riding than the North Riding but in both, more than half of the earliest surviving lists date from the seventeenth century (56% in West Riding; 52% in North Riding).

**Table 2: Dates of Surviving Pain Lists from Yorkshire**

| <i>Date range:</i> | <i>Number of pain lists:</i> |                     |
|--------------------|------------------------------|---------------------|
|                    | <i>West Riding</i>           | <i>North Riding</i> |
| 1500-49            | 3                            | 0                   |
| 1550-99            | 11                           | 4                   |
| 1600-49            | 23                           | 9                   |
| 1650-99            | 22                           | 13                  |
| 1700-49            | 12                           | 11                  |
| 1750-99            | 5                            | 0                   |
| 1800-49            | 4                            | 4                   |

<sup>37</sup> Winchester 2000, 103.

<sup>38</sup> As discussed in Eleanor Straughton's paper for IASC 2008.

<sup>39</sup> The Manorial Documents Register, maintained by The National Archives, is available at <http://www.nationalarchives.gov.uk/mdr/>.

When we come to look at the records of individual manors, there is consistent evidence of proactive involvement by the manorial administration, particularly the estate steward, who presided at the manor court, in the formulation and formalisation of byelaws in the seventeenth century. Much of the flowering of the pain lists across the century appears to represent an active attempt to capture the body of customary law by collecting and writing down the 'ancient pains' which governed the deliberations of the manor court. Two examples from Cumberland illustrate what was almost certainly a widespread process. The surviving pain list from the manor of Isel in 1662 is prefaced by a statement by the jury confirming 'these paines and amerciaments followinge (amongst many others) to have been anciently used time out of minde'; and the same 53 pains were ratified in 1688 as the 'antient paines Bylawes & Orders belonging to this Mannor'.<sup>40</sup> This was a careful selection of local law, formally recorded and confirmed and signed on both occasions by the full manor court jury and local gentlemen.

A similar process took place on the Aglionby family's estates near Carlisle, the hand of the steward this time being more in evidence. In 1683 the steward prepared a volume of 'Pains and Sundery other Memorialls' concerning the manors of Aglionby, Cumwhinton and Tarraby. It contained abstracts of pains and presentments recorded in court rolls from the early sixteenth century, followed by a list of orders and byelaws 'collected out of ancient court-rolls' in 1641 by the then steward and a draft memorandum confirming these in 1683.<sup>41</sup>

The hand of manorial administrators is also visible in other ways. In the mid-seventeenth century rolls of the court leet of Kirkburton in the manor of Wakefield (Yorkshire West Riding) the pains recorded for each of the fourteen constituent townships included a core of almost identical orders, concerning, *inter alia*, taking wood, keeping swine ringed and the upkeep of fences.<sup>42</sup> It had clearly become customary to reiterate these byelaws regularly but was this a case of a continuance of 'ancient custom' or the imposition of uniformity by a steward?

The upsurge in the recording of pains in the century or so after 1570 must be seen in the wider context of estate management in an age of agricultural 'improvement'. The culture of 'improvement' was fundamental to the shift from the feudal legacy of the manorial system towards capitalist farming. It not only heralded an attack on common land (the scale of early-modern enclosure, both of open fields and of wastes, is now being recognised) but also changed landowners' perceptions of their estates, instilling a drive to realise their economic potential.<sup>43</sup> The same era also saw the increasing formalisation of the law concerning property and a sharpening of awareness of landlords' rights. One aspect of this changing context was the formalisation of the manor court. Among the numerous farming manuals and legal treatises

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<sup>40</sup> CRO, D/Law/1/230.

<sup>41</sup> CRO, D/Ay/3/2.

<sup>42</sup> Fraser and Emsley 1977, 111-18; 1986, 154-63; Robinson 1990, 182-9.

<sup>43</sup> Leslie and Raylor 1992, 35-57 (Andrew McRae on husbandry manuals); 64-8 (Anthony Low on enclosure).

published across the sixteenth and seventeenth centuries were court-keeping manuals, guiding estate stewards in the right ordering for holding courts baron and courts leet.<sup>44</sup> It is striking how the distinction between courts leet and courts baron becomes more explicit at this time: late-medieval court rolls frequently bear the simple heading *curia*, whereas seventeenth-century rolls almost invariably name the court either *curia baronis* or *curia leta cum visu franciplegii*. Less explicit is the impact of the printed word on the business of the court. Sometimes it is possible to discern the hand of a new steward formulating orders in legalistic terms not seen in earlier court rolls. For example, the arrival of a new steward in the manor of Millom (Cumberland) in 1603 immediately resulted in the re-statement of existing byelaws in formal legal language. That concerning turbary rights on the common will serve as an illustration:

no manner of person or persons ... shall at any time or times hereafter ... grave or dig any more peats yearly or cause or suffer in any of their 'rooms' [allocated peat banks] to be graved or dug but only to the necessary use of their own fires and neither to give sell or any otherwise to suffer them or any of them to be used converted or bestowed ...<sup>45</sup>

The heavy hand of a trained lawyer seen here contrasts strongly with the immediacy of the vernacular wording of an earlier byelaw from Millom, in 1566, which said that no one

shall grave no peats in no manner of mosses within this 'byreley' but in his own rooms on pain of 3s 4d and not in his neighbours.<sup>46</sup>

These various expressions of the influence of estate stewards suggest a growing professionalisation in the running of the manor courts. We can imagine that the power of the printed word would tend to privilege the court-keeping manual over local custom and oral tradition in framing the deliberations of the courts, moving byelaw-making one step away from the grassroots. Further research is needed to ascertain how widespread was the growing influence of the steward. It is striking that a similar expansion of the role of lawyers in drawing up village byelaws has been noted in Schleswig Holstein.<sup>47</sup>

Other factors which may have lain behind the flowering of manor courts, and the upsurge in the recording of pains in the sixteenth and seventeenth centuries may have included a desire on the part of lords of the manor to maximise their revenue from courts (for which a clear statement of byelaws and penalties would be invaluable); the growth in the statutory duties of courts leet, discussed above; and the spread of the vernacular and of literacy, a cultural shift which would have encouraged the recording of pains in English

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<sup>44</sup> Those printed up to 1546 are listed in Maitland and Baildon 1891, 3-4. Later manuals included Jonas Adames' *The Order of Keeping a Court Leet and Court Baron* (several editions from 1603).

<sup>45</sup> CRO, D/Lons/W8/12/9, p. 17 (spelling modernised).

<sup>46</sup> CRO, D/Lons/W8/12/5, Millom court 14 May, 8 Elizabeth (spelling modernised).

<sup>47</sup> Rheinheimer 1999, Band 1, 294, who also notes the similarity between byelaws in neighbouring villages.

for the first time.<sup>48</sup> The peak in byelaw recording may also have been driven by the need for clarity in local law at a time of stress. The rising population of the century 1550-1650 generated social conflict and tensions over access to resources and there are hints of ecological pressure, particularly over fuel resources.

The challenges of interpreting the body of orders and byelaws recorded in manor court records are significant: I have concentrated in this paper on the lists of 'pains' which appear to record complete sets of regulations governing a particular community, but the records of manor courts include numerous 'one-off' orders and it is not always clear whether these were intended to replace an existing byelaw or to deal with an immediate, short-term problem. Then there is the fact that lists of byelaws survive for probably only a minority of settlements. Sometimes we can deduce that such a list must have existed at one time, as, for example, where the manor court jury records presentments against a checklist of numbered offences.<sup>49</sup> But there is frequently no evidence of a written statement of byelaws: are we to assume in these instances that the court's deliberations continued to be structured around communal oral memory of local customary law?

In conclusion, what we see when we look at a body of village byelaws in England is the result of a complex interplay between custom, grassroots decision-making and wider culture. At one level these were, indeed, statements of local law, grounded in the need to provide local responses to particular social, economic and environmental challenges. But they should not be viewed in isolation, as entirely local regulations: the decisions taken and orders made by manor court juries were framed within a wider body of common agrarian custom and a clear context of common law, reaching back to the thirteenth century, if not before. Moreover, the lists of village byelaws from Tudor and Stuart England can only be fully understood in the light of contemporary developments: the role of statute; the growth of the legal profession and the development of legal process; and changing attitudes to land among the landowning classes and their stewards, as the dominant paradigm shifted from 'ancient custom' towards 'improvement'.

Such conclusions pose important questions for the study of commons. First, traditional commons in western Europe, such as common land in England and Wales, are often assumed to have been governed by 'long-enduring CPR institutions' – indeed, the English manor courts have been interpreted as just that. Yet, though they endured from the medieval period to the eighteenth century (and later in some cases), they were themselves subject to an historical dynamic, most immediately in a changing legal context, which itself reflected wider cultural change. Second, it is the local, indigenous qualities of governance systems such as these that have often been seen as essential to success in managing commons. Yet village byelaws in medieval and early-modern England not only incorporated local custom but also drew on a reservoir of national – or even trans-national – agrarian folk custom and were

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<sup>48</sup> Harrison 1997.

<sup>49</sup> e.g. Mickleton, Yorkshire North Riding, 1632: Winchester 2000, 37.

framed by national legislation. Manorial governance of common land was at one level determined and subsequently policed at grassroots level by an enduring institution, the manor court, but it was also the product of a wider – and changing – historical and cultural context.

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