

Articles

The Seigneurs Descend to the Rank of Creditors: The Abolition of Respect, 1790

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On the great night of August 4, 1789, the French National Assembly proclaimed the abolition of feudalism. This momentous revolutionary proclamation was not, however, self-executing: in the days that followed, it became clear that there was no definitive agreement about what “feudalism” was. After a week of uncertain debate, the gentlemen of the Assembly had not produced fully detailed abolition legislation. Politics having failed, the decision was made to turn the problem over to lawyers; on August 12, the Assembly constituted a Committee, made up principally of lawyers, and charged with the task of defining “feudalism.”

So it was that the lawyers stepped in, to take charge of the first great abolition of Western history. The special Committee on Feudal Rights worked away during six months of increasing revolutionary tension, as peasants rioted and châteaux burned in many parts of France. Finally, on

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February 8, 1790, the Committee delivered a refined and elegant report, full of technicalities and fine phrases. Among that report's pronouncements was the following declaration: "the *Seigneurs*," reported the Committee, analyzing the legal essence of the abolition of feudalism, "have descended to the rank of simple *Creditors*."¹

This elegant bit of Revolutionary legal analysis is my starting point in this article. I want to explain what the Committee on Feudal Rights meant when it analyzed the abolition of feudalism as meaning the reduction of "seigneurs" to the rank of "creditors." French lawyers, I want to show, had been struggling since the Reformation to enforce a distinction of rank between "seigneurs"—a feudal legal category—and "creditors," a Roman legal category. Until the great Revolution, it had been utterly unacceptable that *seigneurs* should be identified with mere creditors, and French lawyers made great efforts to prevent any collapse of the two categories. By tracing the history of their efforts, I hope to give us a subtler sense of the meaning of the Revolutionary abolition of feudalism. I also hope to give us a subtler sense of the impact of Roman law in Europe, and push us towards a subtler grasp of the importance of the enforcement of claims to honor in legal history.

We are, I think, in need of some subtlety. For our existing accounts have missed much of what is most interesting in this important revolutionary episode. Our existing accounts of this episode focus almost entirely on economic concerns, and ascribe great importance to the prerevolutionary spread of Roman law as a commercializing force. According to these accounts, the Committee's 1790 declaration that the "seigneurs" had been transformed into "creditors," elegant though it may have been, had no practical meaning. For the "seigneurs" had *already* been transformed into "creditors" long before the Revolution, as the result of the spread of Roman law. Well before the Revolution, French lawyers had begun trying to conceptualize feudal relationships in Roman terms. Through their efforts, (so argue lay historians especially²) Roman commercial concepts had

1. "Rapport fait à l'Assemblée Nationale au Nom du Comité de Féodalité de 8 Février 1790 par M. Merlin, Député de Douai," in *Procès-Verbal de l'Assemblée Nationale*, vol. 13 (Paris, n.d.), 7. This and comparable passages are quoted most conveniently in R. Robin, "Fief et Seigneurie dans le Droit et l'Idéologie Juridique à la Fin du XVIIIe Siècle," in E. Schmitt, ed., *Die Französische Revolution: Anlässe und Langfristige Ursachen*, Wege der Forschung 293 (Darmstadt, 1973), 507-11. (Originally published in *Annales Historiques de la Révolution Française* 43 (1971): 554-602.) For these events, see most recently F. Furet, "Night of August 4," in F. Furet and M. Ozouf, eds., A. Goldhammer, trans., *A Critical Dictionary of the French Revolution* (Cambridge, Mass., 1989), 107-13; and still especially the learned account in M. Garaud, *Histoire Générale du Droit Privé Français (de 1789 à 1804): La Révolution et la Propriété Foncière* (1958), 167ff.

2. The technical legal historians are of course more aware of the problems, though their work does not seem to have entered the general literature. I will scatter complaints about even the technical historians through these notes. For accounts relatively sensitive to the fragility of the use of Roman law in the French countryside, see, e.g., Garaud, *Histoire Générale*, and see still F. Olivier-Martin, *Histoire du Droit Français des origines à la Révolution* (Monchrestien, 1951), 642ff. Among older authors, see E. Garsonnet, *Histoire des Locations Perpétuelles et des Baux à Longue Durée* (Paris,

gradually eaten away at customary feudal concepts. By the mid-eighteenth century, the process of "romanization"³ had already transformed French agrarian society from a customary world of "seigneurs" and "vassals" into a romanized world of "creditors," "debtors" and "real property owners."⁴

The often drawn corollary is that the lawyers of the Committee on Feudal Rights were perpetrating a kind of reactionary pettifoggery. According to this interpretation (still often repeated, though less heatedly than in an earlier era) the Committee understood quite well that the feudal "seigneurs" had already been transformed into Roman "creditors," that France was already a commercial order, and that its declaration was meaningless. But the lawyers were frightened by the growing social disorder of the autumn and winter months of 1789-90, and they were determined to undercut the abolition proclamation. Such was the purpose of declaring the *seigneurs* to be "creditors." The declaration was a "swindle"⁵ which declared the peasants to be free, but in fact confirmed their enslavement in a debtor-creditor order.⁶ The lawyers thus showed themselves to be a thoroughly counterrevolutionary force, and the great Revolution showed itself to be less a Revolution than a Ratification of commercial changes long since effectuated.

Now, I do not wish to deny that these interpretations have large elements of truth. It is true that "creditor" was a concept drawn from Roman law. It is true that the availability of Roman law had produced deeply disruptive, and to some extent commercializing, consequences

1879). Nevertheless, the classic German view of Heinrich Brunner, according to which French law was most notably characterized by its "resistance" to Roman law, has found surprisingly little echo in the French-language literature. See H. Brunner, *Grundzüge der deutschen Rechtsgeschichte*, 7th ed., ed. E. Heymann (Munich, 1919), 264.

3. For this concept, see especially A. Piret, *La Rencontre chez Pothier des Conceptions Romaine et Féodale de la Propriété Foncière* (Paris, 1937); and, e.g., V. Piano Mortari, *Diritto Romano e Diritto Nazionale in Francia nel Secolo XVI* (Milan, 1962), 27ff.

4. Robin, "Fief et Seigneurie"; J.Q.C. Mackrell, *The Attack on 'Feudalism' in Eighteenth-Century France* (London, 1973); Gerd van den Heuvel, "Féodalité, Féodal," in R. Reichardt and E. Schmitt, eds., *Handbuch politisch-sozialer Grundbegriffe in Frankreich 1680-1820* (München: Oldenbourg, 1988), 10:4ff.

5. J. Godechot, *Les Institutions sous la Révolution et l'Empire* (Paris, 1951), 163.

6. See most recently, P.M. Jones, *The Peasantry in the French Revolution* (Cambridge, England 1988), 81ff., citing earlier literature; E. Hinrichs, "'Feudalität' und Ablösung: Bemerkungen zur Vorgeschichte des 4 August 1789," in E. Schmitt, ed., *Die Französische Revolution*, Neue Wissenschaftliche Bibliothek, 86 (Köln, 1976), 124-57. Even Furet, the inspiration of whose approach will be obvious in this article, has not quite escaped this tradition. See now Furet, "Feudal System," in Furet and Ozouf, *Critical Dictionary*, 687, which shows, I think, some of the continuing influence of Piret, *Rencontre chez Pothier*, and Mackrell, *Attack on 'Feudalism.'* My interpretation is, I would nevertheless like to think, one of which Professor Furet would approve; it fits with his general view that the Revolution produced a kind of commercialization, see Furet, "Night of August 4," 113, while giving a somewhat different account of what it was that was abolished. For another recent account that emphasizes the commercializing consequences of the Revolution while avoiding some of the conspiratorial analysis of the older school, see E. Botsch, *Eigentum in der Französischen Revolution: Gesellschaftliche Konflikte und Wandel des sozialen Bewußtseins* (Munich, 1992), 9 and often.

before the Revolution. It is true that the Committee's report confirmed most of the economic rights of the former *seigneurs*.

But despite these large elements of truth, I think that our existing accounts have gotten it wrong. First, historians have made a significant error in focusing so heavily on purely economic rights. As I will try to show, the debate was far less about money than about the enforcement of honor and social discipline: the Committee *did* abolish something, and what it abolished was a system for the enforcement of respect that cannot be understood in economic terms. Second, and equally significant, historians have ascribed the wrong kind of importance to Roman law, and have misjudged the role of the French legal profession. Roman law did serve, in a very complex way, as a commercializing force. But the French legal profession cannot be blamed for that. For the legal profession, far from furthering the spread of Roman law, worked to combat the spread of Roman law.

The real story of the work of the Committee on Feudal Rights, I want to show, is more complex and more interesting. The story, as I will tell it, will focus on one small but critically important seignorial payment, called the "cens," and it will run as follows: it is true that Roman law had a great impact in the prerevolutionary world. Roman concepts were not inherently commercial. But they *were* deeply alien to the customary feudal order of medieval and early modern Europe, and their very alienness had a tendency to break down feudal norms and thus open the way for commercialization. In particular, Roman law broke all legal relations down into either personal or real rights—something utterly foreign to the feudal world, which linked real and personal rights inextricably in a system founded on concepts of loyalty and trust. Medieval jurists who tried to conceptualize feudalism in Roman terms were accordingly able to come up with only two inadequate conceptualizations of feudal rights, one personal and one real. According to the personal conceptualization, which came to be widely used in prerevolutionary France, *seigneurs* were analogous to "creditors"; according to the real conceptualization, which was widely used in prerevolutionary Germany, *seigneurs* were analogous to "real property owners." These Roman models were very different indeed from customary feudal conceptualizations, and if they had been applied directly, they might rapidly have changed feudal society both in France and in Germany.

But in point of fact, the Roman conceptualizations were not directly applied. Lawyers in both countries⁷ were much too conservative to apply anything so deeply disruptive, and they worked hard to neutralize any disruptive effect Roman law might have. In France, in particular, lawyers

7. I will only discuss the French case here; the case of German difficulties with the servitude analogy is extensively discussed in J. Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton, 1990), chap. 5.

developed some elaborate practices to guarantee that *seigneurs* would not be reduced to the status of mere creditors, but would retain an enforceable right to demand "honor and respect." This idea of the enforcement of "honor and respect" was pioneered by one of the great geniuses of Reformation legal history, Charles Dumoulin, and it was imbued with Reformation notions of Christian feudalism. But the enforcement of Christian-feudal "honor and respect" survived long after the Reformation, and indeed flourished in *ancien régime* legal life. It was this right to demand "honor and respect," I will argue, that the much misunderstood Committee on Feudal Rights abolished in 1790. And the abolition of "honor and respect," I will suggest, was not an insignificant revolutionary act, for its enforcement had played a large and obnoxious role in French life before the Revolution.

At the end of the paper, I will offer some conclusions about French legal reasoning, and I will try to make a case for the much neglected importance of the enforcement of honor in law. We have failed fully to understand this revolutionary episode because we are generally blind to the importance of the legal interest in honor—an interest just as important, in many societies, as the interest in money. Finally, in a Postscript, I will propose a comparison with the very different world of the German-speaking countries. German lawyers never developed doctrines of the French kind about the enforcement of respect, and respect was in some sense never abolished in Germany. By contrasting this German history with the French, I will try to draw some conclusions about the importance of French law in shaping the ultimate course of the Revolution.

I

To understand the work of the Committee on Feudal Rights in 1790, we must begin deep in the Middle Ages, with medieval attempts to perform an extremely difficult juristic task: to use Roman law to conceptualize feudal relations.

Roman texts had great authority in medieval Europe, if only because they came from ancient Rome,⁸ and they were studied eagerly from the time of the rediscovery of the Digest of Justinian in about 1100. But medieval jurists found the Roman texts extraordinarily difficult to apply to European countryside society. This was true partly because the details of the Roman texts regulated an ancient society that was thoroughly different from medieval society—one that included, for example, non-Christian institutions

8. For the motivations for the study of Roman law in the Middle Ages, see E. Cortese, "Scienza di Giudici e Scienza di Professori tra XII e XIII Secolo," in *Legge, Giudici, Giuristi. Atti del Convegno Tenuto a Cagliari nei Giorni 18-21 Maggio 1981* (Milan, 1982), 93-148; A. Padoa-Schioppa, "Sul ruolo dei giuristi nell'età del diritto comune: un problema aperto," in *Il Diritto Comune e la Tradizione Giuridica Europea* (Perugia, 1980), 155-66.

such as unrestricted divorce. But it was not just that the specific institutions treated in the Roman texts had no European counterparts; there were also profound differences in fundamental assumptions about the legal world. Roman and feudal traditions gave different answers to the most basic conceptual question of the law: the question of how persons relate to each other and to things. In sorting out the relationships among persons and things, the Roman texts tended to break all relations down into either direct, unmediated relations between persons (obligations) or else into direct, unmediated relations between persons and things (ownership). In feudal relations in rural Europe, by striking contrast, the strong tendency was to avoid division between obligations and ownership.

The difference showed most significantly in the law of real property. In classic feudal society, as we very broadly reconstruct it,⁹ one's property rights depended on whether one was faithfully performing one's duties of loyalty to others. A peasant laboring, let us say, in the depths of the tenth century, was allotted a certain landholding, provided he faithfully performed the duties he owed to his lord and his community. The lord, for his part, also held land on condition that he perform his duties to society, to his vassals, and to his own lord. All rights in land depended on the faithful performance of personal obligations to some other persons. (Conversely, it was understood that persons of a certain social station would be allotted property accordingly.) Thus no one "owned" land in the way that we think of things as being directly "owned." Rather, land was "held" by vassals in return for the performance of services, or the payment of in-kind rents, to lords.¹⁰ The relationship between persons and things was a *mediated function* of the relationship of loyalty and trust between persons.

9. This is of course a highly stylized description of feudal society; I would like to acknowledge that this description is written from a thoroughly legalistic point of view, and is intended to set the stage for an account of sixteenth-century *juristic* theories of feudal ordering. Indeed, the description that I give here corresponds most closely to the assumptions about feudal society to be found in the sixteenth-century juristic authorities Dumoulin (discussed below, Section II); and C. Loyseau, *Traité du Déguerpissement et Delaissement par Hypothèque*, in *Les Oeuvres de Maître Charles Loyseau*, nouvelle éd., ed. C. Ioly (Paris, 1666), separately paginated (orig. 1598), from whom I draw much of my account. For a much more detailed standard account along much the same lines, extensively quoting medieval sources, see F. Ganshof, *Feudalism*, trans. P. Grierson, 3d ed. (New York, 1964). The account I give fits closely with those to be found in most standard *legal*, as opposed to *social*, histories—see, e.g., P. Ourliac and J. Gazzaniga, *Histoire du droit privé français* (Paris, 1985), 45-46—with the exception that I have tried to avoid using the implicitly Roman analytic terms "real" and "personal" in describing the feudal order as it existed before the revived study of Roman law.

10. The same seems to have been true, *mutatis mutandis*, of personalty, as reflected in the centrality of trust in the Germanic rule "Hand wahre Hand." For a brief introduction with references to further literature, see W. Ogris, "Hand wahre Hand," in A. Erler and E. Kaufmann, eds., *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin, 1971), 1: cols. 1928-36.

The contrast with the Roman treatment of property rights was profound.¹¹ In dealing with the question of how persons relate to things (a question, as Paolo Grossi has evocatively said, "soaked in good and evil,"¹² a question going to the heart of a legal system's moral grasp of the world), the ancient Roman legal texts were characterized by a peculiar kind of absolutism of property rights: Roman jurists tended to present the relationship between persons and things as direct and unmediated—one's obligations to other persons had, in principle, no bearing on one's rights in one's things.¹³ If a Roman person "owned" a thing, the link between person and thing seemed, to Roman jurists, as direct and unshakeable as the link between biological mother and child seems to us. An owner's link to his thing (at least as medieval lawyers understood their private law texts¹⁴) was unaffected by the state of the rest of the society, much as a modern mother's link to her child is unaffected by the state of the rest of society. To be sure, the Roman legal texts developed many exceptions to the enforceability of this property absolutism, just as our law has developed exceptions to the principle that a biological mother may always claim her child. But the underlying view of the world, in which persons had absolute and direct links to their things, remained. In this sense, the Roman relation between persons and things, as medieval jurists found it in their texts, was an *unmediated* relationship.

Of these two elementary conceptions of the relationship between persons and things, the feudal conception dominated in the society that learned jurists saw about them in the later Middle Ages and early modern period.

11. For the contrast between the romanist understanding of property and the prevailing medieval understanding, see P. Grossi, "La proprietà e le proprietà nell'officina dello storico," in E. Cortese, ed., *La Proprietà e le Proprietà* (Milan, 1988), 214-15; and H. Honsell, T. Mayer-Maly & W. Selb, *Römisches Recht*, 4th ed. (Berlin, 1987), 142-43; K. Kroeschell, "Zur Lehre vom 'germanischen Eigentumsbegriff,'" in *Rechtshistorische Studien. Hans Thieme zum 70. Geburtstag zugeeignet* (Cologne, 1977), 34-37.

12. Grossi, "La proprietà e le proprietà," 212.

13. For more thorough general accounts, see especially still F. Schulz, *Principles of Roman Law* (Oxford, 1936), 151ff.; as always, Schulz is highly sensitive to premodern debates. See also K. Kroeschell, "Zur Lehre vom 'germanischen Eigentumsbegriff.'" For the classic older view, with a now generally rejected insistence on the unrestricted character of Roman property rights, see G. Dahm, *Deutsches Recht*, 2d ed. (1963), 450ff. For modern objections to this account, see Honsell, Mayer-Maly & Selb, *Römisches Recht*, 142-43. I do *not* wish to deny the truth of what authors like Honsell et al. say with regard to ancient law. My purpose here is simply to describe a medieval and early modern problematic.

14. Cf. Schulz, *Principles of Roman Law*, 152-53: "Duties . . . may be associated with Roman ownership—the aversion to duties so often emphatically stated to be a part of Roman ownership is simply non-existent. The duties, however—apart from those towards neighbours—are seldom or never mentioned, as they come under public law, this being strictly separated from private law, which was the Roman lawyers' main concern." See also Schulz's accompanying footnote, 153 n. 1. The critical fact, then, is not that Roman law was *in fact* characterized by property absolutism, in the sense I am using it here, in antiquity, but that Roman law *as described* in the private law texts with which medieval jurists were familiar, was characterized in that way. It is a peculiar feature of Roman private law that it omitted express regulation of many *social* restrictions which would have limited property rights as they limited other sorts of legal rights.

To be sure, feudal society in anything like its classic form had vanished after the central Middle Ages. As Marc Bloch long ago argued, classic feudalism was associated with a "shortage of currency";¹⁵ classic feudal society was a society based on trust at least in part because it was a society that lacked money; a decline had to set in as soon as money began to circulate widely in the central Middle Ages. The later medieval world became a world in which lords often collected money payments from vassals, especially in the form of land rents, or what was called the "cens," a regular tax-like payment. This monetized order was different enough from the classical feudal order that it is now usually given the separate name "seigneurialism." But despite this heavy monetization, basic feudal assumptions remained, in custom, the law: most property rights remained theoretically feudal, theoretically "held" in return for the performance of personal services—even when those services had in fact been commuted into money payments.

When late medieval and early modern jurists trained in Roman law tried to analyze European property relations, they were thus confronted by rights that violated the root concepts of their texts. On the one hand, lawyers had to recognize that feudal rights were at least in part Roman law "real" rights. Especially after the disasters of the Black Plague and the Hundred Years' War, there was a fairly lively traffic in feudal real properties.¹⁶ But at the same time, the jurists had to recognize that once these real properties changed hands, a vassal-lord relationship was created, with a host of personal obligations. The purchaser—typically the vassal—had to pay rents, and also, often, to perform personal services. Both parties had a general feudal duty of mutual trust and loyalty. No one had rights in the piece of property in question unless those personal duties were observed and personal obligations performed.

How then could one use Roman texts to analyze feudal relations? To some extent, the problem could be solved by means of the famous doctrine of split property, developed by the marvelous Roman jurists of medieval Italy, which held that both *seigneur* and vassal counted somehow as "owner."¹⁷ But it is a mistake to suppose that the doctrine of split property solved all problems. Simply declaring both parties to be part-"owner" did not settle the questions of the greatest financial and social weight: the questions about how and when one party had to make payments to the other. To settle those questions, jurists had to look deeper and harder at their Roman sources. Struggling with their sources, medieval

15. M. Bloch, *Feudal Society*, trans. L.A. Manyon (Chicago, 1961), 66ff.

16. H. Neveux, "Déclin et reprise, la fluctuation biséculaire," in G. Duby and A. Wallon, eds., *Histoire de la France Rurale* (n.p., 1975), 2:41ff.

17. For a brief discussion of this famous doctrine in French context, see Ourliac & Gazzaniga, *Histoire*, 224ff.

jurists managed to develop two quite different approaches, one a "real" approach and one a "personal" approach.¹⁸ Neither was truly satisfactory, but both would linger, in European jurisprudence, down into the time of the great Revolutions.

When medieval jurists tried to think of feudal rights as essentially "real," they analyzed a feudal lord's rights using the familiar Roman concept of "servitudes." Roman "servitudes" were strictly limited rights to use someone else's property—prototypically, a right of way to cross someone else's property. A Roman who had such a right of way did not own the property that he was entitled to cross. Nevertheless, he did have a limited "real" right in that property. The right to demand feudal payments and services could be analyzed as that sort of limited "real" right. When a lord demanded his payments and services, he was acting essentially in the way the holder of a right of way acts: he was, as it were, striding across the feudal property; he was enjoying rights that attached to the piece of property and not to the vassal who happened to possess it.¹⁹

This servitude analogy was in its way quite ingenious. But (as Renaissance jurists would later complain²⁰) it made little sense as Roman law.²¹ Feudal rights clearly imposed upon the vassal a personal obligation to act, whereas Roman texts established equally clearly that servitudes created real rights and could not possibly impose personal obligations. True Roman servitudes were to be passively "suffered." One had one's right to stride across the property, but one could demand no positive acts from the owner. Yet a feudal vassal had the active, personal obligation to gather money or in-kind rents with his own hands, and bring those rents to his lord.

Servitude analysis was, however, not the only alternative. Medieval jurists also tried to analyze feudal rights as essentially "personal" in nature. Lawyers who took this yet more ingenious approach viewed feudal rights as a kind of mortgage relationship. According to this analysis, the vassal was a "debtor," the lord was a "creditor," and the debt between them was "secured" by the infeudated property. It was as though there had been a fictitious loan of money from lord to vassal at some point, secured by the vassal's property. The vassal's payments were mortgage payments, and the

18. Gierke, *Deutsches Privatrecht*, 2:704-05, emphasizes, in my view correctly, that these are two alternative approaches. Current French legal historical literature, by contrast, does not generally treat these two forms of analysis together, as conceptual alternatives. Sixteenth-century scholars were clearer on this point. See still Loyseau, *Traité du Deguerpissement*, I, 3, pp. 6ff. for a penetrating discussion of these alternatives.

19. See now P. Grossi, "'Dominia' e 'Servitutes,'" in Grossi, *Il Dominio e le Cose. Percezioni Medievali e Moderne dei Diritti Reali*, Quaderni Fiorentini Per la Storia del Pensiero Giuridico Moderno 41 (Milan, 1992), 57-122.

20. Loyseau, *Traité*, I, 3, 10, p. 8 and generally pp. 7-8.

21. For the generally accepted critique of this conceptualization, see F. Schulz, *Classical Roman Law* (Oxford, 1951), 384, again sensitive to premodern debates.

lord's rights—particularly his right to reenter the property—could be analyzed as a Roman creditor's rights.²²

This sort of conceptualization had its virtues. In particular, the "creditor" analogy had one very great practical advantage from the point of view of *seigneurs*: it greatly enhanced the liability of vassals. For under the "creditor" analogy, the vassal had personal liability, and in principle could remain personally obligated even if the underlying property were destroyed.²³ Nor was the destruction of the underlying property a purely conjectural possibility: war, and great disasters like phylloxera, often effectively destroyed properties in the premodern world, and it was very much in the interest of *seigneurs* to be able to pursue their vassals even after these all-too-common events had taken place.²⁴

But appealing as the "creditor" conceptualization might seem, it had grave difficulties, just as the "servitude" conceptualization did. Use of the "creditor" analogy raised uncomfortable questions about whether the *seigneur's* rights were usurious. For canon lawyers, the idea that a feudal relationship should be analyzed as a debtor-creditor relationship smacked of all the worst features of usury, for it meant that a two-sided obligation of loyalty would be transformed into a one-sided obligation of liability, and until very late in the Middle Ages, canon lawyers cast a cold eye on the "creditor" analogy.²⁵ Moreover, as Roman law, mortgage analysis was quite as erroneous as was servitude analysis. As a Renaissance critic would object: "The mortgage is a subsidiary or accessory obligation of the *thing*, which serves to confirm and assure the promise of the *person* who is the debtor; but the feudal obligation is a payment due properly and directly

22. See the discussion of Gierke, *Deutsches Privatrecht*, 2:704-05, and references cited therein.

23. This, it is important to say, did not involve simply the *mortgage* analogy, which in principle could limit the obligation only to the underlying property, but the fuller "creditor" analogy, which permitted the imposition of a wide range of personal liability through the creation of "general" mortgages and special liability clauses. For the techniques involved, see B. Schnapper, *Les Rentes au XVI^e Siècle. Histoire d'un instrument de crédit* (Paris, 1957), 57ff.

24. Two sources indicate that the liability of the vassal in the event of the destruction of the property was one, or the, critical factor. First, standard treatments all discuss wartime destruction, which was clearly the principal context. This is true of the German literature discussed below at note 89. A list of authorities is provided, for example, in [J.] Renauldon, *Dictionnaire des Fiefs et des Droits Seigneuriaux Utiles et Honorifiques* (Paris, 1765), 138. It is also true of Loyseau, whose *Traité du Deguerpissement* was a commentary on the status of Paris homeowners who were obliged to pay their rents despite the destruction of their homes in the course of the French Wars of Religion. See the full title of the first edition of Loyseau's work, which is presented as a commentary on a royal ordinance dealing with that problem. Loyseau omitted the subtitle that referred to the context in which he wrote from the third edition on; it is deleted by Loyseau's own hand in the copy of the second edition in the Bibliothèque Nationale, Paris, shelf number F. 20459, which seems to have served as his copy for corrections. The second reason for believing that liability was the key issue is the fact that Roman law analysis dovetailed here with the canon law analysis discussed extensively by Schnapper, *Les Rentes*. See below, note 30.

25. J.T. Noonan, *The Scholastic Analysis of Usury* (Cambridge, Mass., 1957), 154-70; B. Schnapper, "Les rentes chez les théologiens et les canonistes du XIII^e au XVI^e siècle," in *Études d'histoire de Droit Canonique dédiées à Gabriel le Bras* (Paris, 1965), 2:965-95.

from the piece of property, and not from the person.”²⁶ Creditor analysis erred much too far in the direction of calling feudal rights “personal” rights, neglecting their “real” aspect.

Thus both prevailing forms of analysis—servitude and creditor—were wrong as Roman law. But it was difficult to do better. Lawyers who wished to apply Roman law had to make do with the choice between two dubious Roman law analogies: the “personal” creditor analogy or the “real” servitude analogy.

II

The history of medieval struggles with Roman law analysis forms the ultimate historical background to the 1790 work of the Committee on Feudal Rights. Faced with the uncomfortable choice between two unsatisfactory medieval analogies, French legal practice, at the end of Middle Ages, showed a strong tendency to favor the creditor analogy. By around the year 1500, the idea had strongly established itself in French practice that the seigneur should generally be thought of as a kind of “creditor” with mortgage rights. The creditor analogy was directly written into the basic texts of French law, the so-called “Customs” of France, compiled as sources of French customary law through a complex and politicized procedure during roughly the first two-thirds of the sixteenth century. The Customs frequently declared “seigneurs” to have the rights of “creditors,” embracing the Roman “personal” analogy in very full measure.²⁷

Why did French practice, in the form of the Customs, embrace the “creditor” analogy? While the answer is not entirely clear, I think we can speak with some confidence. By embracing the “creditor” analogy, the Customs satisfied two different, powerful constituencies: learned lawyers, and local *seigneurs*. The Customs were redacted by jurists who had been schooled in the great traditions of medieval Roman law analysis,²⁸ and who could be expected to seek *some* Roman law analysis. The Customs were, furthermore, written under pressure from seignorial interests.²⁹ From the point of view of *seigneurs*, the “creditor” analogy had a very

26. Loyseau, *Traité*, I, 3, 11, p. 8.

27. Gierke, *Deutsches Privatrecht*, 705 n. 16; R. Filhol, *Le Premier Président Christofle de Thou et la Réformation des Coutumes* (Paris, 1937), 252. The French customs are reviewed in A. Loisel, *Institutes Coutumières*, ed. Dupin and Laboulaye (Paris, 1846), Liv. IV, Tits. 1-2, pp. 8-26.

28. Ourliac and Gazzaniga, *Histoire*, 150 and 378-79 n. 2, summarize the conclusions of the monographic literature.

29. See, e.g., Piano Mortari, *Diritto Romano*, 87; and the full account of J.P. Dawson, “The Codification of the French Customs,” *Michigan Law Review* 38 (1940): 765-800. Struggles over this issue went on in the customary jurisprudence over the course of the century. See the account of Filhol, *Christofle de Thou*, 249ff.

great advantage indeed, for by using the creditor analogy, it was possible to create extensive personal liability for vassals.³⁰

But if the Customs had already embraced Roman law at the end of the Middle Ages, granting *seigneurs* "creditors' rights," why did the Committee on Feudal Rights have to declare the *seigneurs* to be creditors three hundred years later, in 1789? Here we come to the nub of my tale. The answer is that while the Customs declared the *seigneurs* to be creditors as early as 1500, the French legal profession began to raise questions about that declaration almost from the beginning. As French legal historians have amply shown, sixteenth-century lawyers—moved by the great purist movements of humanism and religious reform—experienced intellectual and spiritual doubts almost as soon as the Customs had experienced their initial redaction in the first years of the sixteenth century. A desire to "reform" the Customs governed much of French jurists' activity throughout the sixteenth century,³¹ and it governed their approach to the *seigneur*-creditor question as well. Thoughtful lawyers simply could not accept the

30. See the full discussion of techniques at the beginning of the century in the context of customary jurisprudence in Filhol, *Christofle de Thou*, 252; as well as Schnapper, *Les Rentes*, 57ff. The "creditor" analogy was possibly attractive to lawyers for another reason as well: because of canon law traditions. Medieval canon lawyers worked along lines that converged with those of the Roman lawyers. Where Roman lawyers tended to assimilate "seigneurs" to the class of "creditors," canon lawyers, driven by concerns about usury, tended to assimilate "creditors" to the class of "seigneurs."

Here the background fact was a pattern of rural lending, dating far back into the Middle Ages. It was inevitable that the monetized "seigneurial" order would have a heavy element of credit transactions. Well back into the Middle Ages, "creditors" were accordingly lending money in transactions that made them difficult to distinguish from "seigneurs." Money, in these transactions, was extended in return for "seigneurial" payments. Practically speaking, there was little means of distinguishing such transactions from ordinary seigneurial transactions. By the late Middle Ages, this form of seigneurialized lending had taken the regular form of the creation of land annuities, later to be called "rentes constituées." In the creation of such a "rente constituée," the lender would acquire the right to a regular stream of rents from the debtor's land. The land, in effect, would secure the loan.

By the fifteenth century, the Canonists had arrived at a decision critical to the tale I tell here: they held that these "rentes constituées" were legitimate as long as they were structured to meet certain requirements. Their interest rate had to be limited; the "seller"-debtor had to have the right to repurchase the annuity, buying his way out of the transaction. Otherwise, they were to be structured as ordinary feudal land purchases, with their payments treated like ordinary feudal prestations. For all this, see generally the account of Schnapper, *Les Rentes*, 49-78.

This canon ruling has interested chiefly economic historians, who have seen it as critical to the rise of a functioning credit economy. But we should recognize that it had grave social as well as economic consequences—social consequences for the ability of lawyers to distinguish seigneurs from creditors. In effect, the canon lawyers had allowed lending as long as that lending conformed to the social norms of the countryside: as long, that is, as creditors "bought" in ways that made them essentially indistinguishable, for most purposes, from seigneurs. On paper, there was no easy way to distinguish these two sorts of rents, and it was (and would remain throughout the early modern period) difficult or impossible to tell a "rente constituée" from a "rente foncière." For a very learned account of the difficulties, see Henrion de Pansey, *Traité des Fiefs de Dumoulin, Analyse et Conféré avec les autres Feudistes* (Paris, 1773), 200ff; for the continuing difficulty "über die Revolution und die napoleonische Herrschaft hinaus," see Van den Heuvel, "Féodalité, Féodal," 39. This practically existing confusion of the two types of "rente" was surely an additional factor, alongside liability, inclining French jurists to use the "creditor" analogy. This was in part simply a matter of law-office utility: since there was often no means of distinguishing the rights of "creditors" from the rights of "seigneurs" anyway, the temptation to declare the two classes to be the same for legal purposes must have been powerful.

31. See the classic account in Filhol, *Christofle de Thou*.

identification of *seigneurs* with creditors, and they set themselves to work reinterpreting the Customs.

The work of reinterpretation was bound up, at least at the beginning, with the social ideas of the Reformation. In particular, it was bound up with one of the most interesting and elusive figures of Reformation legal thought, Charles Dumoulin. Dumoulin, born in 1500, was a remarkably brilliant and profoundly influential lawyer. Like so many of the great French, English, and German lawyers of the sixteenth century, he had deeply Protestant sympathies; like most of these lawyers, Protestantism meant, for him, the resurrection of a lost Christian-feudal order, founded at least in part on the politico-religious leadership of a resurrected Christian nobility. He was, in fact, as many scholars have observed, the founder of a tradition of Ancient Constitutionalism that would spread from France throughout Europe,³² and it was in the service of the revival of the ancient Christian-feudal constitution that he approached the problem of "seigneurs" and "creditors."

When Dumoulin, this great Reformation lawyer, addressed himself to the problem of distinguishing "seigneurs" from "creditors," he was drawing on central ideas of the political theology of the Reform. Luther himself had deplored the tendency to confuse "seigneurs" with "creditors," and had done so in one of his most important writings: his Address to the Christian Nobility of the German Nation of 1520. That famous work was directed to the religious consciences of a Christian seigneurial leadership. It was undoubtedly in part because he needed this leadership, that Luther, surveying the evils of Germany, poured particular scorn on the tendency to call "creditors" "seigneurs." Roman (and canon³³) analysis had contributed to a great confusion of "seigneurs" and "creditors" in Germany as in France. This confusion Luther saw as nothing less than "the greatest misfortune of the German nation"—"a figure and sign that the world has been sold to the devil for the hard dollar."³⁴ For Luther, the confusion of "seigneurs" and "creditors" was a symptom of a terrible corruption in the Christian-feudal order.

32. On Dumoulin, see J.-L. Thireau, *Charles Du Moulin (1500-1566): Etudes sur les sources, la méthode, les idées politiques et économiques d'un juriste de la Renaissance* (Geneva, 1980). For his connection to the larger constitutionalist tradition, see D. Kelley, "Civil Science in the Renaissance: Jurisprudence in the French Manner," *History of European Ideas* 2 (1981): 269; P. Craveri, *Ricerche sulla Formazione del Diritto Consuetudinario in Francia* (Milan, 1969), 198.

33. Luther was, I should rush to state, addressing himself to the *canon* analysis described above. To quote him more fully: "[D]as grossist ungluck deutscher Nation ist gewiszlich der zynzs kauff." M. Luther, *An den christlichen Adel deutscher Nation* (1520), in WA 6:466. For the meaning of "zinskauff," cf. *Grimm Wörterbuch* s.v., vol. 31, col. 1527. For an invocation of this passage by a later German jurist concerned with "rentes constituées," see Iohan-Otto Tabor, *De Praesidiis Debitorum Egentium* (Strasbourg: J. Andrea, 1646), 13r. Again, I must insist on the tremendous importance of the parallelism between canon and Roman analysis.

34. Luther, *An den christlichen Adel deutscher Nation*, 466.

What worried Luther was also what worried Dumoulin, eighteen years later. Luther's heated rhetoric was, however, very different from Dumoulin's sort of sober legal and constitutional analysis. Where Luther fulminated, Dumoulin was obliged to do something much more difficult: Dumoulin was obliged to craft legal arguments that would translate his vision of the ancient feudal constitution into rules for day-to-day seigneurial practice. He needed legal reasoning that would defeat or blunt the "creditor" analogy that was written into the French Customs, and so preserve the feudal social order.

Dumoulin undertook this very difficult task in his famous first work, his *Commentary on the Custom of Paris*, which he published in 1538. The Custom of Paris was the preeminent Custom of France, widely used even outside of Paris as a supplemental body of law. It treated two principal types of Parisian tenures: "fiefs," the so-called noble tenures, which carried a right of homage; and "censives," the non-noble tenures, which carried the right to a tax-like payment called the *cens*.³⁵ With respect to both sorts of holding, the Custom presented Dumoulin with uncomfortable language: both *fief-seigneurs* and *censive-seigneurs* were characterized as creditors.

Dumoulin had no choice but to accept these characterizations: it was the law that both *fief-seigneurs* and *censive-seigneurs* were, for important purposes, to be thought of as "creditors." Nevertheless, it is clear that the law from which he earned his bread brought him spiritual unease, and that he wished to find some means of legal reasoning that would undercut the "creditor" analogy without directly flouting it. This was a problem that he approached differently in dealing with the two different types of Parisian tenures. With regard to *fiefs*, Dumoulin mounted a number of complex and beautifully wrought arguments to show that the relationship between lord and vassal was not an economic relationship (as medieval Canonists had implied), but a more purely feudal relationship of "honor and grace."³⁶

35. Despite the fact that the *censive* was a non-noble tenure, the holder still had seigneurial rights. See, e.g., Olivier-Martin, *Histoire du droit français*, 266-67. This tenure was perhaps particularly important because it threatened most to slip out of the feudal order and into a more purely commercial world.

36. Dumoulin's argument, with regard to fiefs, is of great beauty and deserves to be described in some detail. After denying, against some humanist authority, that the feudal relation had any direct genetic connection with Roman institutions, but praising the Romans as a moral model, Dumoulin turned to the canon authority that held that seigneurs were not usurers, because, even though they extended credit, they extended that credit "graciously and out of liberality." Dumoulin made short work of this specious argument:

nec etiam videtur obstaré quod huiusmodi admissio in fidem est gratiosa & liberalis: & sic potest patronus quam vult legem & modum apponere, ut diximus. supra eo. glo. 2. nu. 1. quia verum est de modo & pacto licito, non de illicito, ut usurario: imo hoc esset abominabilius et nephandius inter patronum & clientum quam inter extraneos . . .

C. Dumoulin, *Commentarius in Priores Titulos antiquae consuetudinis Parisiensis*, in Caroli Molinaei, *Omnia quae extant Opera*, ed. novissima (Paris, 1681) 1:115, Tit. I, § 1, gl. 9, no. 14. Usury was a moral wrong, even as against aliens, one which no degree of "graciousness and liberality" could wash white. How much more "abominable and unspeakable," then, as between "patron and client." A very finely wrought socio-moral argument lay behind this passage, one which legal philosophers can still

His treatment of *fiefs*, however, was not nearly as important for French legal history as his treatment of *censives*. *Censives* were the more important of the two; over the course of the *ancien régime*, they were to become the "normal form" of real property-holding in France.³⁷ It was particularly with regard to *censives* that Dumoulin set the pattern of distinguishing *seigneurs* from creditors that would dominate in French juristic thought up until the Revolution—the pattern of guaranteeing *seigneurs* the personal right to a "show of honor and respect."

Censives were properties whose lords were entitled to a regular tax-like payment, the "cens," from their vassal-debtors. How was one to characterize this relationship as anything other than a debtor-creditor relationship? In searching for answers, Dumoulin lit upon a seemingly insignificant gap in the provisions of the Custom regarding payment. The Custom did not state who had the obligation to deliver feudal payments: it did not say whether the lord-creditor had to fetch his payment from his vassal-debtor, or whether the vassal-debtor had to bring payment to his lord. The question of the delivery of payment may seem a trivial omission; certainly it is the sort of omission that would rarely interest historians doing purely economic analysis. But there is more to human relations than cost, and it was upon this omission that the shrewd Christian lawyer Dumoulin sought to build a social system of honor and respect.

Dumoulin's issue had been briefly addressed by the great fourteenth-century Bolognese authority, Baldus, who had arrived at the following distinction between ordinary debts and seigneurial "debts":

The general question is posed, whether the debtor should be required to go to the place of the creditor, or vice versa. I respond by making a distinction: If the debt is one which involves a measure of obsequiousness, or the showing of respect, then the debtor is obliged to come to the creditor, just as vassals are required to do when they renew their vows of loyalty. *Cens*-payers are required to act in this way, as are

study with profit. The abstract concept of "graciousness and liberality," Dumoulin in effect argued, was useless outside the context of the moral analysis of social relations. The social relation in question was that of "patron and client," of seigneur and vassal seen through the lens of Roman tradition. How then was the status of seigneurs as creditors, unshakeably sanctioned in the Custom of Paris and the traditions of medieval law, to be justified? Here is Dumoulin's solution:

[R]es de qua patronus investit clientem, affert fructum & redditum, & omnis ille redditus, jure optimo debetur, & spectat ad patronum . . . itaque si clientem admittit in fidem iuribus non solutis, multum honoris & gratiae ei facit . . .

Dumoulin, *Commentarius*, 1:116, Tit. I, § 1, gl. 9, no. 19. From a purely abstract point of view, this giving of Dumoulinian "honor and grace" was of course indistinguishable from the giving of canon "graciousness and liberality." Insisting on the social context in this way made no legal difference; in the end, Dumoulin simply accepted medieval legal strictures. But it made a socio-moral difference. For Dumoulin had accepted the old legal strictures on new grounds; grounds that allowed him to preach; grounds that allowed him to emphasize all that was "abominable and unspeakable" in the moral decay of the seigneurial relationship in a world of debtors and creditors.

37. P. Ourliac and J. de Malafosse, *Droit Romain et Ancien Droit* (Paris, 1961), 2:155.

the payers of in-kind rents, since they stand in a relationship of a certain kind of subjection.³⁸

Baldus thus held that feudal and seigneurial creditors, unlike ordinary creditors, were entitled to demand that their "debtors" bring them payment. And they were entitled to make this demand, because it was in the nature of the feudal-seigneurial relationship that debtors were bound to show "a bit of obsequiousness," were bound to show "respect." Ordinary creditors, by contrast, had to arrange a place of payment contractually, or else show up at the door of their debtor, where they could demand only payment, never respect.

Dumoulin seized energetically on Baldus's suggestion, with its little social drama of obsequiousness and respect. The Custom of Paris itself said not a word establishing that the vassal was required to bring his payment to his *seigneur*. But Dumoulin saw a need, and he made it clear that an enforced visit by vassal to lord was necessary in order to integrate *censives* into the larger system of rural honor. Forcing the *cens*-payer to "show respect" at the residence of his *seigneur* was a means of maintaining the feudal character of the *censive*. Dumoulin writes here in what would become one of the most cited passages of *ancien régime* law:

Cens-payers and vassals are obliged to come to their lord, and indeed to his home, whether to make payments or to renew their investiture. For this is not a mere pecuniary debt. It has attached to it the showing of honor and respect, as Baldus beautifully puts it. The same is not true of ordinary payments.³⁹

Behind the pallid legal language of this once-famous passage shimmers the vivid image of a whole rural social order. It is Dumoulin's desire to transform the *cens*-payer's payment into a ceremony as full of meaning as the investiture with a fief. Accordingly, he insists that the *cens* be, as later French terminology would put it, "portable" and not "quéable": he insists that the *cens* be brought by the vassal to the lord, not sought by the lord from the vassal.

So much was essentially no more than what Baldus had suggested. But Dumoulin also went yet further than Baldus had gone: he also focused on the precise nature of the *cens* itself, in ways that would prove extremely influential. What was this *cens*?, Dumoulin asked. It could not be "a mere money debt," for the payment of the *cens* was to be an occasion, not for the settling of mere financial accounts, but for the "showing of honor and respect." Accordingly, "*cens*" was to be understood as a term for "modest

38. Baldi Ubaldi Perusini, *In Sextum Codicis Librum Commentaria* (Venetiis, 1577), ad Tit. De cond. insert. l. 4, p. 167v.

39. Dumoulin, "Secunda Pars Commentatorum Analyticorum in Consuetudines Parisienses," in *Opera Omnia*, 1:815, § 85, no. 3.

annual payment, which is made in recognition of lordship rights.”⁴⁰ The critical word, in this definition, was “modest”: the *cens* had, by Dumoulinian definition, to be a *small* payment. Characterizing the *cens* in this way required Dumoulin to reject much authority.⁴¹ But he found it important to insist that this was not a payment made because it had any value. It was a symbolic *non-value* payment.⁴²

The idea that the *cens* should have little value was quite central to Dumoulin’s vision, one in which I think we should see an important kind of Reformation symbolism. The full scope of Dumoulin’s idea, elaborated from Baldus, was that the *cens*-payer should be obliged to make an annual trip to the residence of his *seigneur*, carrying a symbolically negligible *cens*, in order to show “honor and respect.” At the center of this annual ceremony solemnizing a nonfinancial relationship was to be a payment that was no payment at all. The result was a resonant transmutation of the payment relationship, on its face so purely economic. Dumoulin’s payment of the *cens* served, so to speak, as a kind of financial black mass—a payment whose very design was to deny its own nature as payment. With this, Dumoulin had created a symbolically noncommercial ceremony that would prove to be of great importance from the early seventeenth century on.

But before pressing on to Dumoulin’s later influence, I would like to linger for a moment over his work as a work of legal reasoning. In a sense, Dumoulin had only done what Continental legal theorists and historians say that lawyers always do: he had filled a gap. The Custom of Paris said nothing about whether vassal must go to lord or vice versa. We should notice, however, that he had filled his gap not through an appeal to Roman law, nor through an appeal to custom in any narrow sense, but through the invocation of a fairly grand and deeply reasoned vision of society; his appeal was not to particular provisions of customary law but to a large social tradition. We should also notice how ultimately inaccurate it is to say that Dumoulin “filled” his gap. He did not “fill” a gap in the law of debtor-creditor relations; he *used* a gap to undercut the law of debtor-creditor relations.

At any rate, with this piece of legal reasoning Dumoulin had created a mark by which the “seigneurs” could be kept separate from mere

40. Ibid., 1:671, § 73, no. 20. For the medieval background, see Schnapper, *Les rentes*, 41.

41. Dumoulin, “Secunda Pars,” 1:669, § 73, no. 7 and ff.

42. It was probably possible for Dumoulin to insist that the *cens* should always be small because the great inflation from the late Middle Ages onward, and especially in the sixteenth century, vastly reduced the value of all money payments. See, e.g., Olivier-Martin, *Histoire du Droit Français*, 647-48. In effect Dumoulin was holding that the face value of the *cens*, unlike the face value of other dues, could not be adjusted upwards.

"creditors." A kind of ritualized feudalism would continue to exist—haunting, so to speak, the interstices of the debtor-creditor order.⁴³

III

Dumoulin was not the only jurist to address the great Reformation concern about distinguishing *seigneurs* from creditors. We should place alongside him, at a minimum, the great Loyseau, whose *Traité du Déguerpissement* spoke, at the end of the French Wars of Religion, to exactly the same constellation of "seigneur"/"creditor" difficulties that Dumoulin had faced.⁴⁴ There are other issues, too, that a complete account of this history would touch upon.⁴⁵

Yet Dumoulin, the calm lawyerly Christian, remained supremely important, setting what would remain the basic terms of debate for the next two and a half centuries;⁴⁶ and Dumoulin's minor ritual of the *cens*—always *portable*, always to be brought by the vassal to his lord—would remain at the center of the French Roman legal tradition down to the Revolution. According to the basic terms of the Dumoulinian tradition, *seigneurs* retained, with regard to most payments and rights, the enforcement rights of creditors which had been vouchsafed them by the French Customs.⁴⁷ Nevertheless, those *seigneurs* were something significantly more than mere creditors;⁴⁸ as the *cens* ritual dramatized, they belonged to a feudal order of "honor and respect."

Dumoulin's *cens* remained centrally important indeed, as the great symbol of what French society was not. The *cens* seems to have

43. Dumoulin, I would thus emphasize, was neither "for" the monarchy nor "for" any particular class, but for a feudal order that established rights and duties on all.

44. See note 36.

45. In particular, the creation of a tacit general mortgage on behalf of the seigneur meant havoc for land markets, since these "mortgage" interests were unrecorded. For this "créance privilégiée," see, e.g., Dénisart, *Collection des Décisions Nouvelles*, 317; Renauldon, *Dictionnaire*, 140; [M. de la Touloubre], *Collection de Jurisprudence sur les Matières Féodales et les Droits Seigneuriaux*, nouv. éd. (Avignon, 1773), 1:12-13; 2:69. Repeated royal attempts to develop some sort of recordation practice (beginning already in the sixteenth century!) were defeated by the opposition of landed seigneurs. See A. Franken, *Das Französische Pfandrecht im Mittelalter* (1879; reprint, Aalen, 1969), 20-23; and J. Minier, *Précis historique du droit français. Introduction à l'étude du droit* (Paris, 1854), 553, 637-38. Seigneurs were not only creditors, but also debtors; and a full history of credit and honor in France would have to discuss this seigneurial resistance to subjection to normal debtor/creditor rules.

It should also be noted that seigneurs were not the only holders of such "tacit" mortgages. Other parties with a claim to protection under customary law, particularly wives and other dependents, were also protected under Romanizing analysis through "tacit" mortgages of various types, created both by statute and common law. For a wide-ranging, if strangely rambling, account of the remarkable variety of creditors' rights and debtors' protections (including such items as lawyers' books and priests' vestments), along with a full discussion of forms and procedures, see Antoine Bruneau, *Nouveau Traité des Criées, Contenant les Procédures, pour faire Toutes Sortes de Decrets, Suivant les Coutumes, Ordonnances, Arrests & Reglemens, sur ce intervenus jusques à present*, 3d ed. (Paris, 1704). "Tacit" mortgages were an important means of denaturing debtor/creditor law.

46. For Dumoulin's importance in the eighteenth century, see, e.g., Robin "Fief et Seigneurie," 465.

47. See, e.g., Dénisart, *Collection des Décisions Nouvelles*, 316-17.

48. In part, this was because they had extra creditors' rights. See note 45.

dominated in litigation,⁴⁹ and it dominated in the juristic literature, too. Long after the storms of the Reformation had passed, French jurists continued to follow Dumoulin's authority. Long after the Reformation, the *cens*, and the question of its *portabilité*, remained perhaps the most controverted question of prerevolutionary rural France.⁵⁰

It was a controverted question because, while jurists generally wished to put Dumoulin into effect, putting Dumoulin into effect was a difficult, and in part a juristically dubious, enterprise. In theory, the question of *portabilité* should have been resolved by customary law. There was, however, not enough customary law to settle the question. Some Customs were interpreted as specifying that the *cens* was *portable*—that it had to be brought, as Dumoulin would wish, by the vassal to the *seigneur*.⁵¹ But many Customs (including, as we have seen, the centrally important Custom of Paris) said nothing on this question, and many were interpreted as specifying that it was *quérable*—that the *seigneur*, contrary to Dumoulinian theory, had to come fetch it from the vassal.⁵² Eventually, in this French world of variegated custom, Dumoulin's approach won out, and by the late eighteenth century it won out with a radicalism possible only in French legal culture: it was extended, in principle, even to properties where by custom there was no *cens* whatsoever.

But this victory came only slowly. The mildest form of Dumoulinianism would have been the establishment of the principle that where Customs were silent, it should be implied that the *cens* was portable. Even this mild form was still too radical for the Paris Parlement in 1627, which in that year decided what may have been the first major test of Dumoulin's theory. The peasants of Feugerolles, who lived five or eight miles from their *seigneur's* château, contested their *seigneur's* claim that their *cens* was portable. Claude Henrys, who reported the case, described what was at stake in the ritual of the portable *cens*:

49. As Dr. Schmale has shown, in the sixteenth century, the *cens* accounted for from a quarter to a half of cases between peasants and seigneurs at the Parlement of Paris; in the seventeenth century, from fifty-five to seventy percent; and in the eighteenth century, as much as *eighty* percent of cases involved the *cens*. Calculated according to various methods in Schmale, *Bäuerlicher Widerstand*, 135-36, 153.

50. The heat of this controversy is noted by J. Bastier, *La Féodalité au Siècle des Lumières dans la Région de Toulouse (1730-1790)* (Paris, 1975); and (rather indirectly) by Schmale, see *Bäuerlicher Widerstand*. Neither author brings out, I think, the deeper importance of this controversy in *ancien régime* legal thought.

51. E.g., Custom of Anjou of 1508, § 178, in *Nouveau Coutumier General*, ed. T. Chauvelin, J. Brodeau & J. Ricard (Paris, 1724), 4:546; Custom of Maine, n.d., § 196, in *Nouveau Coutumier General*, 4:482.

52. For examples, see Custom of Melun of 1506, § 132, in *Nouveau Coutumier General*, 3:421-22; Custom of the Grand Perche of 1558, § 83, in *Nouveau Coutumier General*, 3:652; Custom of Blois of 1523, §§ 109, 113-15, in *Nouveau Coutumier General*, 3:1055; Custom of Orléans of 1509, §§ 117, 119, in *Nouveau Coutumier General*, 3:743. For a late survey of the variety of Customs by a very interesting, subversively minded author, see M.D.P.D.C. [Honoré Lacombe de Prezel], *Dictionnaire Portatif de Jurisprudence et de Pratique, à l'usage de tous les Citoyens & principalement de ceux qui se destinent au Barreau* (Paris, 1763), 1:223.

The portable *cens* . . . is demanding and vexatious, and vassals struggle to free themselves from this obligation. On the other side, the seigneurs exert their energies to bind the vassals, since beyond the advantages that they draw when the *cens* is brought to them, it is a great mark of their domination [*grande marque de seigneurie*].⁵³

How to resolve this conflict of interests in honor? Henrys was strongly inclined to follow Dumoulin, holding that at least where the custom was silent, the principle of "honor and respect" dictated that the *cens* be portable unless the local Custom stated otherwise.⁵⁴ The Parlement, however, avoided reaching any such large questions of the nature of respect and its enforcement. Instead, the Parlement held, as a matter of statutory construction, that a few rather ambiguous terms in the local Custom could be interpreted as making the local *cens* portable.⁵⁵

But a half century later, there was much more room for Dumoulinian radicalism. Sixteen eighty-two, in the heat of the legal reforms of Louis XIV, was the date of a decision that would be cited throughout the eighteenth century.⁵⁶ This time, the case involved *la Grande Mademoiselle*, the powerful magnate, who had moved her southern French château across a border in the Massif Central. Her vassals resisted her demand that they bring their *cens* to a residence in a foreign jurisdiction, but the Parlement held against them. *Every cens was always portable*; Customs that seemed to state a rule to the contrary had simply been misread.⁵⁷ It was a basic principal of the seigneurial order that vassals must always present themselves, at *cens*-paying time, at the residence of their *seigneur* in order to "show respect."

That was the watershed. From this 1682 decision on, the jurisprudence of the *cens* was marked by the same phenomenon that marked so many aspects of French intellectual life in the classical period: a clear orthodoxy. With regard to the *cens*, the classical clear orthodoxy embraced Dumoulin and the show of respect as a means of distinguishing *seigneurs* from mere creditors. The *cens* continued to be of disproportionate importance in the

53. Claude Henrys, *Recueil d'Arrets Remarquables donnez en la Cour de Parlement de Paris* (Paris: Gervais Alliot, 1638), 163. The case is also discussed in Schmale, *Bäuerlicher Widerstand*, 135.

54. Henrys, *Recueil d'Arrets Remarquables*, 167-69. The peasants of Feugerolles contended that they were subject to Roman law, and that Roman law would excuse them from the obligation to bring their *cens* to their Seigneur. *Ibid.*, 164. They may well have been right that Roman law would have excused them.

55. *Ibid.*, 170.

56. See, e.g., by [P.P.N.] Henrion de Pansey, *Dissertations Féodales*, 2 vols. (Paris: Théophile Barrois le jeune, 1789), 1:287; C. Pocquet de Livoniere, *Traité des Fiefs*, 2d ed. (Paris: J.-B. Coignard, 1733), 537; F. Bourjon, *Le Droit Commun de la France et la Coutume de Paris Réduits en Principes*, 2 vols. (Paris: Grangé/Rouy, 1747), 1:227.

57. Reported in C. Blondeau & G. Gueret, eds., *Journal du Palais, ou Recueil des Principales Décisions de Tous les Parlements et Cours Souveraines de France*, 2 vols., 4th ed. (Paris: Nyon, 1755), 2:351-53.

legal thought of the eighteenth century,⁵⁸ and so well-established was the orthodoxy that authorities tended to use virtually the same terms to describe the law. In line with the decision of 1682, most legal authorities continued to insist that feudal rents must always be *portable*, that vassals had in general the obligation to present themselves “at the château or principle manor of the *seigneur*.”⁵⁹ These authorities invariably linked the *portabilité/quérabilité* question to Dumoulin’s formula on the “requirement of showing honor and respect.” The seigneurial “cens” was that payment which was owed to a *seigneur* as a sign of his seigneurial status—“in signum superioritatis,” as jurists often put it.⁶⁰ There is little point in extensively citing authorities whose accounts were fundamentally similar. We may simply take one example with the dramatic date 1789, which summarized the orthodoxy as it had been understood for a century—and which also captured some of the intense social anxiety that the orthodoxy embodied. Here writes Henrion de Pansey:

The cens is not requérable, in other words it is rendable & portable. This is the rule.

Dumoulin gives the reason in the following terms: *This is not a mere pecuniary debt. It has attached to it the showing of honor and respect.*

M. Chabrol develops the text of Dumoulin in the following way: ‘The cens consists in *Honor & Respect*. It would not be appropriate if the *seigneur* were obliged to go to the house of his vassal and request a payment which is due to him as a sign of subjection and homage. In general, it would seem just as revolting if a vassal should pretend that he has been liberated from the portability of the cens, as if a vassal were to imagine that his feudal lord was obliged to come find him at his home in order to receive his profession of faith and homage.’⁶¹

It is remarkable how loudly the social concerns of the Reformation continue to echo in this passage, even when explicitly Christian argument has fallen by the wayside. Authors like this, who regarded the idea of

58. See Mackrell, *Attack on 'Feudalism.'* As Pothier summed up post-Dumoulinian French learning on the meaning of the “dominium directum”: “La seigneurie directe que retient le seigneur sur l’héritage qu’est tenu de lui en fief, est une seigneurie purement d’honneur” Quoted in Bastier, *La Féodalité au Siècle des Lumières*, 208. For similar passages, see, e.g., Pocquet de Livonière, *Traité des Fiefs*, 533: “Le cens emporte & dénote la Seigneurie directe; c’est une reconnaissance de l’obéissance & de la sujétion du Censitaire, & de la supériorité du Seigneur.”; Bourjon, *Droit Commun de la France*, 1:226.

59. Rule stated, e.g., in Preudhomme, *Traité des Droits Appartenans aux Seigneurs sur les Biens Possédés en Roture; Avec l’application des Coutumes, des Décisions du Conseil & des Arrêts de la Cour; la manière d’intenter les actions qui ont rapport à cette manière, & d’y défendre: le tout suivant le Droit Commun, & la Jurisprudence actuelle* (Paris: Froullé, 1781), 113. For a southern authority, see [M. de la Touloubre], *Collection de Jurisprudence sur les Matières Féodales et les Droits Seigneuriaux*, nouv. éd. (Avignon, 1773), 2:238ff, with discussion of decrees and decisions throughout the south.

60. See here Henrys, *Recueil d’Arrets Remarquables*, 162.

61. Henrion de Pansey, *Dissertations Féodales*, 1:286.

quérabilité as “revolting,” represented the dominant line in the eighteenth century.

But to say that there was a classic orthodoxy is not to say that there were no radicals who wished to push further. The eighteenth century also saw some remarkable Dumoulinian radicalism in the decades immediately before the Revolution, radicalism that pushed the tradition beyond anything the orthodox tradition was ready to accept.⁶² In these last prerevolutionary decades, jurists went well beyond the Dumoulinian claim that where there was a *cens* by custom, it should always be *portable*. They began to claim that even where by custom no *cens* existed, one should be created by operation of law, in the name of maintaining proper seigneurial order. This argument arose with a kind of inevitable logic from the basic position established by Dumoulin. If the *cens* was truly the “signum superioritatis,” the sign of a *seigneur’s* superior status, then every *seigneur* ought to be able to claim one. But this was a shocking logic to the ears of early modern jurists, since it involved the enforcement of rights for which there was no customary authority. It is thus not surprising that there was no sixteenth-century authority for the notion that a new *cens* could be instituted through this sort of fiendishly uncustomary logic.⁶³

But by the eighteenth century, French jurists, apparently inspired by royal efforts to establish the authority of the crown as feudal overlord of the south,⁶⁴ as well as by the rationalizing drift of the day, were more

62. For the transition from seventeenth to eighteenth centuries as a transition from antitax rebellion to anti-seigneurial-dues rebellion, see R. Chartier, “Culture populaire et culture politique dans l’Ancien Régime: quelques réflexions,” in Baker, ed., *The French Revolution and the Creation of Modern Political Culture*, 250ff. H. Root, “Challenging the Seigneurie: Community and Contention on the Eve of the French Revolution,” *Journal of Modern History* 57 (Dec., 1985): 681, argues that the intensification of dues took place—if at all—in the seventeenth and not the eighteenth century. This is belied by Schmale’s figures, cited note 49.

63. Contrast Schmale, *Bäuerlicher Widerstand*, 145-46, who, in my view, takes too seriously eighteenth-century claims that this sort of innovative *cens* had already been imposed in the sixteenth century. Closely read, the sixteenth-century authorities are easily distinguishable. The case of the Religieux de Reaulieu près Compiègne, for example, recounted in G. Louet, *Recueil d’Aucuns Notables Arrests donnez en la Cour de Parlement de Paris*, 6th ed. (Paris, 1620), 124-34, seems to have involved *written* title; and, honestly read, the oft-cited Ordinance of Rousillon was not much help, since it concerned only the treatment of existing rights. That this reasoning was new is also suggested by the pre-mid-century commentaries on the critical Article 85 of the Custom of Paris, which dealt only with minor points of interpretation. See, e.g., M.I. Tournet, *Coutumes de la Prevosté et Vicomté de Paris* (Paris: Michel Bobin, 1641), 110-12; C. de Ferrière (rev. M. Sauvan d’Arainon), *Nouveau Commentaire sur la Coutume de la Prevosté et Vicomté de Paris*, 2 vols. (Paris: Guillaume Cavelier, 1719), 1:165-66.

64. This radical line of jurisprudence developed as the crown tried to establish its “directe universelle,” its status as feudal overlord in the south of France. A politically important arrêt de conseil of 1746 declared Agen, Condom, and Marmande to be obliged to the King as “universal seigneur” (“sous la directe universelle du Roi”); and continued by holding that “cette directe emporte nécessairement un cens recognitif.” Accordingly the conseil ordered “en conséquence que dans les lieux où la perception du cens peut avoir été interrompue, il en sera imposé de nouveau.” See Henrion de Pansey, *Dissertations Féodales*, 1:269, cited by the famous feudiste La Poix de Fréminville, and subsequently repeated in the juristic literature. For La Poix de Fréminville’s importance, see, e.g., A. Soboul, “De la pratique des terriers à la veille de la Révolution,” *Annales E.S.C.* 19 (1964): 1051. For the political background to this arrêt, which stretched back generations, see F. Loirette, “The Defense of the Allodium in Seventeenth-Century Agenais: An Episode in the Local Resistance to Encroaching

ready to follow logic where it might lead them. Typical was the marvelous François Bourjon, whose "Droit Commun de France" of 1747 was intended to bring Cartesian method to the longstanding French project of developing a unified customary law for all France. Bourjon laid out the basic line of reasoning about introducing the unprecedented *cens*, not only for the King, but also for *seigneurs*.⁶⁵ All French real property was to be presumed seignorial property, subject to a portable *cens*.⁶⁶ Even fiefs, in the absence of title to the contrary, were thus to be, as it were, "censivized," made subject to a *cens*. Bourjon's argument for this radical reordering of France's real property shows how deeply French intellectual life had moved away from the concerns of the Reformation in the direction of physiocratic economics. Universalizing the *cens*, argued Bourjon, was a good thing, because to do so would tend to make these formerly feudal properties economically freer.⁶⁷ This could do no economic harm: because it was by definition modest in size, the *cens* did not belong to the world of economic calculus, but to the world of honor.⁶⁸ Making all French properties *censives* would thus reconcile the economy of money with the economy of honor, regularizing and solidifying the French system of honor without imposing costs that might endanger financial liberalization. Dumoulin had sought to cabin off the sphere of the economic in order to emphasize the importance of the sphere of honor, assimilating *censives* as closely as possible to *fiefs*. Bourjon, by contrast, here sought to cabin off the sphere of honor, assimilating *fiefs* as closely as possible to *censives*. Bourjon's goal was, of course, to emphasize the importance of the sphere of the economic.

The desirable state of economic affairs Bourjon hoped to promote could not, however, be achieved unless and until the *cens* could be introduced into a huge number of properties in which no *cens* was customary. Was that legal? Here came an extremely important point in Bourjon's reasoning. Introducing an unprecedented *cens* was indeed legal, held Bourjon, because the *cens*, like all historically feudal rights, was imprescriptible. Even if the right to the *cens* had not been claimed for thousands of years, that right could not be lost. This idea of the imprescriptibility of the *cens* was old, but the conclusion Bourjon drew from it was not: merely

Royal Power," in R.F. Kierstead, ed., *State and Society in Seventeenth-Century France* (New York, 1975), 181, 192 and passim. Loirette discusses only archival records and not the very significant impact of this arrêt on late-eighteenth-century juristic thought.

65. Bourjon, *Droit Commun de la France*, 1:226: "Cette charge est une suite nécessaire de la maxime, nulle terre sans Seigneur, nul franc-aleu sans titre; ainsi tout héritage est présumé tenu à cens si il n'y a titre contraire."

66. Ibid. (the universality of the *cens*); 1:227 (its *portabilité*).

67. Ibid., 1:226. To Bourjon this reflected in part the presumption in favor of liberty, since it meant that the properties in question were seignorial rather than feudal.

68. This is, as it were, the converse of the proposition enunciated by Root, "Challenging the Seigneurie," 654: "As feudal dues became residual they became detestable."

on the strength of his status as *seigneur*, a *seigneur* could always claim his modest *cens*, the sign of his superiority, even if he could point to no custom, no ancestor, no tradition. Prescription could never argue against this historically feudal right.⁶⁹

Bourjon's radical line of reasoning was very widespread indeed from the mid-eighteenth century onward (though lawyers naturally challenged it).⁷⁰ The critical subsidiary points—first, that the *cens* was by definition modest, merely a matter of honor and not of gain; and second, that the right to a *cens* was wholly imprescriptible—were more or less universally accepted.⁷¹ The larger conclusion—that an unprecedented *cens* could, in absence of title to the contrary, in principle always be instituted—was also widely accepted after mid-century, by jurists if not clearly by courts.⁷²

The state of affairs around mid-century was nicely summarized by J.B. Denisart in 1775. By that time it was clear that juristic logic dictated that all *seigneurs* could, in principle, claim a *cens* with hope of success. Denisart recited the standard reasoning. The *cens* was a modest annual payment, sometimes in cash, sometimes in kind.⁷³ It was, however, not simply a payment: "It contains within itself a sort of right to honor."⁷⁴ In all northern, and many southern, parts of France, the right to the *cens* was non-prescriptible.⁷⁵ As a non-prescriptible and modest sum, the *cens* could be claimed by any *seigneur* purely on the strength of "sa qualité de seigneur féodal."

Nor was this right merely theoretical. Denisart cited 1753 litigation which confirmed a *seigneur's* right to such a *cens*, along with twenty-nine years of arrearages, though he also cited a decision to the contrary.⁷⁶ Other authors cited other decisions.⁷⁷ Together, these decisions make it clear that after about 1750, it became in principle possible for French *seigneurs* to claim wholly unprecedented *cens*, along with twenty-nine years' arrearages.

69. Bourjon, *Droit Commun de la France*, 1:226-27.

70. Cf. Root, *Peasants and King in Burgundy*, 191-92 (some lawyers try to argue against prescriptibility where rights are not uniform).

71. For examples of modicité, see, e.g., Pocquet de Livoniere, *Traité des Fiefs*, 534. For examples of imprescriptibility, see, e.g., Guyot, *Traité des Fiefs*, 2:16ff; Pocquet de Livoniere, *Traité des Fiefs*, 533; I. Brodeau, *Coutume de la Prevosté et Vicomté de Paris* (Paris, 1669), 1:481-82; and generally Schmale, *Bäuerlicher Widerstand*, 145.

72. It is significant that Pocquet de Livoniere, *Traité des Fiefs*, makes no mention of this issue in 1733. This is the only major issue upon which Pocquet de Livoniere does not touch.

73. J. B. Denisart, *Collection de Décisions Nouvelles et de Notions Relatives à la Jurisprudence Actuelle*, 9th ed. (Paris: Desaint, 1775), 1:315. Denisart shrewdly observed that the low value of the *cens* was probably the result of sixteenth-century inflation.

74. *Ibid.*

75. Although the arrearages and the "quotité" were prescriptible after thirty years. *Ibid.*, 318.

76. *Ibid.*, 317.

77. Henrion de Pansey, *Dissertations Féodales*, 1:269.

To my knowledge, there was no large number of these cases, and there were undoubtedly more unfavorable than favorable decisions.⁷⁸ But the favorable decisions exercised a special fascination for French jurists, and it is easy to see why. These were the decisions that pushed the juristic logic to its limits. Moreover, the result of these decisions must surely have been one of the more humiliating and affronting experiences offered by modern legal systems. Numbers of Frenchmen were forced to submit to the payment of *cens* their predecessors in title had never had to pay—and forced to pay a *cens portable*, which meant that once every year they had to present themselves at the château of some lord in order to show him respect.⁷⁹

IV

By the eve of the Revolution, French jurists thus had behind them three centuries of efforts to neutralize the acid of Roman debtor-creditor analysis, distinguishing *seigneurs* from creditors by guaranteeing the former a show of respect. During the period after mid-century, these efforts had grown to such a level of intensity that at least a few Frenchmen who never before had paid the *cens* were being forced to make an annual trip to the château of their *seigneur* in order to make a show of respect, carrying with them, the first time, twenty-nine years of arrearages. That such a humiliating duty could be imposed on Frenchmen, with so little customary authority, is a measure of how intensely the French juristic community wished to safeguard the system of honor and respect against any threat of infection from Roman debtor-creditor rules. “Romanization” of any straightforward kind simply did not take place in the prerevolutionary countryside.

To be sure, there was also a more deeply romanizing tradition which insisted that according to principles of Roman law, *seigneurs* were mere creditors who were obliged to come fetch their payments as other creditors did. In particular, there was the fine author Boutaric, who was strongly committed to using Roman law as the basic source for supplementing French customs. So radical was this author that, at times, he seemed ready to drop the requirement of respect entirely, and he was prepared to argue,

78. See the cases summarized by M. Chapsal, *Discours Historiques sur la Féodalité et l'Allodialité; suivis de Dissertations sur le Franc-Aleu des Coutumes d'Auvergne, de Bourbonnois, du Berry, de Champagne, et principalement sur la partie de cette Province régie par la Coutume de Vitry* (Paris, 1789), 185-89 (also discussed by Dénisart), 271-72.

79. This could, of course, cut both ways. Thus Pothier declared “c'est abusiv et improprement que, dans nos coutumes, les créanciers de rente foncière sont appelés seigneurs de rente foncière.” Quoted in Piret, *Rencontre chez Pothier*, 149-50; cf. Salviat's efforts to insist that the title “Seigneur” be limited to “celui à qui appartient une rente foncière.” Quoted and discussed in Schmale, *Bäuerlicher Widerstand*, 69 n. 70.

contrary to prevailing authority, that the *cens* was normally *querable*.⁸⁰ There may have been a few others, too.

Still, I think it is fair to say that this radical romanizing tradition was weak; it is a mistake (sadly made by one leading historian⁸¹) to treat Boutaric as typical. Jurists tended to be very hesitant indeed about applying Roman principles. To find really vigorous Roman law radicalism, we must abandon the technical juristic literature, and turn to pseudo-juristic philosophical history. We must look, for example, to the unoriginal but often ingenious M. Chapsal, whose *Discours Historiques sur la Féodalité* appeared in 1789. In that work, a universal history in the Montesquieuian tradition, Chapsal attacked the pretensions of *seigneurs*, contrasting them unfavorably with creditors. *Seigneurs*, wrote Chapsal, following good enlightened tradition, had their status only through usurpation.⁸² Creditors, by contrast, were merely exercising the most historically just of rights, drawn from the earliest days of Roman law. Chapsal imagined a world of early society in which most persons lived from their private property. But:

Society having once been established, there may have been individuals who, because they had managed their property badly, had no means of providing for their needs, and who accordingly were obliged to borrow. The laws of the society thus needed to legislate about repayment, and creditors were doubtless permitted to force their debtors to cede property in proportion to the loan. The same laws of society, in order to punish the idleness and bad faith of those who borrowed beyond their means, could have permitted the creditor to reduce his insolvent debtor to servitude.

“So it is,” he added, “that laziness and neglect gave rise to inequality.”⁸³ Nothing more natural and normal than debt-enslavement; it was seigneurialism that was perverse! In this strange inversion of Luther’s values, we see true Enlightenment radicalism. Certainly it was much more radical than anything France’s jurists could offer—until we come to the Revolution.

For it was emphatically only with the shock of the Revolution that the French jurists finally surrendered to the creditor analogy. To return to our starting point: on August 4, 1789, the abolition of feudalism was proclaimed, and in the succeeding days, the Assembly produced its preliminary legislation.⁸⁴ Shortly thereafter, the Committee on Feudal Rights was

80. [F.] Boutaric, *Traité des Droits Seigneuriaux et de Matières Feodales* (Toulouse: Gaspard Henault, 1745), 181-83.

81. R. Mousnier, *The Institutions of France under the Absolute Monarchy 1598-1789*, trans. B. Pearce (Chicago, 1979), 1:494, seems clearly to rely too uncritically on Boutaric.

82. Chapsal, *Discours Historiques*, 148ff.

83. *Ibid.*, 15-16.

84. That preliminary legislation, following the lines of French tradition, held that feudalism was essentially a personal, and not a real, phenomenon: only personal rights were abolished, whereas real rights were to be redeemable.

constituted, and in the midst of growing tension in early 1790, the Committee offered its countrymen the explanation that "the *Seigneurs* have descended to the rank of simple *Creditors*."⁸⁵

I hope that some of the wealth of meaning in this phrase is clear after what I have recounted in the foregoing pages. With this declaration, the French legal community surrendered, after three centuries of resistance, to "revolting" Roman debtor-creditor law, rupturing the wall of rank it had erected between *seigneurs* and creditors.

And it was emphatically the French juristic community that spoke here, not the Revolutionaries in general. This shows most clearly in the Committee's treatment of the *cens*. The National Assembly's preliminary legislation had provisionally abolished the *cens* as a purely feudal payment and a much-hated one.⁸⁶ Rather than concur in this abolition, the Committee felt it necessary to reinstate the *cens* in a new-old form. The *cens*, declared the Committee, had not been abolished, but transformed. It was now merely once more a pecuniary debt. Pennies the *cens* might be, but they were pennies that must be paid, because they were pennies that were owed to a creditor.⁸⁷ This may seem to demonstrate how ruthless the Committee was in its zeal to preserve the economic rights of the *seigneurs*, but we must not forget that the *cens* was by definition of no economic value, nor must we forget the social drama of the old rule requiring vassals to bring their *cens* to their lord. The Committee's decision to reinstate the *cens* had a large symbolic meaning. It undid all the labors of the long Dumoulinian tradition, by insisting that coins were merely money, not "tokens of superiority"; by making the *cens* yet another payment that the creditor must simply seek from his debtor. It declared an end to three centuries of efforts to maintain a ritual feudalism of honor distinct from the world of commerce.

Indeed, it was in many ways radical work that the Committee did. Let me now summarize precisely how we should understand the Committee's work. The Committee's report was something much more far-reaching than an *ad hoc* piece of counterrevolutionary pettifoggery. It was an attempt to upset a system for the enforcement of respect that was of real importance in France. It bears emphasizing that the *cens* had been extremely prominent in prerevolutionary legal life: Frenchmen had been litigating fiercely over the requirement of showing respect that the *cens* represented.

85. "Rapport fait à l'Assemblée Nationale au Nom du Comité de Féodalité de 8 Février 1790 par M. Merlin, Député de Douai," in *Procès-Verbal de l'Assemblée Nationale*, vol. 13 (Paris, n.d.), 7. "[L]es censitaires ne sont pas . . . déchargés de l'obligation de reconnoître leurs Seigneurs: Seulement les Seigneurs étant descendus au rang de simple créanciers de dettes foncieres, il ne peut plus être exigé des censitaires, d'autres reconnoissances, ni d'autres déclarations, que si ceux-ci n'avoient été orginairement que Débiteurs ordinaires de prestations ou redevances réelles."

86. See, e.g., Furet, "Night of August 4," 111.

87. See Garaud, *La Révolution et la Propriété Foncière*, 184.

Eliminating seigniorial rights and substituting creditors' rights was a dramatic and significant change.

If legal historians have failed to grasp how dramatic and significant the work of the Committee was, that is because they have failed to grasp how much honor and respect matter in the world. There is more to human relations than cost; in this, as in a host of other aspects of the French legal system (and other legal systems as well), the battles that parties fight are often battles over their social and personal standing. The history of the *cens* is also in one way peculiarly revealing. Making the *cens* a matter of respect required Dumoulin and his followers to tease out social possibilities in the very payment relationship itself. A shrewd lawyer like Dumoulin could detect issues of honor even in this most seemingly financial of relationships, merely by focusing on a superficially minor matter: who, payor or payee, was obliged to come to whom?

The way that Dumoulin teased this hidden hierarchical issue out of the payment relationship also suggests some conclusions about the ways in which lawyers reason. Our standard accounts of the Revolution have supposed that lawyers are basically technicians in the business of applying conceptualizations, with little regard for the social consequences of what they do. But Dumoulin and the powerful members of the French legal profession who followed him did not serve as the technician-agents of the spread of destructive Roman concepts. To be sure, those Roman concepts were around, and to be sure those concepts did have something of a destructive effect. In particular, the "creditor" concept was around, and it had the effect of offering authority for the substitution of one-sided liability where there had once been two-sided loyalty. If the "creditor" concept had spread unchecked, it might well have transformed France into a debtor-creditor order, as the standard accounts suggest.

But the "creditor" concept did not spread unchecked. It did not spread unchecked, at least in part, because the legal profession was not interested just in technical conceptualization. The legal profession was interested in much grander issues of social order. Dumoulin and the lawyers who followed him were perfectly well aware of the danger of commercialization, and, stirred at first by Reformation visions of a healthy Christian-feudal order, they displayed great shrewdness and theoretical sophistication in defending and enforcing "honor and respect." They built, in fact, a whole edifice of feudal rights that could continue to exist alongside the edifice of creditors' rights.

French legal reasoning was thus not (or at least not always) about technical conceptualization. French lawyers did not just fill gaps, nor did they simply try to solve the dispute before them. They tried to integrate the parties before them into a larger social order—in this case, a larger social order of honor and respect. They reasoned about the way society should be constituted *as a whole*. That such was the case in France can be

elegantly illustrated with yet another example from the same eighteenth-century French legal community, an example with which I close. Here is how a M. Muyart de Vouglans, of the bar of the Parlement of Paris, explained in 1767 why Beccaria's enlightened principles of equality before the law did not apply in France:

The author pretends . . . that it is unnecessary, in imposing punishments, to consider the *Quality* of the person against whom the crime has been committed; and gives as a reason that all men depend equally upon the society of which they are members. He also wishes, for the same reason, that persons of the highest rank be punished in the same way as the least of Citizens.

One senses all the danger and absurdity of such a principle. It is not only contrary to the disposition of the laws, which have always distinguished according to the Quality of persons in establishing penalties; and to daily experience, which teaches us that, as persons of a higher condition hold honor dearer than life itself, the imposition of a simple shameful punishment makes a deeper impression upon them than corporal punishments make on persons of low condition; it is also contrary to the author's own system, since the public interest, which he wants to place so much at the center of analysis, demands that one have particular regard for noble persons and persons with dignity, the extinction or blemishing of which can not fail to cause *damage* to society.⁸⁸

The great issue, in prerevolutionary French legal reasoning, was not legal technique, not justice, not philosophy, not elegance of reasoning. The great issue was the fundamental values of "la société," as articulated and enforced by juristic minds such as Dumoulin and Muyart de Vouglans; that *société* was one that would not, until the great Revolution came, tolerate blemishes upon the dignity of its noble persons.

POSTSCRIPT

But of course the great blemish of the Revolution did finally come to France. That fact brings me to this Postscript, in which I want to compare France with the very different German-speaking world. German lawyers had very different social visions from French ones, and they developed a jurisprudential tradition very different from that of the French. German jurisprudence never concerned itself with the definition or enforcement of respect, the way French jurisprudence did, and respect was, in some sense, not abolished in Germany during the revolutionary period. The dignity of the German seigneurial class survived the Revolution largely without

88. Muyart de Vouglans, *Avocat au Parlement, Réfutation des Principes hasardés dans le Traité des Délits et Peines, traduit de l'Italien* (1767), 103-04. My thanks to Mirjan Damaska for bringing this book to my attention.

blemish. This makes for a contrast that I want to develop in this Postscript, as a way of gaining a better purchase on just how important the peculiar focus of the French legal profession on "honor and respect" was in setting the stage for the Revolution.

Early modern German jurists faced the same difficulties as their French counterparts in using Roman law to analyze seigniorial rights. At first, they followed a similar path of Roman legal analysis; through the seventeenth century German jurists seem, by and large, to have accepted the "creditor" analogy, Luther's railings, and severe difficulties in the Thirty Years' War notwithstanding.⁸⁹

Yet if pre-eighteenth-century Germans accepted the "creditor" analogy, they did not cite Dumoulin, or grand French ideas about "honor and respect" more generally.⁹⁰ In the German seventeenth century, there was never any doctrine that the *cens* had to be a small payment symbolizing honor value as opposed to money value. The very word "cens" in German—"Zins"—came, strikingly enough, normally to mean "interest payment," what it continues to mean to this day.⁹¹ The *cens* in Germany was a payment made not to *seigneurs*, but to creditors. Indeed, more broadly, seventeenth-century Germans never seem to have developed anything like the elaborate French debate over respect and its enforcement.⁹²

If German jurisprudence had already taken a significantly different direction from French in the seventeenth century, the differences were magnified at the beginning of the eighteenth. At that time, as a number of historians have noted, German jurists moved sharply away from the old "creditor" analogy in the direction of the "servitude" analogy.⁹³ German

89. See especially those pamphlets dealing with the spectacular ruination at the end of the Thirty Years' War; e.g., Caspar Manzius, *Praeludium Belli Civilis inter Rigorosos Creditores & Calamitosos Debitores super Censibus et Pensionibus praeteritorum Annorum* (Ingolstadt: Typii Gregorii Haelini, 1642), 115-21; P. Zorer, *Rechtmässiges Bedencken und ohnvorgreifliche Vorschläge über etliche bey jetzigem bewusten zerrüttten und ruinirten Zustand/ der Herrschafften und Unterthanen in dem Heil. Röm. Reich/ vor den Gerichten und Obrigkeiten hin: und wider vielfältig vorfallende Fragen*, 2d ed. (Nürnberg: bey und in Verlegung Jeremiae Dümmlers, 1651), e.g. 121; Iohan.-Ottonis Taboris, *De Praesidiis Debitorum Egentium* (Strasbourg: J. Andrea, 1646), 2r-v. A number of pamphlets on the issue of the German *cens* at the end of the Thirty Years' War are bound together in a volume in the Staatsbibliothek Berlin, Haus 2, with the call number Gy 555*.

90. See, e.g., Manzius, *Praeludium Belli Civilis*, 6.

91. See, e.g., *ibid.*, 7.

92. To be sure, the German jurists, like their French counterparts, were aware of the traditions of feudal loyalty. But, unlike the French jurists, the Germans never developed any system of the legal enforcement of respect; nor any Dumoulinian or Montesquieuan grand theory of honor. On the contrary, German jurists contented themselves with repeating empty feudal formulas, for which they proposed no enforcement mechanism. For such a formula, see, e.g., G.G. Titius, *Das Teutsche Lehn-Recht Nach Seiner eigenen Beschaffenheit und Verfassung des Teutschen Staats*, 2d ed. (Leipzig, 1707), 66-67.

93. See especially G.G. Titius, "Dissertatio de Servitute Faciendi," in D.D. Bartholomaei Caepollae, *Tractatus de Servitutibus* (Lausanne/Geneva: Sumpt. Marci-Micharlis Bousquet & Socior., 1756), 555-72. Cf. already Titius, *Das Teutsche Lehn-Recht*, 367, attacking the doctrine of "tacit" mortgages. See also the literature collected in Whitman, *Legacy of Roman Law*, 169 n. 75.

jurists shifted from calling *seigneurs* “creditors” to calling them “owners.” Why this shift took place is a difficult problem, which I cannot fully solve here—though I believe the short answer is “Enlightenment,” and in particular Saxon Enlightenment.⁹⁴ (For my purposes here, I would, however, like to note that this difference between Germany and France shows how much historians oversimplify when they speak of the “reception” of some single corpus of commercializing Roman law.)

The result, at any rate, was that by the time of the Revolution Germans had no tradition of the sort of jurisprudence of respect that the French had; no one had ever much discussed how one went about enforcing “honor and respect,” or what it would mean to “*la société*” to do so. The German difference was noted in the 1760s by a jurist named Goetsmann, who described seigneurial practices in Alsace for a French readership. Goetsmann described what, by the mid-eighteenth century, had become a striking socio-legal contrast:

The feudal regime, as it exists in Germany, is the authority of a certain number of Seigneurs, subordinated to each other by the right of birth, and by the possession of certain lands; it is the servitude of one piece of real property to another piece of real property [c'est la servitude d'une terre, sous une autre terre].

Many politically-aware persons [Politiques] in France believe that there are serious defects in this sort of regime; the feudal regime, they say consists purely in the authority of a *seigneur* over his vassals. . . .⁹⁵

So different was Germany from France that Goetsmann expected his French readers to find the German system nothing less than subversive.⁹⁶ “The feudal regime” was, in the mind of the French, purely about “authority”; it was positively dangerous to mix it with real rights, with the German idea

94. The shift to the “servitude” analogy seems to have come among Saxon scholars who had both the intellectual concerns, and possibly also the humanitarian concerns, of the state that was the great center of German Enlightenment in the early eighteenth century. Enlightenment, among these scholars, meant in large part an intellectual determination to mount more correct descriptions of the world around them. This meant emphasizing what had always been clear: the heavily real character of feudal properties, in which there was, after all, a lively real estate market. Also at work may have been the old liability concerns, now presented in the context of the Great Northern War, which devastated Saxony immediately before Saxon jurists moved to the “servitude” analogy and its less far-reaching principles of liability.

The “servitude” analogy also had some conceptual advantages. In particular, it meant that jurists could consolidate the treatment of rents with the treatment of other feudal rights. See Whitman, *Legacy of Roman Law*, 170. The author of one letter to the Committee on Feudal Rights noted this important consequence of using the servitude analogy: see C.G.H., “Observations relatives au Decret de l'assemblée nationale des 4. 5. 6. 7. 8. et 11. août 1789 portans abolition du regime feodal,” 13 December 1789, in Archives Nationales D XIV 13, 94 Pièce 6.

95. M. Goetsmann [=Louis Valentin Goetzmann?], *Traité du droit commun des Fiefs*, 2 vols. (Paris, 1768), I:1.

96. *Ibid.*, I.

of "the servitude of one piece of real property to another piece of real property."

A world of social difference was thus reflected in the differing doctrines of France and Germany by the end of the eighteenth century. This difference came fully to the fore when France spilled over the Rhine into Germany at the turn of the century. When Revolutionary and Napoleonic regimes attempted to extend the reach of French abolition legislation into regions historically governed by German law, it was, strikingly, possible for German lawyers to claim that the French abolition simply did not apply in their lands. The French abolition, German jurists argued, had been an abolition of a system of honor and respect, whereas the German system had, in law, never been any such thing.

Thus one pamphleteer wrote that French legislation could not possibly apply in Alsace (French, but ruled by "Germanic law"⁹⁷) in part because by French definitions a seigneurial right was recognized by its "modest amount." German payments were real payments, not "modest" ones; accordingly a wide range of Alsatian obligations had to be regarded as not abolished.⁹⁸ Another author, equally eager to deny that French legislation applied to differently conceptualized German rights,⁹⁹ explained that the French legislation had only abolished those payments which represented a "pure evidence of honor."¹⁰⁰ This sharply limited—indeed, practically nullified—the effect of the French legislation in Germany. For there were simply not seigneurial rights that fit the forms of French analysis to be found in Germany:

Not every payment [Zins] has been abolished in France. Rather, it is only those which have their immediate origin in the feudal system. In order to distinguish such a payment from all the others, I want to offer here a few marks, by which French jurists sought to make feudal payments particularly recognizable.

Since the seigneurial *cens* [Zins] was paid merely with the purpose of representing a ceremonial recognition of seigneurial rights, the *cens* was regarded, with respect to the seigneur, more as a mark of honor than as valuable income.

*The cens was more a matter of honor than profit.*¹⁰¹

97. *Traité sur la Nature des Biens Ruraux dans les deux Départements du Rhin, ci-devant Province d'Alsace* (Strasbourg: André Ulrich, n.d. [after law of 17 juillet 1793]).

98. *Ibid.*, 11-12.

99. A. Stündeck, *Historisch-Juridische Abhandlung über die Abschaffung der Lehns-Verfassung in Frankreich. Nebst praktischer Abwendung derselben auf die im Ruhr-Departement unter dem Namen Leibgewinns und unter ähnlichen Namen bekannten Abgaben* (Crefeld: Schüller, 1805), iv. This author could be quite as passionate about creditors' rights as his German predecessors of the Thirty Years' War. See *ibid.*, vii.

100. *Ibid.*, 2-3.

101. Stündeck, *Historisch-Juridische Abhandlung*, 42-43.

German obligations, however, simply did not fit the French juristic model, and French legislation had correspondingly small application to German feudalism.¹⁰²

Germans thus never defined feudalism as a system of "honor and respect," and that fact allowed at least some lawyers to combat French abolition legislation during the revolutionary period. The edifice of "honor and respect" that was torn down in France was not there to be torn down in Germany: Germany was simply never a land in which feudalism was legally defined and enforced as a system of respect.

Moreover, if Germans never defined respect, one can say that they never abolished it either, during the revolutionary period or after. It is a commonplace of comparative history that the German nobles managed to keep their grasp on status and power long after their French counterparts had been forced to yield.¹⁰³ German politics continued to be characterized by an atmosphere of seigneurialism until 1933; indeed there is a body of opinion which blames the disaster of 1933 squarely on the failure of the Revolution to dispose of the social power of German *seigneurs*: it was, so runs the argument, the catastrophic marriage of modernization with lasting seigneurialism that explains how badly wrong German society went.¹⁰⁴

That may or may not be true, but it is surely true that seigneurial hierarchy survived the revolutionary period in Germany better than it did in France. "Honor and respect" were, in some sense, never abolished in Germany. And that offers us meat for some speculative comparative conclusions.

What happened in France that did not happen in Germany? Can we say that the French lawyers, by focusing so squarely on "honor and respect," smoothed the way for an abolition of respect that never came to Germany?

On one level it is quite easy to see how the work of the French lawyers might have smoothed the way for the Revolution. The French lawyers may simply have stirred what Americans call, using an analytic concept that deserves greater play in legal history, "backlash." The enforcement mechanisms that French lawyers developed were fairly obnoxious, as we have seen. By the eve of the Revolution, the pitiless Dumoulinian radicalism of French lawyers was forcing at least some Frenchmen to perform ritual respect, for the first time, before lords who never before had

102. As Stüdebeck observed, there was no ban on *surcens* in Germany, and the rule "nulle terre sans seigneur" had no application. *Ibid.*, 44. For the French difference, see, e.g., the discussion of *surcens* in Bastier, *La Féodalité au Siècle des Lumières*, 209.

103. For the lasting strength of the German nobility, see, e.g., D. Lieven, *The Aristocracy in Europe, 1815-1914* (London, 1992), 243-44; A. Mayer, *The Persistence of the Old Regime: Europe to the Great War* (New York, 1981), 101-02.

104. For a recent version of this thesis, see H.-U. Wehler, *The German Empire, 1871-1918*, trans. K. Traynor (Leamington Spa, 1985), 245-46.

had the right to act as lords. Perhaps, as a result, the doctrine of *portabilité* made a few friends for the Revolution.

But I think we can see that the lawyers also had a less direct, but possibly more important, impact on a theoretical level. That less direct impact lay in the very act of defining "feudalism." Defining "feudalism" tended to endanger it, simply by creating a convenient target for abolitionists. This is clear partly from the work of the Committee itself. When the Committee finally analyzed the meaning of "feudalism," it inevitably took its definitions from the legal bookshelf: the Committee abolished feudalism as an order of "honor and respect," because its lawyer-predecessors had defined feudalism that way. The edifice that the Committee tore down was the edifice that lawyers had built.

The point can, moreover, perhaps be carried further. What is true of the Committee alone is arguably true of the whole Revolution. Because prerevolutionary lawyers had spoken of feudalism as a system of "honor and respect," it was "honor and respect" that the French Revolution abolished. Even beyond the *cens* itself,¹⁰⁵ even beyond the work of the Committee on Feudal Rights in 1789-90, the effect of the Revolution was to eliminate, to a startling degree, the honor-obsessed social order of the *ancien régime* while bringing, in the early nineteenth century, a very high degree indeed of commercialization. After the Revolution, the social prominence of French aristocrats was largely gone—especially by contrast with Germany. The impact of the *ancien régime* lawyers can surely be detected here, including the impact of the greatest lawyer-theorist of "honor," Montesquieu. Through long efforts at definition and articulation, prerevolutionary lawyers had explained how it was that "honor" characterized the *ancien régime* at its deepest level. Had they never done so, the Revolution might not easily have proceeded in the way that it did, for it would not have had a defined target.

Germany was different. *Ancien régime* German jurists did not define or enforce feudalism as a system of respect. That does not mean that the Germans did not *have* a functioning system of feudal respect. On the contrary: it likely means that the Germans had a social system of feudal respect that functioned so well that it needed little by way of enforcement mechanisms. The German lawyers spent little time worrying about respect because respect was never in any great danger in German society. Conversely, the fact that French lawyers worried so much about respect may reflect the fact that respect *was* in danger in French society, on some level, as a result of the spread of Roman law liability as well as of other forces.

105. For a representative list of other honorific rights abolished, see van den Heuvel, "Féodalité, Féodal," 7.

But we would be wrong to conclude, from that, that law merely reflects social forces. For I think the comparison with Germany gives us a clue to an importance in what the French lawyers had done that went well beyond mere reflection of any relative weakness of the order of respect in France. The work of the French lawyers did not just reflect a social conflict; it articulated a social conflict, and enforced the claims of one party to that conflict. And that mattered when the day of abolition arrived, for nothing can be abolished that has not first been defined. What the French lawyers did was what lawyers are best at: they put the conflict into words, and into court. A conflict that has been put into words, and put into court, is a conflict that can become the object of political struggle in a way that vague and inchoate social forces cannot.

The ultimate effect of the work of the French lawyers, I would accordingly propose, was to take conflicts over honor and respect out of the vague and ill-thought-through world of social relations, where they lay in Germany, and to place those questions on the political agenda. No political actor in eighteenth-century Germany thought very clearly about issues of honor and respect, just as no political actor in America today thinks very clearly about issues of honor and respect. This is not because those issues are not present, but because they have not been articulated in the right way; we remain deeply wedded to a sort of Millian view of the world, which declares questions of honor to be a matter strictly for social sanctions, never for legal ones.¹⁰⁶ French law took a different course. This does not mean that French law reflected politics. It means something quite different: French law *created* politics out of the raw matter of inarticulate social conflict. French law took issues that were the basis of unspoken daily resentment and petty friction, described those issues clearly in words and gave them plastic and dramatic representation in court. As a result, those issues could be the basis of party programs. Had French law not done this work of articulation, we may speculate that the Revolution might have taken different forms.

106. Cf. J.S. Mill, *On Liberty*, ed. C. Shields (Indianapolis, 1956), 93-95. For a different view of the legal world, much more conscious of the prominence of the honor-interest in most legal systems, see, e.g., R. v. Jhering, *Der Kampf ums Recht*, ed. F. Ermacora (Frankfurt am Main, 1992), at 75, 78 and often.

