

Nedzel, Nadia E.

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THE GROWTH OF THE ENGLISH RULE OF LAW

BY NADIA E. NEDZEL

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CENTER FOR THE
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AT DUKE UNIVERSITY

Chapter 2: The Growth of the English Rule of Law

Abstract: The following is a work in progress and will be Chapter 2 of a book entitled “The Rule of Law, Economic Development, & Corporate Governance.” The first chapter will be an introduction to the major ideas and themes of the book. This chapter explains the Anglophile Rule of Law and its history. The next chapter will explain the civilian version, termed the Rule through Law and its history. The Rule of Law is part of the Anglo-American liberty narrative, while the Rule through Law is part of the equality narrative. Chapters that follow will focus on how the two different concepts effect Economic Development and Corporate Governance and what this means for developing effective policies in different cultural environments. The work will be aimed at a multi-disciplinary audience.

I. English Legal Culture in Time Immemorial ¹

The seeds for England’s unique legal and governmental culture were planted long before the Norman Conquest in 1066 A.D.² During this time “before legal history and beyond legal memory, Roman historian Tacitus (AD 56-117) described the cultures and governments of the Germanic tribes (Celts, Angles, Saxons, and Jutes)³ who ultimately settled in England as merit-based and egalitarian.⁴ While the chiefs could deliberate minor matters among themselves, when it came to important matters, the free people of the community would gather in a governing assembly, called a *husting* to deliberate publicly and collectively make final decisions. If the multitude was displeased with a king’s proposition, they would reject it with murmurs, but if they agreed, then they would brandish their spears.⁵ If they were really displeased with a king, they would depose him in a public meeting called a *witenagemot*.⁶ This happened to at least two kings: Sigeberht of Wessex (in 757) and Alhred of Northumbria (in 774).⁷ Tacitus contrasted the liberty of the Germanic tribes with the tyranny of the Roman Empire,⁸ describing the government of the Germanic tribes as based on leadership by example rather than authority.⁹

As was true of most tribal societies, the early Angles and Saxons thought of law as a common possession of the tribe.¹⁰ Never written, it consisted of customs perpetuated by word of mouth by which the tribe maintained peace within itself.¹¹ Overtime, such customs became so ingrained as to be called law, and given the static nature of society at the time, such law was viewed as permanent and unchangeable. There was no theory about the nature of the law, no organization of it, and it was “assumed to be eternally valid and in some degree sacred.”¹²

As with political decisions, because the law belonged to the folk and had existed ‘time out of mind’, the folk were entitled to be consulted and their consent was important when an important legal statement or decision was to be made.¹³ Once writing was available in the sixth century, the results of such consultations were recorded and promulgated by the king “in the name of the people” so as to clear up any doubts.¹⁴ The belief that the law belonged to the folk and that their recognition of it was important (as well as their power to depose him), further showed that the common belief was that the king himself was just as obliged to obey the law as his subjects were. The Germanic tribes traditionally used analogy and inductive reasoning in reaching such legal consensus, they did not deduce them from primary principles the way the Greeks, Romans, and Catholics did.¹⁵

Contrary to what many assume, law does not have to arise in a formal fashion. Informal legal processes to perform the three functions of law (dispute resolution, rule formation, and rule enforcement) such as those used by the Anglo-Saxons often develop spontaneously. For

example, *Lex Mercatoria* began as customs observed by merchants in the high Middle Ages, not government-mandated law.¹⁶ Similarly, Robert Ellickson described the formation of law via custom in the informal norms and habits that ranchers and farmers used to resolve cattle- and sheep-farming conflicts in Shasta County, California.¹⁷ Friedrich Hayek and Bruno Leoni both describe the English legal system as an instance of a societal institution that developed spontaneously.

Before the Norman conquest of 1066, the Anglo-Saxon kings had divided England into administrative units or *shires* run by sheriffs who had the power to collect taxes. They had a permanent treasury founded on that tax system, a royal monopoly on minting coins, and a writ system – i.e. a system whereby the king issued judicial instructions to governmental officials.¹⁸ They also had a decentralized court system consisting of both shire courts and the *hundred courts* (which tried torts, tax, and other cases). The Anglo-Saxon king's power was both created by the law and subject to it. Though he was not subject to the ordinary processes of his own courts,¹⁹ as mentioned previously, he could be both elected and removed by *Witenagemot*.²⁰

Among the Anglo-Saxons during time immemorial, liberty existed in the shape of a good constitution, temperate kingship, *husting* and *Witenagemot*, and general principles of freedom.²¹ Anglo-Saxon kings such as Alfred the Great²² and Edward the Confessor²³ left a legacy of immense prestige on which William the Conqueror and his Norman successors built after the 1066 invasion.

II. The Norman Invasion and Its Aftermath– A History of Increasing Limitations on Governmental Power

A. Good and Bad Kings: Charters, Petitions, and the Taxing Power

English history from the Norman invasion in 1066 to the ‘Glorious Revolution’ of 1688 shows a continuous trend of limiting governmental power. While the Norman invasion was brutal and brought some cataclysmic changes, it not only preserved pre-existing legal and governmental habits, but it also (as with many fusions) brought innovation. William the Conqueror introduced a number of changes: a split society with a dominant minority (the Normans) imposing new rules, a new language (Norman French), and even special feudal courts for the French ruling class and ecclesiastical courts.²⁴ Nevertheless, neither William nor his successors changed either the preexisting Anglo-Saxon shire-based governmental structure or the tax-collection system, which was better developed than its Norman feudal counterpart.²⁵ William I promised to uphold existing Anglo-Saxon laws and customs, because of tax collection issues, because it helped him maintain authority, and because he wanted the title of king, rather than merely Duke of Normandy.²⁶

Gradually the two nations and two traditions became amalgamated into a new England. Nevertheless, the English not only maintained but also developed the tradition of periodically requiring that a proposed king agree (sometimes in writing) to certain concessions before being allowed to rule, and also kept the tradition of deposing (and often killing) kings who ruled badly. In fact, while the Normans may have brought feudalism to England, rather than supporting an all-powerful monarchy, the English version of the feudal system supplied a constitutional framework for resisting it: even if the king was sometimes regarded as the barons’ divinely ordained ruler, he was also their feudal lord²⁷ and was expected to follow English law. When he abused his powers, his barons or his courts rose up against him. Each time they did so, the king’s power was further circumscribed, first by three foundational

documents (the Charter of Liberties, the Magna Carta, and the Petition of Rights); then by the courts, and finally by Parliament itself.²⁸ This does not mean, however, that only the King's power was circumscribed. As shall be seen, all governmental power was limited: The King's, Parliament's, the courts', and the power of all government agencies.

1. *Henry I and the Charter of Liberties*

After William II (William the Conqueror's first son) incurred the anger of both the nobility and the clergy, his younger brother Henry ascended the throne in 1100 A.D. on condition that he agree to follow Anglo-Saxon law, refrain from William II's oppressive and abusive policies towards the Church and barons' property rights and stop the Royal court from pillaging villages. He was also required to sign the Charter of Liberties, which limited his power over nobles and church officials, thus formalizing these promises. Henry I further promised to "establish a firm peace" across England.²⁹

Like the Anglo-Saxon tax system, the pre-existing Anglo-Saxon shire courts and 'hundred courts' survived the Norman invasion. However, by Henry I's time, they were slow and inefficient. In keeping with his promise, Henry sternly punished those who violated the king's peace. Consequently, increasing numbers of people sought redress for private disputes directly from him, so much so that he expanded the royal justice system, as well as strengthened local government, thus leading to the sobriquet "the Lion of Justice,"³⁰ – though it was his descendent Henry II who was responsible for founding the Common law, which gradually led to the elimination of the 'hundred courts.'

2. *King John and the Magna Carta*

Henry I's successor Henry II was also a good king – one of the best, in fact, -- but his successor John was not. While he may have been intelligent, industrious, and energetic, John alienated his barons because he was jealous, suspicious of everyone, devious, cruel, and grasping.³¹ He appropriated both his mother's and his sister-in-law's private incomes and killed hostages (rather than ransoming them, as was the habit at the time). John's international dealings showed a similar lack of prudence – he stole his bride from a French baron, thus incurring the wrath of Phillip II of France who declared war. John lost the war in a devastating defeat, losing Normandy in the process. John then wanted a rematch and demanded that his barons pay additional scutage in order to fund it. They not only refused, but even allied against him, ultimately forcing him to sign the Magna Carta in 1215 in order to maintain his throne. Though it was intended to be a peace treaty, neither side complied with the conditions set forth in the Magna Carta. Civil war broke out, and John died in 1216 while fighting to maintain his throne.

The Magna Carta reiterated England's previous limitations on kings' powers and proclaimed certain liberties that had already become traditional such as the explicit statement that no freeman (non-serf) could be punished except through the law of the land, the right to obtain a writ of *habeas corpus* (a royal demand that someone unfairly imprisoned be freed), and the right to a jury trial. It curtailed the king's ability to levy taxes without the approval of a parliament of lords, and it made the king promise not to sell, refuse, or delay justice. Most importantly, it makes it clear that no person of whatever office – including the king – may take the law into his own hands, thus referring to the underlying rule of law principle that the country is to be governed by a system of laws, not the rule of men.³² The Magna Carta was confirmed by at least thirty kings after John, and thus established a principle that the English invoked whenever they objected to a king's arbitrary actions – each confirmation was a solemn assurance that the king would act with regard for the welfare of all subjects, and was also an acknowledgement that the king, like his subjects, was subject to the law.³³

3. *Edward I and the Creation of Parliament*

Although King John signed the Magna Carta, that did not end the power struggles between English kings and their lords. Johns' successors Henry III (1216-1272) and Edward I (1272-1307) were both involved in political crises caused largely by their profligate spending, leading to a number of contests between the king's and the lords' will in issues such as foreign policy, control of the royal council, and control of the administration.³⁴ Edward I (Henry III's son), having seen what happened when his father flouted barons' demands (as a young prince, Edward was held hostage by an English baron), Edward not only confirmed Magna Carta, but also emphatically promised that no taxes would be assessed "except by the common assent of the whole kingdom and for the common benefit."³⁵

In order to keep this promise, Edward I frequently called meetings (*parliaments*) comprised of commoners as well as nobles from all over England. These meetings, effectively the successor to the hustings, served two main purposes: 1) they informed the entire kingdom; and 2) they allowed the king to secure consent to new legislation and new taxes. Consent to new legislation as well as new taxes was necessary because at the time, only customary law carried authority.³⁶ Pursuant to Edward I's request, Parliament began meeting regularly in 1295. By the end of the thirteenth century, both Parliament and the king's counsel were approving and giving consent to new laws and taxes separate and apart from the customary feudal dues and services.³⁷ The House of Commons kept its character as a lower chamber. The House of Lords developed out of Anglo-Saxon Witanagamots, and by the fourteenth century included both clergy and barons.

Because of these and other actions of English kings in the first 100 years after the Norman invasion, the two nations and two traditions gradually became one: Normans and Anglo-Saxons intermarried (including Henry I), the English language (especially the language of law) absorbed a massive amount of French vocabulary, and England's government became more centralized, more bureaucratic, and its courts more efficient.

4. *The 'English disease' and the Statute of Monopolies*

Even when an English king agreed to the limitations forced upon him by his barons, he was still likely to be deposed and even murdered. No fewer than 8 English kings were deposed and killed between 1066 and the Glorious Revolution of 1688. It happened so regularly that, as one historian stated, "Murdering kings was, thought the French, a peculiarly English disease until they started to murder their own": Between 1100 and 1688, nine English kings were deposed. Most of them were subsequently killed either in battle or murdered:

1. William II (1087-1100) Killed by a 'stray arrow' in England.
2. John (1199-1216) Effectively deposed in 1215, after not complying with the Magna Carta.
3. Edward II (1307-1327) An ineffective and unpopular king, overthrown by a conspiracy led by his queen, and then murdered gruesomely in prison.
4. Richard II (1377-1399) Like Edward II, a weak and extravagant king overthrown by a baron, Henry Bolingbroke (who later became Henry IV), Richard was later murdered.
5. Henry VI (1422-1461) Obsessively religious, he was overthrown in 1461, restored to the crown for a short period, then overthrown and murdered in a coup by an English lord.
6. Richard III (1483-1485) Defeated and killed in battle by an English nobleman.

7. Charles I (1625-1649) Defeated in 2 civil wars, beheaded.
8. James II (1685-1688) Tried to establish absolute monarchy and restore the Catholic religion but was overthrown in the Glorious Revolution. He lived out his days in France as a pretender at Louis XIV's court.

In contrast, in the same period on the Continent, only two French kings were killed – Henry III in 1589, and Henry IV in 1610. Both were murdered by Catholic zealots who wanted to make sure that France did not become Protestant. One Polish king, Przemysl II, was murdered in 1296 by a family member; and one Dutch king, William the Silent, was killed in 1584 for his actions in support of the Dutch Republic and its religious toleration. Thus, English kings in particular had good cause to be wary of over-stepping their powers and angering their barons, and as described earlier, were several times forced to sign agreements limiting their power: William II's misdeeds led to Henry I's signing the Charter of Liberties, John was forced to sign the Magna Carta., and Charles I was forced to sign the Petition of Rights

5. Increasing Limits on Monarchs' power: The Statute of Monopolies

James VI of Scotland, the first Stuart king, succeeded to the English throne when his cousin, Elizabeth I died in 1603, becoming James I of England, uniting the three countries (England, Scotland, and Ireland) and calling himself "King of Great Britain." While his rule was in some ways beneficial to England (he settled Elizabeth's on-going war with Spain), he never made peace with the idea of sharing power with Parliament or having to ask the House of Commons for subsidies. He believed himself to be an absolute monarch.

James I was not skilled at managing money, so when he had trouble securing subsidies from Parliament, he turned to charging patent-holders for the monopolies he had granted them. Originally developed under Henry VIII, the grant of monopoly rights was intended to strengthen England's economy by promoting new industries, but gradually the crown saw the system as a way to raise money without having to get Parliament to pass a new tax (always an unpopular move): the Crown increased the amount a patentee was to pay, and the patentee would then have to raise his prices in order to cover the increased patent fee. The advantage to the Crown was that any public unrest as a result of the increased patent fee was usually directed at the patent holder, not the monarch. Elizabeth I used the system this way, even issuing patents for every-day needs such as starch and salt, until she faced public criticism -- at which point she agreed to revoke some of the more restrictive monopolies and to turn the administration of patents over to the common law courts.³⁸ The 1603 Case of Monopolies even held that "the grant of exclusive rights to produce any article was "against the common law and the liberty of the subject."³⁹ James I, however, reverted to the same habits, incurring public wrath to such an extent that on May 29, 1624, Parliament passed the Statute of Monopolies, written by Sir Edward Coke.

The Statute of Monopolies began by declaring past, present, and future patents void, and new patents enforceable only if they were consistent with the common law. It limited the grant of a patent to a maximum of 14 years, limited the grant to the first inventor, and barred them where they either were contrary to law, increased the price of a commodity, or restrained trade. It still forms the basis for patent law in a number of countries, even if it was not immediately enforced at the time – and it began as another limitation on the power of English kings.

6. Charles I, the Petition of Rights, and the Glorious Revolution

James I died in 1625, and his son Charles I, who also believed in absolute monarchy, succeeded him. While James I was eventually convinced that limiting monopolies was a good idea,⁴⁰ Charles I was not and continued both issuing patent letters and charging patent holders increasing amounts for them. The result was ultimately disastrous – both for Charles I (who lost his head in 1649 as a result) and Great Britain, which was thrown into a civil war that lasted, on and off, until 1660.

In 1625, Charles demanded that Parliament grant him a subsidy of over £700,000 to support England's participation in the Thirty Years' War. The House of Commons granted only £112,000 and the House of Lords refused to approve even that amount. Angry at what he perceived as an attempt to curb the Royal Perogative, Charles I shut down Parliament, forced lords to 'loan' him money and arbitrarily imprisoned those who refused.⁴¹ He also forced private citizens to billet soldiers in their homes, imposed taxes without Parliament's approval, and imposed martial law over large parts of the country, and he attempted to nationalize the coal industry. In response, Parliament passed the Petition of Rights on June 7, 1628 and forced Charles I to sign it on precondition to any grant of future subsidies. This document, like the Statute of Monopolies, was drafted by Sir Edward Coke (then a member of the House of Commons), and it reiterated Magna Carta principles. It also further restricted non-Parliamentary taxation, forced billeting of soldiers, imprisonment without cause, and the use of martial law. The Petition of Rights, as mentioned previously is one of England's foundational documents, but has been influential elsewhere, including the U.S. Constitution.

Charles I incurred the wrath of Parliament because he violated what they regarded as their historical legal rights and customs, but he had also angered both the English and the Scottish populace on religious grounds. The English, still strongly anti-Catholic after a number of plots to overthrow Elizabeth I and James I (including the Guy Fawkes plot) and restore Catholicism as the state religion, distrusted Charles I because his wife was Catholic. The Scottish disliked him because he tried to force them to adopt high Anglican habits into their Presbyterian faith, leading to the Bishops' wars (1639-1640) and eventually the Wars of the Three Kingdoms (1639-1652). Ironically, in keeping with the old maxim that 'the enemy of my enemy is my friend, Charles I's actions strengthened both the English and the Scottish Parliaments whose armies defeated him in 1645. He refused to accept their demand of a constitutional monarchy, and he was eventually executed in 1649.

From 1649-1653, England was effectively a republic governed by a Rump Parliament (consisting of those MPs who were not purged by those supporting Charles I's execution) which took over all legislative and executive functions. However, conditions in this Commonwealth of England were very unsettled, allowing Oliver Cromwell to take over. Oliver Cromwell, an independent Puritan and successful commander has been described as many different things: a regicidal dictator, a military dictator, a man of liberty, and even a revolutionary bourgeois. Unlike many English kings, he was not assassinated, but was nevertheless executed posthumously after dying of malaria!

Charles II, known as the "Merry Monarch," (1660-1685) kept his promises but nevertheless incurred Parliament's wrath by issuing a Royal Declaration of Indulgence announcing toleration for both Catholics and non-Anglican Protestants. In response, Parliament declared that the "king had no right to arbitrarily suspend laws," and Charles II willingly rescinded his Declaration. Generally, he was known as the playboy monarch who was naughty but nice. He thus endeared himself to the populace that was tired after 11 years of civil war. Taxpayers,

however, were not so thrilled by the fact that their tax money went to support his seven mistresses and twelve illegitimate children.

While Charles had many illegitimate children, he had no legitimate ones, so his brother, James II succeeded him in 1685. James II did not last long – he aroused Parliament's ire when he challenged its supremacy by reissuing Charles II's Declaration of Indulgence and was deposed in 1688 when seven prominent noblemen invited William of Orange to invade. Louis XIV offered assistance, but James II refused, lost the resulting battle, and 'escaped' to France, where he finished out his life as a hanger-on at the French court.

From earliest times, England had a history not only of limited government, but also of imposing those limits on its kings. Its ruling classes never accepted the concept of absolute monarchy. While religious intolerance was wide-spread in seventeenth century England, other liberties were both protected (such as the right to habeas corpus) and developed (the right not to be forced to incriminate oneself) and both entrepreneurship and individualism were valued among the populace, who were regarded by outside visitors as unusually proud, wealthy, and independent. This understanding that government had little power to interfere in daily life was a cultural phenomenon. Furthermore, the concepts of separation of powers and checks and balances developed out of this unique culture.

III. Good King Henry II & The Development of Common Law

The previous section discussed English kings whose bad acts aroused the enmity of their subjects thus leading to limits imposed on their power, but this section considers Henry II (1133-1189), the great grandson of William the Conqueror. Henry II was an able and creative administrator and implemented a number of measures in an effort to consolidate his power and keep peace among his subjects.⁴² One of those measures was the founding of a centralized court system: in 1178, Henry created a royal court consisting of five judges who sat at Westminster Hall, calling it the King's Bench.⁴³ Originally, the King's Bench's jurisdiction included only disputes that involved royal property, but the court began to mete out justice even in disputes between English subjects.⁴⁴ It became so popular that eventually his court was divided into two: the Court of Common Pleas, which sat at Westminster and had jurisdiction over all civil suits that did not involve the king, and the King's Bench, which followed the king on his travels and had jurisdiction over civil suits that involved the king as well as criminal and tort issues (lawsuits that implicated the King's Peace). A third court, the Court of the Exchequer, eventually developed to deal with matters of equity – civil cases that did not fit in either of the other two courts. By the sixteenth century, all three courts met in Westminster Hall.

Henry II's judges initially came from a variety of professions (clerics, academics, etc.) and sat only for short periods of time, but gradually they became high-powered, full-time professionals: they formed a cohesive group, applied one common law, and used the same procedures drawn from Glanville.⁴⁵ They were different from the itinerant lawmen and aldermen of the local courts. By putting litigation into the hands of a disinterested professional body, the king created an institution that soon developed its own ways and traditions. The royal courts gradually became litigants' preferred forum, but not as the result of any attack on either the Normal feudal courts or on the Anglo-Saxon hundred courts. They became the preferred forum for all private disputes 1) because the professional judges were an improvement over the partisan local courts; 2) because the records kept by the royal courts were incontestably valid in contrast to the fallible

memories and poorly-kept records of local courts, and 3) because the royal courts' decisions had the Crown behind them, they were enforced by an authority with such wealth and power that it could not be challenged.⁴⁶ A fourth reason was that the jury trial became preferred over older modes of trial such as trial by combat or ordeal. For example, in a cold-water ordeal, the accused was lowered into a pit of water. If he floated, he was guilty; but if he sank, he was innocent (but probably drowned). By the twelfth century, even the Church questioned the effectiveness of such trials.⁴⁷

1. The Jury Trial

Although juries long had been used by the Anglo-Saxons to settle local litigation, the wholesale adoption of the jury would probably not have occurred but for Henry II, who adopted it as the finder-of-fact in a murder trial in 1168.⁴⁸ He then used it as well in land disputes.⁴⁹ In so doing, Henry II's use of the jury differed from the way his Norman royal ancestors and Islamic law used it. In the latter two instances, the jury was used to provide evidence (not decide the facts) and used only in trials involving royalty. Henry II used the jury to determine which of two parties was more likely telling the truth. Thus, in cases involving land, the jury's role was to hear both sides' evidence and then decide which side was telling the truth—this use is consistent with traditional Anglo-Saxon custom. In his 1179 proclamation, the Grand Assize of Windsor, Henry II declared that henceforth a defendant knight facing a claim from another knight had a choice between trial by combat and trial before a jury of knights. Prior to this, the jury was available only where parties agreed to it or it was granted by royal writ, but afterwards, jury trial became very popular.

As described by Glanville, the reason the jury trial became more popular than trial by combat or trial by ordeal were several: the jury avoided loss of life, it was less costly, and what twelve knights confirmed under oath carried more weight than the opinion of one man. Naturally, it was also more efficient, as the outcome of a trial by combat was doubtful and seldom just.⁵⁰ Furthermore, as it was neither exclusively Norman nor English, it disparaged neither group.⁵¹ Whether his inspiration was Norman royal trials or Anglo-Saxon local custom, Henry II made two monumental changes that led to the wholesale adoption of the jury in England: 1) he gave the jury the recognition of royal authority (previously in England, juries had only local authority); and 2) he made jury trials available to ordinary people. Consequently, because of Henry II, the jury became the primary fact-finder in both civil and criminal trials and was used in all cases in English Common Law courts.

In contrast with the growth of adversarial procedure and jury trial in England, both were rejected on the Continent and even the use of a jury as part of a royal inquest was replaced by Roman-Canonical procedure. Civil-law trained judges traditionally have nothing but contempt for jury trials, believing it barbaric to put an itinerant jury on the same footing as a judge who has been university-trained.⁵²

This opinion, however, shows a misunderstanding of the common law jury's role. The jury compliments -- but does not replace -- the judge's professionalism. The judge informs the jury of the applicable legal concepts. The jury's job is then to determine the facts: did the accused, beyond a reasonable doubt, commit the crime? Or was the defendant, more probably than not, negligent and did that negligence cause the plaintiff's injury? If the defendant was negligent and that negligence caused the plaintiff's injury, what was the dollar value of the plaintiff's injury? Used this way, the jury's decision is based on their individual and collective assessment of the truthfulness of the parties' and the witnesses' testimony. It requires no trained knowledge

of the law. In the United States, a jury's finding of fact is exceedingly hard to overturn on appeal.

The jury has long served as a check on the power of the prosecutorial arm of the government and a check on the power of big business. For example, in finding O.J. Simpson 'not guilty' of murdering his ex-wife, the jury sent a powerful message about perceived racism in the Los Angeles police department – it was likely that O.J. committed the crime, and also highly likely that the jury was so offended by the racist testimony of the Los Angeles policemen that it refused to find him guilty. If this was the jury's reasoning, then this would be termed 'jury nullification.' In the McDonald's hot coffee case, where a 'little old lady' was awarded several million dollars of punitive damages for spilling superheated coffee on her legs, the jury calculated the profit McDonalds made from two day's-worth of coffee – and awarded that sum as punitive damages for the arrogance with which they found McDonald's had treated the plaintiff and other customers who had been similarly burned. Though one can find abundant criticism of the use of the jury in the U.S., many U.S. judges find that juries, more often than not 'get it right,' and given modern technology, most juries can understand all but the most complicated patent cases.⁵³ Furthermore, many of those who serve on juries find it to be a very positive experience, and the one time in their lives when they feel that their input is important to their community – much more powerful than voting. The sad fact, however, is that jury trials are now prohibitively expensive for many if not most defendants who want one, and most of those called for jury duty try to avoid it.

2. Process, and legal study

By 1200 A.D., the primary features of the Royal courts were set, and it became the guardian of 'custom and justice' against 'will and violence' – even the king's.⁵⁴ It became the primary source of law because Parliament rarely legislated. England developed one national law (in contrast with the layers of Roman law, canon law, and local customs used on the continent), and it had with one corps of royal justices to administer and develop it.

Procedure at the time was by writ, which meant that a complaint had to fit into one of the existing forms. Originally, a writ was an order from the king under his Great Seal, addressed to the sheriff of the county where the case arose or the defendant resided, and commanding the sheriff to have the defendant appear in the king's court on a certain day. Gradually, the Chancery took over the task of issuing writs, which specified the nature of the complaint, the parties' names, etc. Each different kind of writ (and the kinds were limited) had its own procedure, statute of limitation, mode of proof, and remedy.⁵⁵ The most common complaints alleged that a neighbor or lord had wrongfully taken the plaintiff's land or other property ("trespass" or "trespass on the case").⁵⁶ The number of writs gradually increased to meet new demands and new kinds of claims.

In addition to the judges' skill, the advantages of the jury, and reliable enforcement of judgments, England's royal courts became popular because they developed a certain consistency in generally deciding similar cases similarly. They were able to do this because they systematically recorded both the judges' decisions and the reasoning by which they reached those decisions as early as the thirteenth century.⁵⁷ While the process of using earlier cases as precedent for later decisions did not fully develop until the early seventeenth century; nevertheless, the English reasoning habits were based on study of recorded decisions to determine pre-existing custom and analogy. Stare decisis was not used determinatively until the nineteenth century.⁵⁸

This style of reasoning contrasted with the deduction from first principles favored by those who had trained in Roman law at universities on the Continent. From the earliest days of common law, English lawyers trained as apprentices by reading the law and observing trials rather than studying law at a university. English universities did not even teach English law until the eighteenth century. The fact that English universities did not teach English law seems (at the least) unusual given that both Oxford and Cambridge taught Roman and canon law as early as the twelfth and thirteenth centuries – just as universities on the continent were doing. The reason for this habit, as with the reasons for most habits, stems from history.

In 1162, Henry II appointed his friend, Thomas Becket, to be Archbishop of England, thinking that Becket's loyalty would give Henry the power to punish clerics who had committed crimes and thus give him supremacy over the Church– but Becket sided with the Church instead, not accepting Henry's argument that denying him this power would hamper his ability to govern effectively and undercut the authority of law in England. Becket continued to side with the Pope, and the former friends became arch enemies, ending only with Becket's murder in 1170.⁵⁹ From that time forward, neither Church law nor Roman law were favored in England. In 1167, Henry II even banned English students from attending the University of Paris, leading to the expansion of Oxford university. Apparently, the dislike was mutual as neither English university taught English law until the eighteenth century, regarding it as unimportant local custom rather than theory-based, logically-deduced organized and coherent proper Roman (and later natural) law.⁶⁰

Although English universities were not producing English lawyers, there was still a need to educate future lawyers, and a striated apprenticeship system developed. Edward I, in 1292, instructed judges to find “apt and eager students” to attend court and discuss cases. Over time, those students began to congregate by Westminster and organized themselves into Inns of Court – hostelrys where they dwelled and discussed law. Beginning students would read judicial decisions, observe trials, and listen to lectures given by experienced students or “readers.” Middle tier or ‘outer barrister’ students studied by participating in moots (simulated trials) held in the Inns. At the moots, admitted and skilled litigators would present and argue current questions of law, which were afterwards discussed among judges, lawyers, and students who attended them.

Thus, in an odd sort of way, the fact that the practice and study of applied law was separated from the religious and political disputes that went on at Oxford and Cambridge fostered the assumption that law was separate from religion and politics in England. The English bar effectively reinforced this separation by refusing to accept a university degree as the equivalent of practical experience.

Parliament was not the only English institution that set limits on the King's power, the judicial system did as well: the king was expected to abide by judicial decisions and advice. The English habit of basing judicial decisions on customs and concepts set forth in previously recorded judicial decisions – i.e. the use of inductive, analogical reasoning – does not mean that English law was completely isolated from the Continent's *jus commune* (Roman law). For example, jurist Henry de Bracton (1210-1268) recorded cases he believed illustrated what the law should be: “one must judge not by examples but by reasons.”⁶¹ Bracton, one of a number of important English jurists, sat on the King's Court, and used Roman legal categories to organize common law legal principles. Bracton was also known for his view of the relationship between the King and Law (which was in direct opposition to the Roman view that the King IS the law): “the

king must not be under man but under God and under the Law, because the Law makes the King . . . for there is no Rex where will rules rather than Lex . . . ⁶² He further stated:

But the king has a superior, namely God. Likewise the law, by which he was made king. And likewise his court, to wit, the counts and barons, for the courts are called, as it were, the king's associates, and he who has an associate has a master. Thus if the king should be without a bridle, that is without the law, they ought to put a bridle on him.⁶³

Thus, from very early on in its recognizable existence, the British regarded government as being subservient to and bridled by the law.

IV. English Individualism and its Implications for Law

1. Individualism in family and property law and custom from the 13th Century

Discussion of the development of the rule of law would be incomplete without an explanation of its uniquely individualistic culture. Historians have found that the strong link between a family group and land typical of Continental feudal societies disappeared in England by or soon after the Black Death of the Fourteenth Century.⁶⁴ Empirical studies of property records, property disputes, and baptismal records matched to parish registers show that by the sixteenth century (and likely earlier), English peasant society was much more mobile and thus significantly different from the classic serfdom model of continental Europe: English children often left home in their early or middle teens, and land changed ownership frequently. Extended families, like those of Continental Europe wherein families stayed in one household headed by a dominant father figure on one plot of land did not exist – young couples were expected to live disciplined, self-governing, independent lives in their own separate households.⁶⁵

Part of the reason for this difference was likely that both property and inheritance laws differed from those on the continent. The Statute *Quia Emptores* of 1290 gave freemen the right to sell land they owned outright, in 'fee simple', well before the Black Death of 1348-1349. By the latter part of the thirteenth century, there were innumerable licenses to sell land, sub-leases, sort-term leases, and frequent sales indicating the existence of a considerable market in freehold properties.⁶⁶ Even if a peasant did not own the land he worked – i.e. if he had a copyhold tenure and owed duties to his lord -- by the early seventeenth century, the lord could not stop his tenant from exchanging land as he wished, assuming the duties had been fulfilled. Over time, tenants gained the power to either inherit a copyhold tenure as well as transfer it to a third party. By the sixteenth and seventeenth centuries, private property rights in England were highly developed, as was proven by an enormous amount of litigation over them as well as the making of a large number of wills dealing with land and other chattel – something that did not happen on the Continent among feudal cultures where no individual other than a lord or king had strong property rights.

With regard to inheritance laws and customs, an English child had no expectation that he would inherit from his or her parents. In contrast, in France, to this day, a parent cannot disinherit his children beyond his 'disposable portion' in the absence of legally-defined ingratitude on their part (an attempt on the parent's life constitutes ingratitude) —all children have a claim to some share in their parents' property. In contrast, under traditional English law and custom, children had no birth-right and could be left penniless. If a father left no will, then his property would go to his descendants, and while the custom of primogeniture (much more widespread in

England than on the Continent) might have given the eldest child greater rights, even the eldest son inherited only if his parents wanted him to do so.⁶⁷

Bracton provided a clear explanation of the thought behind English inheritance laws, an explanation that shows that as early as the thirteenth century the English were individualistic and expected law to be grounded in practical insights into human behavior:

“[A] citizen could scarcely be found who would undertake a great enterprise in his lifetime if, at his death, he was compelled against his will to leave his estate to ignorant and extravagant children and undeserving wives. Thus it is very necessary that freedom of action be given him in this respect, for thereby he will curb misconduct, encourage virtue, and put in the way of both wives and children an occasion for good behavior, which indeed might not come about if they knew without doubt that they would obtain a certain share irrespective of the testators wishes.”⁶⁸

2. 14th Century English Individualistic Philosophy – William of Ockham

The individualistic tendency of English culture, law, and thinking is also reflected in the work of English friar William of Ockham (1287-1347). In the fourteenth century, the Catholic Church's thinking was dominated by the views of Thomas Aquinas (and through him, the views of Aristotle). Aquinas and Aristotle both saw the world as having a permanent structure, in which every being – and every thought – has a pre-ordained place. In this teleological view, inequality is natural: some are born rulers, and others are born serfs. Moral law is dictated by man's nature, and not even God can alter it.⁶⁹ In this view, knowledge was based on abstract concepts derived using deductive thought, and societal rules were similarly ground in hidden structures set by way of God's Natural law. Aquinas posited that abstractions refer to real entities independent of human thought. Thus, abstract concepts such as truth, love community, obligation, and law exist, and the superior minds of philosophers and savants are needed to discern their meaning.

Ockham took issue with this – he argued that Aristotle's views and hence Aquinas's as well – were inconsistent with Christianity because they limited God's freedom.⁷⁰ He believed that the world we experience and the moral duties we acknowledge are the results of God's choices as creator, not the result of pre-ordained places because God granted free will to man. To Ockham's individualistic or *nominalistic* (or even egalitarian) thought, the world is not premised on deductive thinking, nor is it pre-ordained. The world consists only of individual things, and thus abstract terms such as truth, love, and other concepts do not refer to any objective reality. They are human constructs. If one talks about society or obligation, one is talking about how humans understand those terms, and these abstractions have no meaning independent of the meaning given them by individuals. It is only when an individual gains a consensus about the meaning of an abstraction that it comes to have a societal meaning. There is no hidden structure to man's thought, and no abstract objective moral truth. Consequently, if people say one must obey the law, that is true only because individuals have agreed that there is such an obligation. Furthermore, Aristotle's doctrine of *a priori* knowledge gives an inaccurate understanding of human thought because it emphasizes abstraction (deductive thought) over experience (inductive thought). In Ockham's philosophy, the belief in universal truths not only threatens God's freedom, but it also threatens individual freedom because it contradicts free will.

Ockham celebrated autonomy and individual liberty from within his understanding of Christianity, finding that man's moral limits devolve from his direct and individual relationship with God: good faith involves accepting constraints imposed by equality and reciprocity, and consequently an individual must control himself. Free and equal individuals have a right to choose rulers both in church and in state, and thus have the right to depose those rulers if they act inappropriately. Thus, Ockham proposed the concepts of social contract, individualism, and limited government⁷¹ before Hobbes, Locke, and other Scottish Enlightenment thinkers restated them – further evidence that these concepts derived from within habits of thought and values endemic to English culture. His thoughts, while illuminating, were consistent with popular English attitudes at the time: visitors from Europe who met members of the English peasantry regarded them as both unusually wealthy and individualistic to the point of being arrogant – very unlike feudal serfs on the continent.

V. English thinkers, inductive reasoning, & the ROL

1. Sixteenth and Seventeenth Centuries: Hobbes and Coke,

In the sixteenth and seventeenth centuries, the religious wars between Protestants and Catholics and the Church's corruption caused first Martin Luther and then much of Western Europe to first question the Church's authority and then to begin to separate religion from the state, and it caused them to reconsider the nature of the relationship between man and government. Thomas Hobbes (1588-1679) described the rise of Christianity as being due in part to the Apostles' preaching, but also due to the Roman oracles' immorality, greed, and political corruption. In blunt English fashion, he analogized this to the fall of Catholicism, berating the continental adoption of Aristotelian thought along the way:

Also the religion of the Church of Rome was partly for the same cause abolished in England and many other parts of Christendom, insomuch as the failing of virtue in the pastors maketh faith fail in the people, and partly from bringing of the philosophy and doctrine of Aristotle into religion by the Schoolmen; from whence there arose so many contradictions and absurdities as brought the clergy into a reputation both of ignorance and of fraudulent intention, and inclined people to revolt from them, either against the will of their own princes as in France and Holland, or with their will as in England.⁷²

Thomas Hobbes' *Leviathan* (1651) has been described as the "greatest, and perhaps the sole, masterpiece of political philosophy written in the English language."⁷³ Hobbes developed the theory of a social contract mentioned by Ockham, focusing on the individual. He is most known for having posited that the natural state of man is to be at war with one another: in the state of nature men and women are completely free to pursue and defend their own interests, with the result that life would be "solitary, poor, nasty, brutish, and short."⁷⁴ However, covenant enables us to live together in peace: it is an unspoken agreement not to interfere with each other's liberty.⁷⁵ Like social contract, others of Hobbes' concepts became fundamentals of liberal thought: the rights of the individual; the natural equality of all men; the artificial character of the political order; the view that all legitimate political power must be "representative" and based on the consent of the people; and a classical liberal understanding of law and natural rights which leaves people free to do whatever the law does not explicitly forbid.⁷⁶ This is consistent with what Tacitus had described of the earlier tribal governments.

Hobbes' political thoughts embodied insights into the habits of English culture from the thirteenth century as well as insights into the liberative results of the history of conflict between English kings and their barons which led to their being bridled by Parliament and judicial decisions. Hobbes' philosophy about the limits of reason, science, & religion show a similarly English outlook that values custom and experience over theory.

In rejecting Aristotle, he rejected pure deductive logic as incomplete. He posited that philosophy is not just the rational study of the universal, it is also the knowledge of causes, but that knowledge is conditional, not absolute.⁷⁷ Philosophical logic must also include experience: from his power to remember, man derives another power, which Hobbes calls imagination (and we might call inductive reasoning), the ability to recall past experiences and derive universal truths from it. Language enables us to derive universal truths from experience, but because experience is ever-changing, there is no eternal, unchanging 'universal' truth. In the context of law, this would mean that experience and precedents should guide future judicial decisions, unless a particular case presents novel facts or a fundamental new insight demands a different decision. Prudence is the power to anticipate experience by means of recollection of what has gone before: "Of our conceptions of the past, we make a future."⁷⁸ His thought process is consistent with that of his contemporary, jurist Sir Edward Coke (even though they disliked each other).

Sir Edward Coke

The seventeenth century was an amazing one for England in terms of literature (William Shakespeare, John Donne, Ben Johnson), its economy (about which more will be said later) and the growth of its legal system and the rule of law. Statesman, philosopher, scientist, and jurist Francis Bacon (1561-1626); barrister, judge, and politician Sir Edward Coke (1552-1634); and philosopher Thomas Hobbes (1588-1679) interacted with each other. For years, Bacon vied with Coke for top positions in government, eventually manipulating him out of office. As a young man, Hobbes served as Bacon's secretary (his amanuensis) for a short period. While neither Bacon nor Hobbes respected Coke's legal reasoning or thoughts about government, ironically, much of their thinking was consistent with his, and Coke's achievements had a profound effect on the British rule of law.

Barrister, Member of Parliament, and Justice Edward Coke had an amazingly varied career: barrister, MP, Attorney General, Chief Justice of the Common Court, Justice of the King's Court, and even King's prisoner in the Tower. At 19, in 1571, it is said that he set off for London with nothing other than a horse, a rapier, ten pounds sterling, and a ring inscribed "O Prepare."⁷⁹ By 1578, he was trying cases. At his death, he owned 60 manor houses.⁸⁰

After serving his apprenticeship at the Inns of Court and reading law voraciously, Coke became such a successful barrister and MP that in 1594, Elizabeth I appointed him Speaker of the House of Commons and then Attorney General (frustrating Francis Bacon). As Speaker, he showed considerable political skill in carrying out Elizabeth's policy of curbing discussion of church matters; as Attorney General, he prosecuted a number of people for treason and other crimes. At that time, the Star Chamber was a court of equity concerned primarily with cases involving normal subjects' problems, and it had a good reputation. For example, Coke once heard a judge say that it was "Better to acquit twenty that are guilty than condemn one innocent." In Elizabeth's time, the court ignored wealth in dispensing justice and even powerful nobles had a healthy awe of it – Star Chamber fines could be ruinous, and the court was apt to favor the poor. The Star Chamber's bad name was acquired under the Stuart kings.⁸¹

As with all equity courts, Star Chamber trials had no jury and its procedure was more like the civilian inquisitorial than the adversarial system of common law. A Star Chamber prosecution could be brutal, and Coke was a brilliant no-holds-barred prosecutor. Coke prosecuted and won a number of high-powered treason cases as Attorney General, including that of the conspirators in the 1605 Gunpowder (Guy Fawkes) Plot to kill King James II). In some of these cases, in retrospect, the accused's guilt was doubtful in part because it was regarded as acceptable to use torture to obtain a confession. In addition to the use of torture, one could also be forced to testify against oneself by means of an *ex officio* oath – an oath often used in trials based on religious offenses such as failure to follow Anglican practices. Under these circumstances, the accused was forced to stand before a judge without knowing any details of the charges brought against him and required to swear before God to answer all questions truthfully. If he was religious (and most were in 17th Century England), this put him in a cruel trilemma: he could lie, betray his oath, and sacrifice his soul; he could refuse and accept punishment for the refusal; or he could incriminate himself and suffer whatever punishment the court imposed.⁸²

Given Coke's fiery advocacy in the Queen's favor, his about-face when on the bench is beyond surprising. After Queen Elizabeth I died in March 1603, Coke was made chief justice of the Court of Common Pleas early in James I's reign.⁸³ Once on the Bench, Coke repeatedly annoyed James I by holding that the King's power was limited by the common law. In 1607 when Parliament was sitting, the Commons requested Coke's opinion concerning the legality of the *ex officio* oath. Coke argued that the oath was unlawful for two reasons: 1. No one should be forced to testify against himself, and 2. A defendant must be told what he is being charged with, and if he isn't, he need not answer the charges.⁸⁴

This assertion is the predecessor of two rights ensconced in the American Constitution's Fifth Amendment: the right not to incriminate oneself, and the right to know what you are being charged with. In the instance in which Coke provided his opinion, two Puritans facing trial before the High Commission for nonconformity with the Anglican Church had refused to take the *ex officio* oath and were imprisoned. Their barrister claimed that the High Commission had no power to fine or imprison them and had them released under a writ of *habeas corpus* until the High Commission's power – or lack thereof – could be determined by the King's Bench. In the interim, the Archbishop had the barrister arrested and convicted of impeachment of the King's authority in ecclesiastical cases, and imprisoned.

In the resulting lawsuit on whether the King could withdraw a case from the King's Court, Coke held that in accord with common law, "the king in his own person cannot adjudge any case." The House of Commons agreed, but James I was furious because he believed it was a violation of his royal prerogative as both king and head of the Anglican Church, and he called both Coke and high church officials to a meeting to resolve the issue. At the meeting, Coke argued that ecclesiastical courts such as the High Commission had authority to proceed only on religious issues, but that cases involving temporal issues had to be transferred to common-law courts, based on statutes passed under Edward II, III, and VI.

Coke went on to tell the King that under English law and custom, where there is no common law authority, then the King may decide an issue himself, but where there is law in place, the King cannot sit as judge. Similarly, the sovereign might sit in Star Chamber, but only to consult with the judges, not in judgment. At some point, James broke in to tell Coke that he, as King, would defend to the death his prerogative of calling judges before him and that he would always protect the common law. Coke responded that it was the common law that protected the king. James then shouted that this was treason, "The King protecteth the law, and not the law the

King! The King maketh judges and bishops. . . he thought that the Law was founded on reason, and that he and others had Reason as well as the Judges.”

Coke then responded that while God had endowed his Majesty with excellent science and reasoning powers, “his Majesty is not learned in the Laws of his Realm of England.” (James was Scottish). “The Law is what protects his Majesty in safety and Peace.” At this, the King was greatly offended, saying that if that was the case, then he would be under the law, which was treason. Coke replied by quoting Bracton – that the King should not be under man, but under God and the Law. Coke then again asked the king to respect the common law and recognize that Ecclesiastical Jurisdiction (Canon law) was foreign to England – which so angered James that reportedly he nearly hit Coke. Coke’s own notes of the incident indicate that he (finally) decided that discretion was needed, so he fell flat on the floor and humbly beseeched his Majesty to forgive him. James apparently relented – probably because Coke had Parliament’s backing.⁸⁵

Despite this conversation, Coke subsequently issued a new prohibition against the *ex officio* oath. Furthermore, he subsequently sent James I a carefully prepared treatise stating that under common law authority, “actes of Parliament are to be interpreted by the judges of the laws of England and not by any canonist or ecclesiastical judge. Consequently, at this point, Coke not only argued that the King had to obey Common law, but also that he (and Parliament) were effectively arguing separation of church and state by establishing that the Church had no power to control the courts, the crown, or Parliament. Furthermore, the incident demonstrated that both the separation of powers (judicial from executive) and rights for the accused were already established.

Stare decisis was not adopted until the nineteenth century, and even precedent was not binding in the seventeenth century, but nevertheless in writing judicial opinions, to Coke, the word innovation in law would be despicable because it meant a flouting of time-tested rule and custom.⁸⁶ He believed that “what we want to do must be coherent with what we have done before” or “to grow, we must rework what we possess.”⁸⁷ “Coke searched for England’s freedom not in the future but in the past, and found it and desired his countrymen to rest upon and retain it.”

Coke was not the only one advocating limits on monarchical powers – in September 1610, James I had overspent his income and looked to raise funds himself by means of proclamations creating new crimes, an action which led to the Case on Proclamations. The Privy Council, which included Coke (as Chief Justice of Common Pleas) was asked for a legal opinion. Coke’s answer was that the King cannot change the common law or create new crimes by Proclamation without Parliament’s approval.⁸⁸ So, not only had Coke barred the *ex officio* oath and frustrated James I’s authority as head of the Anglican church, he also told him that he did not have the power to create law – showing an understanding of separation of legislative and executive powers.

When James I asked Parliament for a substantial subsidy, it balked. His chief advisor proposed a compromise that Parliament would pay off some unusual naval expenses and approve a yearly allowance of 200,000 pounds for the crown, but in return, his Majesty would give up the power to collect customs duties and other sources of income. James I was apparently torn between his belief that as King he had absolute authority and his understanding that in England (as opposed to Scotland), he could lose his throne if he did not reach agreement with Parliament.

He decided to address Parliament in person. Apparently still stung by his earlier interactions with Coke, he began by telling them that he disliked the common law and would have wished to substitute the civil law as used in Scotland. At that point, apparently, he realized that he was likely to anger Parliament if he continued on in this vein, so he backed down and reversed himself.

Later that same year, Coke again angered James I in *Dr. Bonham's* case, wherein Coke's dicta has since been interpreted as the foundation of judicial review. Dicta is reasoning in the opinion that does not lead to the decision and is usually unimportant. In this case, however, over time it was the dicta that became important, not so much the holding because the dicta limits the powers not just of the King, but also of Parliament.

Dr. Bonham, a Cambridge graduate, practiced medicine in London without a license from the Royal College of Physicians. The College had him arrested and imprisoned, and he sued for false imprisonment. In finding for Dr. Bonham, Coke states that the statute at issue distinguishes between unlicensed practice and malpractice. The College had authority to arrest someone who had committed malpractice, but not unlicensed practice. Thus, the College had exceeded its authority.⁸⁹

In dicta, however, Coke went further: Parliament had given the censors the power to "regulate all London physicians and punish infractions with fine and imprisonment." However, the statute, Coke noted, gave the college one half of each fine collected, making the censors both judge and party to each case and creating a conflict of interest. Coke stated that "where an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void."⁹⁰ Coke's view that Parliament, like the King, was 'below' the common law was not unique to him, but was in fact a position commonly held. As Thomas Hedley put it in a speech in Parliament on 28 June, 1610, **"the parliament hath his power and authority from the common law, and not the common law from the parliament. And therefore the common law is of more force and strength than the parliament"**⁹¹

In 1612 (pursuant to Bacon's machinations),⁹² James I transferred Coke to the King's Bench, thinking that Coke would cause less trouble there because that court was dedicated to protecting the king's power. Even on the King's Bench, however, Coke continued to limit James I's power by narrowing the definition of treason and declaring a royal letter illegal. Coke's mishandling of a politically-charged case involving adultery and poisoning among the nobility led to his antagonizing nearly every Lord in the Privy Council and provided James I with an excuse to dismiss him from the bench in 1616.⁹³

Barred from the bench permanently, Coke was elected to Parliament in 1621, where he tried to restrict the king's power to grant monopolies. James I imprisoned him in the Tower of London for several months, but then released him and he returned to Parliament, where he succeeded in getting the Statute of Monopolies passed in 1626. Elected again in 1628 under Charles I, Coke authored and was instrumental in the passage of the *Petition of Right*.

Once out of Parliament, Coke then wrote his *Institutes of the Lawes of England*,⁹⁴ a common law treatise that was studied by common law attorneys for centuries and remains influential.⁹⁵ *Dr. Bonham's case* may have set the precedent to justify the American Colonies' Tea Party rebellion against the Stamp Act of 1765 and the Writs of Assistance, and his writings were influential in the Third and Fourth Amendments of the U.S. Constitution (restricting the

quartering of soldiers in homes and warrantless search and seizures, respectively). Thus, through a tradition of well-placed jurists like Bracton and Coke, there were intellectual resources and a continuing tradition of limited government available to the English that were not available to the continent.⁹⁶ There was also a strong tradition of individualism, equality in application of the law, mobility, and resolving disputes on the basis of the common law.

Though it had not yet been named as such,

[T]he notion of the 'rule of law' was central to seventeenth and eighteenth century Englishmen's understanding of what was both special and laudable about their political system. It was a shibboleth of English politics that English law was the birthright of every citizen who, unlike many of his European counterparts, was subject not to the whim of a capricious individual but to a set of prescriptions that bound all members of the polity.⁹⁷

2. Eighteenth Century: Locke

The two most prominent late seventeenth- and eighteenth-century jurists and scholars who implicitly discussed the rule of law as embodied in the English system included (most prominently) John Locke and the Baron de Montesquieu. Locke, born in 1632, lived through the civil war of Cromwell and saw the violence brought by religious intolerance. As personal physician to the Earl of Shaftsbury, he welcomed the Stuart restoration. Shaftsbury, who had been unjustly imprisoned, helped Parliament pass the Habeas Corpus Act of 1679, which made it illegal to detain anyone without a formal charge or to try anyone twice for the same charge. He (and Locke) later fled to Holland in 1683, when they wrote against Charles II's attempts at absolute monarchy. Locke remained there until 1688, with the crowning of William and Mary. While in Holland, he became a champion of religious toleration in part because he saw how it enabled commerce to prosper. He also wrote his two treatises on government, publishing them in 1689 anonymously.

In his Second Treatise, Locke sets out his original consent theory of government and his belief that labor put into working the land was what initially enabled privatization, thus grounding his theory of negative rights in traditional English individualism. He also describes several ways in which he believes government is limited by law. To Locke, liberty is primary: man is endowed with the liberty to follow his own will in all things that are not proscribed by law, and has a right not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.

Locke speaks of three functions of government: the executive, the legislative, and the judicial. The chief end of government is preservation of private property and the peace, safety, and public good of the people and it does not have a right to destroy, enslave, or impoverish its subjects. The people, not the rulers, are sovereign, and thus government never has the power to take private property without the owner's consent. Similarly, the government may not impose or raise taxes without the people's or their representatives' consent. Consistent with Coke, Locke defined the ruler's prerogative as the discretionary power to do the public good where there is no existing law on the matter. Where there is applicable law, however, and the ruler goes against it, then he (or whatever body is the executive power) is acting as a tyrant. He defines tyranny as the exercise of power beyond that given by law, not for the public good, but for a private separate advantage such as ambition, revenge, or covetousness. Locke affirmed an explicit right to revolution – if the government acts contrary to the trust reposed in them by the people, then that trust is forfeited, and the power previously ceded to them returns to the people who may “place it anew where they shall think best for their safety and security.” Interestingly,

he grounds his support for religious toleration in his understanding of his own Christian religion: one should be tolerant of other religions because, even if their beliefs are wrong-headed, for conversion to be sincere, one must come to the ‘correct’ belief out of one’s own free will, otherwise the conversion is invalid.

Montesquieu wrote one of the first inductive studies of English law and constitution by an outsider in his *Spirit of the Laws* (1748). Born in 1689, the same year as England’s Glorious Revolution, Montesquieu, a well-read lawyer and landed baron, spent two years in England studying its government (1728-1729), subsequently writing his *Spirit of the Laws* in 1748. Like Locke, though he does not identify a concept equivalent to the rule of law, Montesquieu does describe a number of the same attributes limiting government. He famously identifies the English separation of powers among executive (monarchy), legislative (Parliament), and judiciary as largely responsible for its liberty, and posited that tyranny results where any two of those three functions are unified in the hands of one entity. He also identified several features of the English system that limited governmental power: He speaks with approval of the jury system wherein the jury decides guilt or innocence while the judge imposes a penalty that has been pre-established by custom, and he approves of the right English criminal defendants have to confront their accusers and call witnesses. He includes checks and balances in stating that the executive should have a veto over legislation, but that the legislature should be able to override that veto where necessary, and that the parties to a lawsuit can object to the judge assigned to their case where they find him partisan. Adam Smith and David Hume, other Scottish Enlightenment members, further discussed similar ideas, but more in the context of commerce, and will therefore be discussed in the second section of this work.

2. *Nineteenth Century: J.S. Mill, A.V. Dicey*

Nineteenth Century British philosophers John Stuart Mill (1806-1873) and A.V. Dicey (1835-1922) continued the English tradition of regarding governmental power as something that must and should be limited, and warned of concerns that the rule of law (customary and traditional limitations on power) was being degraded.

Mill’s subject in *On Liberty*, was to discuss the “nature and limits of power which can be legitimately exercised by society over the individual.”⁹⁸ He described the history of government as a continuous struggle between liberty and authority, as governmental power is necessary but also highly dangerous because it can be used against a country’s own subjects. He posits that the concept of the state had changed from the personality of a single ruler to popular governments consisting of delegate, whose authority could be revoked at society’s pleasure but nevertheless, their power over the individual still needs to be limited in order to guard against the tyranny of the majority. There are certain areas of an individual’s life which should be free from law such as freedom of conscience (formerly religious freedom), freedom of speech, etc. He posits that the English jealousy of direct interference by either legislative or executive power with private conduct stems not so much from regard for the independence of an individual as from habits of regarding government and governmental power with suspicion. The English are simply not accustomed to being controlled. And he posits that the ONLY purpose for which power can rightfully be exercised over anyone in a civilized community, against his will, is to prevent harm to others. Mill then ruefully notes an increasing worldwide inclination to unduly stretch the powers of society over the individual, both by the force of opinion and by legislation, thus diminishing the individual’s power and liberty.

A.V. Dicey popularized the term “Rule of Law,” a phrase he might have taken from the Petition of Grievances of 1610: “there is none which they have accounted more dear and precious than this, to be guided and governed by the certain rule of law, which giveth to the head and the members that which of right belongeth to them, and not by any uncertain and arbitrary form of government” Like Mill, Dicey was concerned that legislation was encroaching on the rule of law and thus was destructive of liberty. He traveled widely and had an extraordinarily accurate knowledge of continental constitutions (though he may have misunderstood French administrative law). He also had a strong knowledge of the history of English law. He posited that there were three guiding principles of British constitutional law that enabled the British Empire to be so successful: 1. The Legislative sovereignty of Parliament; 2. The rule of law, by which he meant the supremacy throughout the English constitution of ordinary law, and 3. The dependence as a last resort on conventions concerning the law of the constitution.

Dicey traced the concept of the supremacy of the law in England in English Year Books as far back as the reigns of Edward II and Henry VI, and in insights into the character of the English legal system by Tocqueville and Voltaire. He posits three components of the rule of law. In the first place, regular law is absolutely supreme, and excludes governmental arbitrariness or even wide discretionary authority. Dicey’s second component is equality before the law, meaning that the ordinary law of the land as administered by ordinary courts applies to governmental officials as well as ordinary citizens. Finally, Dicey explains that in England, because individual rights grew out of ordinary judicial decisions, they are the source of its constitution, whereas in countries that have written constitutions, those same rights form part of a constitutional code. While this may seem merely a formal difference, some written constitutions merely ‘guarantee’ those rights rather than providing any remedy should the government intrude on them. Consequently, governmental officials in such countries may suspend those rights or intrude on them without facing a judicial trial. The English were far more focused on providing remedies for the enforcement of particular rights than on declaring them. Individual rights are inductions or generalizations based on particular decisions instead of civilian deductions from constitutional principles.⁹⁹

3. Twentieth Century – Maitland, Hayek, & Oakshott

F.W. Maitland

Maitland (1850-1906) trained with Lincoln Inn, taught at Cambridge, and had an extensive knowledge of continental law and languages.¹⁰⁰ He is known as the father of English legal history because his research into England’s vast repository of records coupled with his ability to see the pattern behind a mass of details as well as his skill in explaining the implications of that pattern led him to write several masterful works. His “The History of English Law before the Time of Edward I” (known as Pollock and Maitland, though Maitland wrote all but the first chapter), is still regarded as the authoritative history. Maitland had studied with a disciple of John Stuart Mill, and his life-long query was to understand how equality, liberty, and individualism rose in England.

From his research, Maitland agreed with Montesquieu and Tocqueville that England’s legal and governmental history was peculiarly continuous and different from that of the rest of Europe in part because Roman habits never became entrenched – they were driven out by the conquering tribes: Even in Tacitus’s time, individual land and property ownership was the rule, and it remained so through the feudal era and beyond. English ‘feudalism’ differed radically

from that on the continent in that England never had nobility of birth. England was always more egalitarian and lacked the premise of inequality of birth that developed over the rest of the continent, by the twelfth century, it had already developed towards an individualized and open social structure. Though there were noblemen, they held their positions more because of land tenure and office, not predicated on birth. Law was not based on status. Though a serf was bound to his lord, he was a free man in relation to all others and thus could own land and goods – until serfdom and villeinage simply faded away. This same individualism follows through to family relations, as discussed earlier: there was no *patria potestas*, children inherited from both maternal and paternal line, and infants could not only own separate property, but could sue separately. Husband and wife were treated as separate persons, women could receive and make gifts and wills, bear witness, and appear in court. Though they were excluded from the public domain, they had private rights almost equal to that of men.

Maitland's final concern was figuring out the legal mechanisms that enabled England to become an economic powerhouse. His conclusion, which will be developed in the next section, was that the liberty to form unregulated associations and trusts enabled the development of such institutions as Lloyds and the London Stock Exchange, and that this habit also transferred to the United States.

Hayek, Oakeshott, and Fuller

Hayek is known as an Austrian economist; however, it wasn't until after he had received doctorates in law and political science that he started to study economics. In Chapter 11 of "Constitution of Liberty," Hayek provides a summary of the history of the development of the rule of law, and although he posits that it was grounded in Ancient Greek concepts, he agrees with Dicey that it developed continuously in England until the end of the eighteenth century, when England turned away from it and towards concepts initiated by the French enlightenment and Bentham's utilitarianism, a story which will be discussed in the next chapter.

Hayek describes the rule of law as an ideal, one we can hope to approach but will never fully realize. Like Fuller's description in his parable of King Rex, Hayek's rule of law has several aspects: 1) the rule of law limits governmental power, including the powers of the legislature; 2) It is more than constitutionalism because it requires that all laws conform to certain principles; 3) Laws are certain and known in advance; 4) All laws are general, in other words they apply equally to all; 5) Separation of powers is an integral part of the rule of law; 6. In executing laws, the executive must follow certain procedural rules that prescribe when and where its coercion may be used and in what manner, and those actions are subject to judicial review; and finally 7. Coercion is admissible only when it conforms to general laws and not when it is a means of achieving particular objects of current policy.

As Hayek points out, many of the institutions of society, including both the market economy and the rule of law, are (or were) in fact the result of customs, habits, or practices that were neither been invented nor are observed with any such purpose, he terms this "spontaneous order" Properly understood, the rule of law is not instrumental, i.e. laws that are passed with the aim of changing society rather than protecting liberty do not conform with the rule of law. The evolutionary creation of the rule of law and other social institutions was not teleological, it was not done with any ulterior purpose.

What Hayek is thus describing is what Michael Oakeshott called a civil association: law in a civil association is not instrumentalist – it is not aimed at bringing about any particular

result such as the elimination of class structures or redistribution of wealth. It is more like the set of rules for driving or for playing soccer. Such law regulates how we do something, not whether we do it or not:¹ we drive on the right side of the road (or the left side, if you are in the United Kingdom), not for any logical reason, but because if we all drive on the same side, we will all get where we want to go. Driving on the right side of the road is not a rule that favors those who drive BMWs over Yugos or Mercedes over Hondas. Similarly, the rules of soccer do not favor any particular team, they just regulate how the game is played so that the team which plays with greater skill will win the game. The common law rule of law posits that not just that the law applies to all individuals equally, but also that it is not instrumental – it does not favor some over others in an effort to direct society to any particular end.

Hayek defines the rule of law as follows: "government in all its actions is bound by rules fixed and announced beforehand-rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." Generally, the assumption is that the rule of law safeguards freedom and encourages individuals' economic activity.

Oakeshott

While Hayek focused on inductive reasoning and spontaneous order as factors in the establishment of the rule of law in England, Oakeshott focused on civil association or non-instrumental law as another important factor. In a secular world where a population is no longer homogenous, his argument is that toleration is best promoted by non-instrumental laws. Consequently, there is a paradox here. The freedom to form human associations such as trusts without governmental interference may enable economic development as per Maitland, but those trusts themselves are enterprise associations. As long as government itself remains neutral, remains a civil association, one can expect maximum liberty and encouragement of economic development.

VI. Conclusion

As the previous discussion shows, England's legal system continued as it began, with a polity focused on individualism, free movement, free inheritance rules, and liberal private property ownership. The law that affected most people law began as custom and accumulated over hundreds of years of recorded judicial decision and administrative documents, though the courts also limited governmental power. Legislation was used rarely, and primarily to limit the King's power. Insights by Locke, Montesquieu, J.S. Mill, Maitland, Hayek, Oakeshott, and Macfarlane are consistent. The English rule of law was grounded in an individualistic society that expected equal treatment under the law, limited government, the jury trial, separation of powers, established judicial procedure, and problem-solving by means of inductive, analogical reasoning to determine what decision would be consistent with prior custom.

² Arthur R. Hogue, *Origin of the Common Law* (Liberty Fund 1986) 281, quoting William Blackstone, I *Commentary on the Laws of England* vii p281 (1765)

³ Bede, *Ecclesiastical History of England*, Chapter 15 (Christian Classics 2010)

⁴ Tacitus, *Germania: De Origine et situ Germanorum* (trans. *Concerning the Origin and Situation of the Germanics*); Tacitus, *Agricola (De vita et moribus Iulii Agricolae)*, Chapter 7

⁵ William A. Chaney, *The Cult of Kingship in Anglo-Saxon England: The Transition from Paganism to Christianity* (U California Press 1970) quoting Tacitus: « *Regis ex nobilitate, duces ex virtute sumunt. Nec regibus infinita aut libera potestas: et duces exemplo potius, quam imperio, si prompti, si conspicui, si ante acem agant, admiration praesunt.* »

⁶ H.M. CHADWICK, *STUDIES ON ANGLO-SAXON INSTITUTIONS* 362-363 (Cambridge 1905).

⁷ *Id.*

⁸ Tacitus, *Agricola* Chapters 7-8. As in his *Germania*, in *Agricola* Tacitus contrasts the Britons' liberty with the Roman Empire's tyranny. In Chapter 7, he describes their government and leadership as merit-based and egalitarian, with leadership by example rather than authority. In Chapter 8, he states that women's opinions are respected, and in Chapter 9, he describes a hustung..

⁹ Tacitus, *Agricola and Germania*, Chapter 7 (Benton 2013).

¹⁰ GEORGE H. SABINE, *A HISTORY OF POLITICAL Theory* 199 (Holt & Co. 1950).

¹¹ *Id.* at 200.

¹² Sabine at 202. No man ecclesiastical or temporal shall be examined upon secret thoughts of his heart or of his secret opinion. And the defendant must have, as in Star Chamber and Chancery, the bill of charges delivered unto him, or otherwise he need not answer to it

¹³ Sabine at 204.

¹⁴ Sabine at 205.

¹⁵ Tacitus, *Germania: De Origine et situ Germanorum* (trans. *Concerning the Origin and Situation of the Germanics*)

¹⁶ Bruce L. Benson, *Customary Law, Credibility, Contracts, and Credit in the High Middle Ages*, on file at the Law and Economics Center, Antonin Scalia Law School, George Mason University, visited on December 7, 2016, available at www.masonlec.org/site/rte/uploads/files/Benson.pdf.

¹⁷ Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge 1991).

¹⁸ R.C. Van Caenegem, *The Birth of the English Common Law* 34 (2nd ed. Cambridge U. Press 1988).

¹⁹ Sabine, *supra* n. 9, at 220-221.

²⁰ [Chadwick, H. M., *Studies on Anglo-Saxon Institutions*](#) (Cambridge, 1905)

²¹ SHARON TURNER, *THE HISTORY OF THE ANGLO-SAXONS* (1802)(Classic Reprint 2007)

²² Alfred the Great (849-899) defeated a Danish invasion by creating a standing army and fortifying towns, and funded by a national property tax system.

²³ Edward the Confessor (1003-1066) founded Westminster Abbey, and was revered for his piousness.

²⁴ Van Caenegem, *The Birth of the English Common Law* 4 (2nd ed. Cambridge U. Press 1988).

²⁵ David Carpenter, *The Struggle for Mastery: The Penguin History of Britain 1066-1284*; Richard Huscroft, *The Norman Conquest: A New Introduction* 94, 327 (2009); Hugh Thomas, *The Norman Conquest: England after William the Conqueror*.

²⁶ R.C. Van Caenegem, 8-9. Henry I's Charter of Liberties is since regarded as one of England's foundational documents, along with the Magna Carta and the Petition of Rights.

²⁷ Arthur R. Hogue, *Origin of the Common Law* 54 (Liberty Fund 1986).

²⁸ E.A. Freeman, *History of the Norman Conquest* vol. V; Plucknett, T., *Concise History of the Common Law* 524 (Little, Brown & Co. 1956); Pollock and Maitland, 1 *History of English Law* 95 et seq (Cambridge U. Press 1968).

²⁹ C Warren Hollister, *Henry I* 110-112 (Yale U. Press 2003).

³⁰ Judith Green, *Henry I: King of England and Duke of Normandy* 242-243 (Cambridge U. Press 2009).

³¹ Arthur R. Hogue, *Origin of the Common Law* 46 (Liberty Fund 1986).

³² William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 381 (2nd ed 1914).

³³ *Id.* at 54.

³⁴ Hogue at 56.

³⁵ Hogue at 68.

³⁶ Hogue at 71.

³⁷ Hogue at 206.

³⁸ George Ramsey, *The Historical Background of Patents* (1936).

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- ³⁹ Darcy v. Allein ("The Case of Monopolies") 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (1603).
- ⁴⁰ Kyle, Chris R. (1998). "'But a New Button to an Old Coat': The Enactment of the Statute of Monopolies, 21 James I cap.3". *Journal of Legal History*. Routledge. 19 (3) 215-217.
- ⁴¹ The Civil War: Charles I & the Petition of Right, available at www.parliament.uk (accessed on September 7, 2018).
- ⁴² Van Caenegem at 136, Frederick G. Kempin, Jr., *An Historical Introduction to Anglo-American Law in a Nutshell* 102 (2nd ed 1973).
- ⁴³ Pollock & Maitland, *supra* note , at 155.
- ⁴⁴ W.S. Holdsworth, 1 *A History of English Law* 27 (1903).
- ⁴⁵ Van Caenegem 23-25, citing Ranulf de Glanvill, *Tractatus de legibus et consuetudinibus regni Angliae* (c. 1188).
- ⁴⁶ Arthur R. Hogue, *Origins of the Common Law* 19, 34, 37-72 (Liberty Fund Reprint 1986); See also Frederic W. Maitland & Francis C. Montague, *A Sketch of English Legal History* 36 (Elibron Classics, reprinted from 1915 original).
- ⁴⁷ Van Caenegem at 68-70.
- ⁴⁸ *Id.* at 71.
- ⁴⁹ T. Plucknett, *A Concise History of the Common Law* 111 (5th ed. 1956); Stephen Landsman, *A Brief Survey on the Development of the Jury System*, 44 *Ohio S.L.J.* 713, 721 (1983).
- ⁵⁰ Van Caenegem at 82.
- ⁵¹ *Id.* at 72-73.
- ⁵² Van Caenegem at 71.
- ⁵³ Nadia E. Nedzel, Interview with Judge Carl E. Stewart, *Baton Rouge Law Journal*
- ⁵⁴ Van Caenegem at 29.
- ⁵⁵ Hogue 12-13.
- ⁵⁶ Hogue at 34.
- ⁵⁷ Harold J. Bergman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 *Emory L.J.* 437,
- ⁵⁸ Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law*, 97 *NW L.R.* 1551, 1566-67 (2003).
- ⁵⁹ Hogue 38-43.
- ⁶⁰ Plucknett's *Concise History* 435.
- ⁶¹ Henri de Bracton, *On the Laws and Customs of England* (Samuel E Thorne trans. with revisions and notes, 1968).
- ⁶² *Id.*; see also Frederic William Maitland, *The Constitutional History of England* 100-101 (Cambridge Univ. Press 1963).
- ⁶³ F 5b. Quoted in Carlyle, vol III, Part I, ch. Iv p220-221 Sabine)
- ⁶⁴ Alan Macfarlane, *The Origins of English Individualism* 7 (1978).
- ⁶⁵ Macfarlane at 75.
- ⁶⁶ MacFarlane at 125.
- ⁶⁷ Macfarlane at 84-87.
- ⁶⁸ Macfarlane quoting Bracton at 103
- ⁶⁹ Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* 308-309 (2014).
- ⁷⁰ Siedentop 308-311.
- ⁷¹ Siedentop 313-315.
- ⁷² Thomas Hobbes, *Leviathan*, Chapter XII, available at <http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-b.html#CHAPTERXII>
- ⁷³ Michael Oakeshott, *Hobbes on Civil Association: Introduction to Leviathan* 4, foreword by Paul Franco (Indianapolis: Liberty Fund, 2000), available at <http://oll.libertyfund.org/titles/668>.
- ⁷⁴ Hobbes, *Leviathan* Chapter XIII 9.
- ⁷⁵ Hobbes *Leviathan*, Chapters XIV-XV.
- ⁷⁶ Pierre Manent, *An Intellectual History of Liberalism* (1994) pp 20-38;
- ⁷⁷ Oakeshott 27-28.
- ⁷⁸ *IV English Works of Thomas Hobbes* 16, (ed. Molesworth, 11 volumes, 1839), Cited in Oakeshott at 24.
- ⁷⁹ Allen D. Boyer, *Sir Edward Coke and the Elizabethan Age* 25 (Stanford U. Press 2003); Catherine Drinker Bowen, *The Lion and the Throne* 69 (1956).
- ⁸⁰ Bowen at 527.
- ⁸¹ *Id.* at 108.
- ⁸² John Liburne, *Oaths and the Cruel Trilemma*, Blog (2013) "In Custodia Legis: Law Librarians of Congress" on 2013-04-25.

⁸³ Lord Robert Cecil (1563?-1612). English statesman who succeeded his father as Queen Elizabeth I's chief minister in 1598 and skillfully directed the government during the first nine years of the reign of King James I. Cecil's machinations during Elizabeth's last illness enabled a smooth transition from Tudor to Stuart rule in England.. Encyclopaedia Britannica, accessed on October 17, 2018.

⁸⁴ Bowen at 298.

⁸⁵ Bowen 298-306.

⁸⁶ Bowen 155.

⁸⁷ Bowen 155

⁸⁸ Sir Edward Coke, *The Selected Writings and Speeches of Sir Edward Coke*, ed. Steve Sheppard (Indianapolis: Liberty Fund, 2003). Vol. 1. 3/31/2017.

⁸⁹ Stoner 48-52.

⁹⁰ Bowen at 315; Ian Williams, Dr Bonham's Case and 'void' statutes," 27 JOURNAL OF LEGAL HISTORY 111-128 (Routledge 2006)

⁹¹ <https://faculty.history.wisc.edu/sommerville/367/hedleycommonlaw.htm>

⁹² Bowen at 338-341

⁹³ Stoner at 15.

⁹⁴ See James Stoner, Common Law & Liberal Theory 16 (U. Press Kansas 1992).

⁹⁵ Ian Williams, Dr Bonham's Case and 'void' statutes," 27 JOURNAL OF LEGAL HISTORY 111-128 (Routledge 2006)

⁹⁶ But see Max Radin, "The Myth of Magna Carta," *Harvard Law Review* (1947), pp. 1060-1062.

⁹⁷ John Brewer & John Styles, *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries* 14 (1980)

⁹⁸ John Stuart Mill, *On Liberty and Other Writings* (ed. Stefan Collini, Cambridge U. Press 1989).

⁹⁹ A.V. Dicey, *Intro. to the Study of the Law of the Constitution* 107-121.

¹⁰⁰ Alan Macfarlane, *F.W. Maitland and the Making of the Modern World* (Cam Rivers Publishing 2018)