Holmes & Curious the Case of the PALIMPSEST

BY GEORGE T. ANAGNOST

According to Pliny the Elder, the origin of a wondrous writing material relates to an episode in the second century BCE when two kings became rivals in establishing their libraries, and Ptolemy ordered his merchants not to export papyrus to Asia Minor. Being deprived of this supply source led to the development of writing on skins or parchments (vellum).[1] Owing to the combination of demand and the scarcity of available but durable lambskins, the additional technique soon developed whereby an existing text was scraped off the parchment and a new document was created over the older writing.

A 16th-century wood engraving of a parchmenter. Animal skins were treated with pastes of lime, flour, egg whites and milk.

Derived from the Greek roots, *palin* "again" + *psao* "scrape," *palimpsest* is our word for when a previous written chronicle has been erased and replaced with new text.

Although to some readers "palimpsest" may seem an exaggerated trope, this article reexamines *Derendal v. Griffith*[2] and the Arizona Supreme Court's treatment of "English common law antecedents" as the basis of the state constitutional right to trial by jury for misdemeanor or "petty" offenses. In applying English common law to ascertain the meaning of the right to trial by jury under Arizona's Declaration of Rights, a judicial palimpsest of sorts has occurred, as if the written historical record has been replaced with a new interpretation.

In particular, in terms of historical methodology (*i.e.*, in terms of building a factual nexus between *Derendal's* legal result and its claimed historical sources), the connection between law and history is weak with regard to (a) the failure to define "English common law" substantively and (b) overlooking the towering presence of Parliamentarian statutory enactments intended to supplant weaker strands of common law derived from *lex non scripta*.

As a general matter, the vast majority of misdemeanor offenses in Arizona do not

HON. GEORGE T. ANAGNOST is the presiding judge for the Peoria Municipal Court. All views expressed herein are those of the author.
Many thanks to Maricopa County Law Library and the Bodleian Library at Oxford University for their assistance in locating research materials.

carry mandatory jail or probation and are conducted in limited-jurisdiction courts by way of a bench trial. In *Derendal* the Arizona Supreme Court held that misdemeanor "drag racing," with a maximum jail term of six months, was not a "serious offense" within the meaning of the Sixth Amendment to the U.S. Constitution or a "common law analog" under the Arizona Declaration of Rights, which guarantees that the right to trial by jury shall remain "inviolate."

Significantly, in reaching its result, the Court overruled the longstanding "moral prong" associated with *Rothweiler v. Superior Court*[3] that had been the cornerstone of state constitutional jury-trial eligibility analysis. Prior to *Derendal* and since statehood, a steady stream of misdemeanor offense cases made their way through the appellate process, each asserting, on a case-by-case and offense-by-offense basis, a state-sourced constitutional right to trial by jury, and each asserting *Rothweiler's* moral prong argument. Since *Derendal* was decided, this case-by-case phenomenon has persisted, although instead of arguing "moral turpitude," misdemeanants now argue that their offense (admittedly *prima facie* "petty" in nature because of the six-month jail term limitation) is still jury-eligible because its statutory elements are "analgous" to a common law antecedent crime under English law.[4]

Is this where we want to be? More pertinent, is this where history really tells us we should be?

The Not-So-Well-Known, Overnight Creation of English Common Law

To his followers, he was known as Henry *Curtmantle*, for the shorter-sleeved tunic he preferred to wear. For scholars of English history, he is known as Henry II, a Plantagenet king descended from William the Conqueror. After William's death, England experienced several decades of civil and political unrest. Significant were the battles and struggles between Henry's mother, Empress Maude, and her cousin Stephen. When Henry II returned from Normandy, he was able to establish control over rival lords through diplomacy and conquest, and in 1154 he was crowned "Henry II, King of England." Needless to say, he did not assume the throne as the result of a popular election.

To legitimize his monarchial rule, Henry issued various royal decrees, or assizes. Of these, the Assize of Clarendon of 1166 is considered a foundational document that shaped the structure of law and governance over the English people. Among other things, Henry's edict created a royal court, based in Westminster, that enforced the King's peace through the use of writs whose pleadings invoked the jurisdiction of the crown and authorized itinerant judges to travel the county and administer the king's orders. Through this system of control, the king also collected substantial fees and revenues from his subjects.

The popular view of the origins of English common law entails images of the adaptation of longstanding and established custom and usage, ostensibly understood by a wide, participating populace. But the historical record surrounding what Henry II did in 1166 reads otherwise:

> Many scholars have viewed the reign of Henry II (d. 1189), the medieval king most associated with legal reform, as pivotal in the development of the common law. … By making royal justice widely available, Henry created a national common law. Most historians agree that the English common law is not a continuum stretching back to time immemorial; it is an institution that was born at a particular moment in time.[5]

As another scholar writes, "It is to Henry II that we owe many significant developments in English government, none more important than the 'invention' of the common law."[6]

Two passages from the Assize are noteworthy.

In Article Five, Henry declared that his royal court would be superior to any other local and county courts. His subjects would take an oath to identify serious criminals by inquest and "those who are arrested by the aforesaid oath of this assize, no one is to have court or justice or chattels except the lord king in his court before his justices, and the lord king shall have all their chattels." Second, this arrogation of royal authority was to remain in place, not as long as an enfranchised electorate so determined; rather, "the lord king commands that this assize be upheld in his kingdom for so long as it shall please him."[7]

Nor should it be thought by the modern reader that Henry's itinerant justices represented a large group of law-trained jurists. The number of judges who carried in their heads the "law" of England as of the mid-12th century was surprisingly small. In sports parlance, the king worked with a shallow bench:

> The absence of a regular, permanent, professional royal judiciary was associated with the absence of the concept of the kingship as a regular legislative agency…. But the entire legislation of the first four Anglo-Norman kings from 1066 to 1154 could probably be summarized in one page…. [H]enry II instituted for the first time a regular set of tours for a fixed set of justices. In 1176 six groups of three justices each were sent out to tour the country and hear all cases brought under the king's writ.[8]

Of equal significance, this system was wholly rooted in the notion of "jurisdiction," not the administration of a body of "jurisprudence" of natural rights that belonged to all Englishmen. This philosophical transformation—which later American colonists by necessity would borrow and re-invent to justify their claims to English numerous birthrights, including the right to trial by jury—would require that other social, political and economic forces take place over many decades of development.[9] Henry's royal court did not displace other already-existing local courts and tribunals, but instead co-existed with them:

> Criminal law in England did, to be sure, undergo substantial changes in the sixteenth and early seventeenth centuries. There was not, however,

prior to the late seventeenth century, one all-embracing system that could be called "the" English system of criminal law. Different systems of criminal law continued to be administered in the ecclesiastical courts as well as the various secular courts themselves: royal, feudal, local, manorial, mercantile, urban. In the sixteenth century the Tudor monarchs created a whole new set of royal courts, called prerogative courts, to operate alongside the older royal common law courts of King's Bench, Common Pleas, and Exchequer; each of these new courts had its own criminal jurisdiction and its own substantive criminal law and criminal procedure.[10]

Thus, the king's authority was still measured by the end of his sword and the loyalty of his knights and entourage. All things considered, the notion of a government by rule of law that we wish to impute to our English predecessors was not well established. As for the emergent notion of a right to trial by jury, on that topic also, the historical record is perhaps surprising.

The Not-So-Egalitarian Origins of the Right to Trial By Jury

To the modern observer, the idea of a fundamental right to trial by jury seems such an intuitive aspect of the criminal trial process, at least for serious offenses, that it is hard to accept the fact that it was neither the result of any long-established legal custom of English medieval society nor necessarily considered the most rational method of truth-seeking. Indeed, the chronicle of the emergence of what is now considered a cornerstone of basic due process describes a procedure mostly inflicted by the crown on its subjects to put the accused's life and property at risk of forfeiture to the monarch. As of the 13th century—a period most would concede to be within the heyday of "common law"—resort to "trial" was far removed from the refinements associated with a courtroom setting and a contemplative jury. And when it did arrive, it was through the monarch's coercive imposition.[11]

Another mythic view of the origin of the jury trial also hearkens back to Magna Carta and the notion of a trial by one's peers being forced on King John. This piece of Americana was addressed by Sir James Fitzjames Stephen in his well-known treatise on English common law, first published in 1895:

> *Trial by jury*, or the country, has been assumed to be that trial by his peers (*pares*), which is secured to every Englishman by the Great Charter … . It need hardly, perhaps, be pointed out, that this venerable theory, though consecrated by a long series of writers, has no foundation in historical fact.[12]

A final component of significance when describing the nature of the right to trial by jury in the medieval era involves an important limitation: the absence of any right to a jury trial for petty offenses. The clear presence in English law, during this medieval period, of minor infractions triable before a judge without a jury was addressed in *Duncan v. Louisiana,* when the U.S. Supreme Court opined on the qualified scope of the right to jury trial as derived from English antecedents. Instead, Justice White's majority opinion focused on fundamental notions of fairness, due process and the role of the jury as a safeguard against oppressive governmental power.[13]

But to understand the right, we must look to the ascendant role of Parliament and its categorizing of English criminal law.

The Sovereignty of Parliament and Statutory Law

In *Derendal*, the Arizona Supreme Court declared that the Arizona Constitution preserved, and did not create, a new right to trial by jury.[14] As in other reported cases, it is noteworthy that in *Derendal* the "common law" is introduced *in medias res.* For whatever reasons, when the "common law" is referenced, its English sources, origins and substantive components are never made clear.

It seems that many judges and attorneys profess a nodding familiarity with the common law, the idea of unwritten custom that existed in England from time immemorial. But where did it come from? How was the common law authenticated? Did the English really subscribe to a fixed notion of identifiable substantive law? How did the crown and Parliament relate to the development of that law?

Professor Presser's observations are noteworthy:

> The distinction between common law and legislation in post-Conquest England was murky. … During the later Tudor period, and especially during the reign of Henry VIII … legislation took on the form of a distinct departmental activity based on the careful drafting of bills, parliamentary debate, and policy making. [P]arliament … eventually began to assert a self-conscious power to change law, including common law, or

Although Blackstone's COMMENTARIES are cited as an authority on English law, in his mind, Parliament, not the courts, determined the law, and Parliament could do no wrong.

to enact new law, its only limit being its capacity to bind a future parliament.[15]

By the early 1500s, it is clear that Parliament, not the court, had assumed the dominant position as the voice of the people. As England's society, merchant and urban classes, and religious institutions continued to evolve and redefine their roles, statutory law was the governing force in legal matters.[16]

Thus, for example, William Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND[17] are widely accepted as an authoritative summary. But Blackstone's citation of authorities is often to statute. Indeed, Blackstone himself is the source of the unwritten-custom-versus-statute paradox that has consistently troubled jurists and legal scholars.[18]

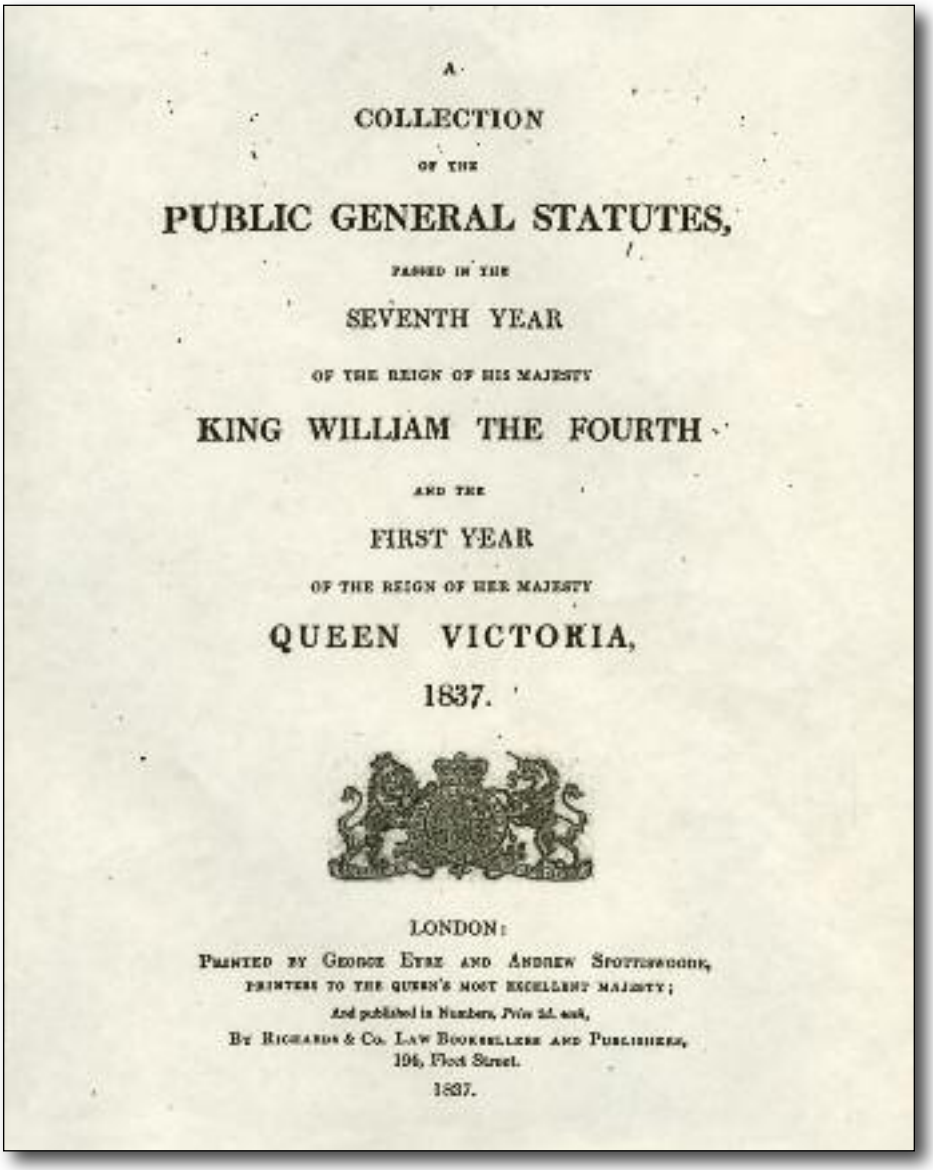
For Blackstone, Parliament's pronouncements were not to be challenged and, even more, whatever birthrights protected Englishmen while they stood on English soil, they did not extend to the American colonists: "And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country."[19]

In criminal law, both early in the course of the written record of English law and in the contemporaneous rise of Parliament as the source of that law, statutory pronouncements were paramount. Statutory enactments were the foundation of accretions to the reach of the king's common law writ, and the correlative role of the king's common law judges was to interpret these statutes.[20]

Despite this, our Arizona courts have not addressed the prevalence of English statutes as a controlling factor in interpreting English "common law." That can be illustrated by the result in *State v. Le Noble*,[21] in which the Court of Appeals determined that misdemeanor resisting arrest was a crime at common law. In *Le Noble*, defendant's bench trial conviction was reversed after the court determined that resisting arrest had a common law analog in English law and defendant was entitled to a jury trial. Consistent with *Derendal*, the court opined that, if a common law offense had similar "elements" to a modern statute, then a jury trial was mandated by Article 23 of the Arizona Constitution, whether the offense was a misdemeanor or felony.

In reaching its conclusion and analyzing English common law, the *Le Noble* court relied on a case from Maryland, *Purnell v. State*,[22] which ostensibly held that, under Maryland law, resisting arrest was a common law crime. To corroborate its holding, *Le Noble* cited *Regina v. Bentley*,[23] an 1850 English case that stated the defendant had been indicted for "cutting and wounding with intent to resist his law apprehension."

The problem with the *Le Noble* holding can be simply stated. First, like many other Arizona cases, the "common law" is not defined. Second, as of 1850, when the case was tried, there was an English statute known as the "Offences Against the Person Act of 1837." Article IV declared that it shall be a felony subject to a term of transportation "beyond the Seas" for 15 years to life if a person cuts or wounds with intent to resist lawful apprehension.[24] Considering the similarity of the statute's wording and the précis of the trial, defendant Bentley probably had been indicted under this statute as of 1850. It is not clear that the common law had anything to do with the charges.



A

COLLECTION

OF THE

PUBLIC GENERAL STATUTES,

PASSED IN THE

SEVENTH YEAR

OF THE REIGN OF HIS MAJESTY

KING WILLIAM THE FOURTH

AND THE

FIRST YEAR

OF THE REIGN OF HER MAJESTY

QUEEN VICTORIA,

1837.

LONDON:

PRINTED BY GEORGE EYRE AND ANDREW SPOTTISWOODE,
PRINTERS TO THE QUEEN'S MOST EXCELLENT MAJESTY;
And published in Numbers, Price 2d. each,
BY RICHARDS & CO. LAW BOOKSELLERS AND PUBLISHERS,
194, Fleet Street.
1837.

The Offence Against Persons Act of 1837 made "cutting and wounding" to resist apprehension one of several listed felonies that carried a potential penalty of transportation.

Law Office History

Vermeer's *The Art of Painting* celebrated Clio, the Muse of History, seen with a trumpet to honor fame and perhaps holding a volume of Thucydides. "Law Office History" is a subject of many articles by scholars and jurists. On the topic of state constitutional interpretations and the need for historical accuracy, *see* Jack L. Landau, *A Judge's Perspective on the Use and Misuse of History,* 38 VALPARAISO L. REV. 451 (2004).

Felony as a Capital Offense

As noted previously, Henry II's establishment of a royal court and the installation of common law writs connected the king's subjects to his authority and the centrality of Westminster. From the outset, and surely to better secure the entire structure of feudal and military tenures, the late 12th century saw the emergence of the "felony" as a capital offense that fell under his domain. Though the word "felony" was not fully defined, it connoted a heinous act and transgression that breached the king's peace and therefore merited a serious punishment:

> At all events this word, expressive to the common ear of all that was most hateful to God and man, was soon in England and Normandy a general name for the worst, the utterly bootless crimes. In later days technical learning collected around it and gave rise to complications, insomuch that to define a felony became impossible; one could do no more than enumerate the felonies. But if we place ourselves in the first years of the thirteenth century some broad statements seem possible. (i) A felony is a crime which can be prosecuted by appeal, that is to say, by an accusation in which the accuser must as a general rule offer battle. (ii) The felon's lands go to his lord or to the king and his chattels are confiscated. (iii) The felon forfeits life or member. (iv) If a man accused of felony flies, he can be outlawed …. We thus define felony by its legal effects.[25]

The authors do not distinguish between felony and misdemeanor as categories of offenses. Again, the inquiry was how the writ invoked the jurisdiction of the king and the serious penalties associated with contravening the king's peace.

In Anglo-Saxon times, the law knew not of felony and misdemeanor, only emendable and "botless" offenses—those that could be amerced and those that exposed the accused to serious consequences.[26] "Might as well hang for a sheep as for a lamb" was a well-travelled proverb in England by the 1600s. Most crimes that transgressed the king's authority were capital offenses.

It is this fusion of felony to the king's royal court that raises a valid question as to *Derendal's* pronouncement concerning the "elements" of an offense as determinative of the state right, itself derived from English law, that conferred a jury trial under the Arizona Constitution. In effect, *Derendal* erected a wall of separation between offense and punishment. On the one hand, *Derendal* held that the state constitution did not create any new rights when it declared that the "right" of trial by jury shall remain "inviolate." But by engrafting the jury trial on to petty offenses, it enlarged that right when compared to how it was interpreted in England hundreds of years ago.

As others have noted, many state constitutions borrowed words and phrases from prior charters and constitutions of the colonies and original states[27]; Arizona's Declaration of Rights is no exception. Thus, where Article 23 of the Arizona Declaration of Rights states that the right to trial by jury shall remain "inviolate,"[28] we find that same formulation was used by New York in 1846: "The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever."[29] Significantly, in New York from the colonial era through the period of statehood, New York law recognized a distinction between serious and petty offenses, with summary trials being allowed for minor infractions.[30]

The Meaning of "English Common Law"

Swift v. Tyson[31] took on almost canonical status in federal jurisprudence with Justice Story's pronouncement in 1842 that federal courts were privileged to "find" their own principles of common law and not be bound by state court determinations. This approach may have had benefits to federal courts and a developing national economy, but *Swift* still invited criticism that such judicial law-making was beyond the reach of the powers granted under the U.S. Constitution. Some critics focused on federalism-based arguments, whereas other voices questioned whether there was a fixed body of law that could be discerned separate and apart from actual state court pronouncements.[32]

Perhaps the most visible opponent of the notion that the "common law" was its own corpus of law was Justice Holmes. His criticism of federal courts positing the existence of the common law as a "brooding omnipresence in the sky" was eventually accepted in *Erie Railroad v. Tompkins*[33] in the mid-1930s. There, the U.S. Supreme Court held there was no federal common law. From the perspective of historical methodology and sound jurisprudence, Holmes's concern remains with us on a state level. Any effort to reach back in time and determine the "history" of an intellectual concept challenges the ability of the bench and bar to engage in historical fact-finding.

Reconstructing the "English common law" with its duration of hundreds of years, and an uncertain historical record written in Latin, French, and English, means the problem of "law office history" is ever present.

Reexamining the Measure of Justice

The right to trial by jury represents one of our most important civil liberties. As the Court in *Duncan v. Louisiana* noted, the jury may be the only protection available to a citizen facing the prosecutorial might of an overzealous prosecutor or a compliant judge. That proposition, however, does not

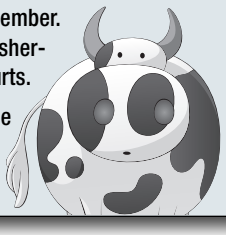
Was "Larceny" a Common Law Crime?

Probably not.

Ranulf de Glanvill was Henry II's "chief justiciar." In 1188, *De Legibus et Consuetudinibus Angliae,* a treatise on English customs, was published and attributed to his authorship. It said:

> The crime which, in legal phrase, is termed that of Lege Majesty, as in the death of the King, or a sedition moved in the realm, or Army—the fraudulent concealment of Treasure-trove—the Plea concerning the breaking of the King's peace—Homicide—Burning—Robbery—Rape, the crime of Falsifying, and such other pleas as are of a similar nature. These crimes are either punished capitally or with loss of Member. We must, however, except the crime of Theft, which belongs to the sheriffs of counties, and is discussed and determined in the county courts.

English commentators suggest that "Larceny" referred to cattle rustling. *See* Helen Jewell, English Local Administration in Middle Ages (1972).



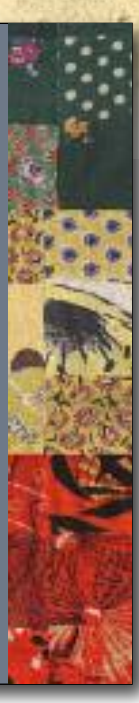
complete the full calculus of important rights and duties at play when evaluating due process and protecting the rights of the accused. Nothing in English legal history (or even the history of Arizona) remotely suggests that the right to trial by jury existed in such absolute, immutable terms.

Today, Arizona's courts are under unrelenting pressure to examine costs affecting employee and service levels, public defender contracts, counseling, and operational budgets and resources. The notion that, hundreds of years ago, the English intended to attach a jury trial right to minor violations of law is not be found in the distant fog of English "common law," particularly when the historical record shows the dominating presence of statute law early on.

Even conducting a single jury trial is a large undertaking. It has sizable costs for case management, jury summonses and juror attendance, court reporters, transcripts and perfection of the record in the event of appeal, and staff time. When measured against what hangs in the balance for a defendant facing perhaps only a fine, the expansion of the right has created a situation that should concern the bench, the bar, and the Arizona community. AZ AT

A Patchwork Quilt?

In *Benitez v. Dunevant*, 7 P.3d 99 (Ariz. 2000), the Court held that under the prior *Rothweiler v. Superior Court* prongs, driving on a DUI-suspended license was not jury-eligible. Concurring in the majority's holding, Justice Martone still dissented from the reasoning and reluctance to adopt a bright-line standard that misdemeanor offenses carrying less than six months penalties should not be jury-eligible. Rejecting the vagueness of the moral prong in particular, he noted that Arizona's cases on this issue were like a "patchwork quilt" that defied reasoned analysis.



endnotes

1. *See* PLINY'S NATURAL HISTORY, Liber 13, ch. 21.
2. 104 P.3d 147 (Ariz. 2005).
3. 410 P.2d 479 (Ariz. 1966). In *Rothweiler*, the Court held that, under the Arizona Declaration of Rights, misdemeanor DUI was jury-eligible under one of three tests or prongs: "serious" offenses due to the length of potential imprisonment, common law offenses, and offenses involving moral turpitude.
4. See *Buccellato v. Morgan*, 220 Ariz. 120 (App. 2008) (city ordinance dancing misdemeanor not common law offense analog); *State v. Willis*, 218 Ariz. 8 (App. 2008) (misdemeanor trespass not common law analog). *Cf. Fushek v. State*, 183 P.3d 536 (Ariz. 2008) (Arizona Constitution guarantees a jury trial to a misdemeanor defendant when the State files a special allegation of sexual motivation with potential serious consequence of sex offender registration).
5. *See* Joshua C. Tate, *Ownership and Possession in the Early Common Law*, 48 AMER. J. LEGAL HIST. 280 -281 (2008).
6. *See* WILLIAM CHESTER JORDAN, EUROPE IN THE HIGH MIDDLE AGES 152 (2001).
7. *See Assize of Clarendon of 1166*, Articles 5 and 22.
8. *See* HAROLD J. BERMAN, LAW AND REVOLUTION 441-444 (1983) ("BERMAN I").
9. For an excellent treatment of this much larger topic, *see* DANIEL HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830 (2005).
10. *See* HAROLD J. BERMAN, LAW AND REVOLUTION II 306-307 (2003) ("Berman II").
11. *See* JORDAN, *supra* note 6, at 236-237.

    If you are looking for a reference to our well-known burden of proof "beyond a reasonable doubt," you are about 400 years too early. The evolution of this modern-day feature of criminal trials proceeded from other social and political sources influenced by the Age of Reason and the Enlightenment of the 18th century. *See* JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT (2008). The phrase "beyond a reasonable doubt" was first reported in the American colonies in the Boston Massacre Trial of 1770.
12. *See* STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND 342 (Jenks Ed. 1922).
13. *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156.). For petty offenses, with no risk of jail or probation, the jury's role as a buffer against abuse falls away.
14. *Derendal*, 104 P.3d 147, at ¶5.
15. STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 3 (7th ed. 2009).
16. For a thematic and historical overview of the rise of Parliament, *see generally* JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT (1999).
17. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769).
18. *Id.* Vol. 1 at 76-77. "So that if any one can show the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament; since the statute itself is a proof of a time when such a custom did not exist."
19. *Id.* Vol. 3 at 105.
20. The evolution of the treatment of larceny is an example worth examining. *See* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 447, 449-451 (5th ed. 1956); 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 41-48 (1948); DEIRDRE PALK, GENDER, CRIME, AND JUDICIAL DISCRETION, 1780-1830 40 (2006).
21. 216 Ariz. 180 (App. 2007).
22. 375 Md. 678 (2008).
23. 4 Cox. C.C. 406 (1850). Significantly, *Regina v. Bentley* is not an official reported case; it is a single paragraph in length; we have no idea what the defendant was charged with.
24. *See* Public General Statutes, 7 W. 4 and Q. V. 1 (1837).
25. FREDERICK POLLACK & FREDERIC W. MAITLAND, 2 HISTORY OF ENGLISH LAW 466-467 (1898).
26. *See* PLUCKNETT, *supra* note 20, at 455.
27. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998).
28. ARIZ. CONST. art. II, § 23.
29. N.Y. CONST. OF 1846 art. I, § 2. *See also* N.J. CONSTITUTION OF 1844 art. I 7) (the right of a trial by jury shall remain inviolate).
30. *See* 2 Colonial Laws, c. 410 (1721) (persons coming into the province likely to become public charges could be summarily dealt with). *See also People v. Wolf*, 53 N.Y.S. 296 (1898).
31. 41 U.S. 1 (1842).
32. *See Baltimore and Ohio Ry. v. Baugh*, 149 U.S. 368 (1893) (Justice Fields in dissent referring to unwritten law with no existence except in the mind of the federal judge).
33. 304 U.S. 64 (1938).