Going Courting

Where We Got Courts and the Rule of Law

PART 1

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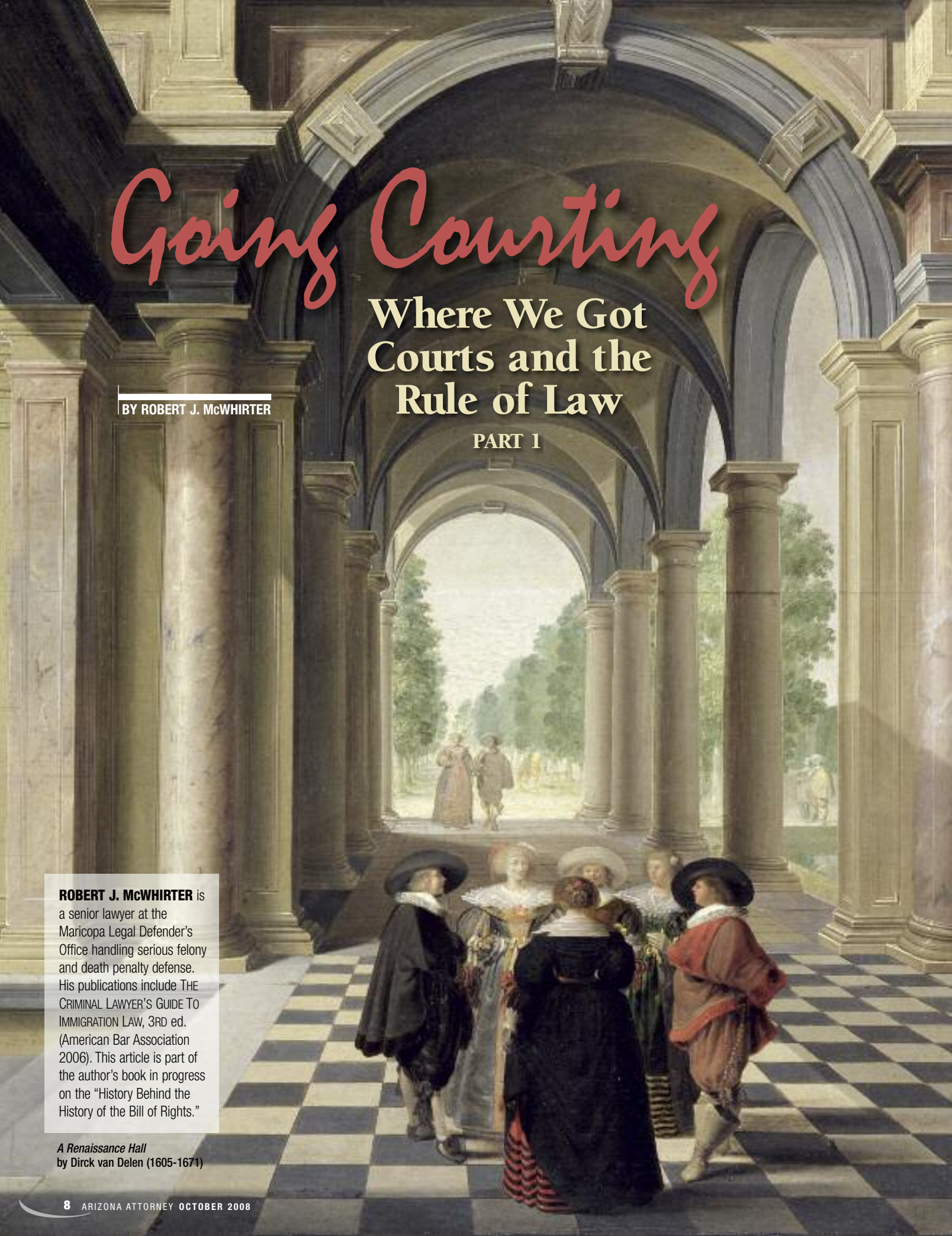

A Renaissance Hall
by Dirck van Delen (1605-1671)

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The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST., ART. III, §1.

We hear a lot about our courts—every day, in fact. But how we got the courts we have—that's a tale in itself.

We *court*,[1] as in a *suitor* goes *courting*.[2] We can be *courteous*, or a *courtesan*, or just *curtsey*—all may be part of *courtship*.[3] Dating is part of courtship and with a tennis date, we play on *a court*.[4] If we play the game well, it *suits* us.

1.The word "court" comes from the Latin *cohors*, an enclosed farmyard (as in *horticulture* or the modern sense of the term in tennis or basketball court). WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 2nd 611 (1942) (WEBSTER'S).

The Latin word *cohort* was a tactical unit of 1/10 of a legion (100 men) in the Roman army and passed into English to refer to any group of people (usually bonded by friendship). "Court" as a legal term comes from *cortem* (Latin), *cort* (Old French), and *curt* (Anglo-Norman) combined with the word *curia*.

2. The verb "to court" as in "courtly love" is the basis of the words *courtesy, courtesan, curtsey* and the song *"Going Courting"* from SEVEN BRIDES FOR SEVEN BROTHERS (MGM 1954). Indeed, the terms *romance* and *romantic* come from the stories of courtly love written in the Latin vernacular of France, a *romance* language, *i.e.,* written in the language "of Rome." *See* WEBSTER'S WORD HISTORIES 114, 400-01 (1989); JOHN AYTO, DICTIONARY OF WORD ORIGINS 141, 448 (1990).

3. **Courtship** is traditionally the wooing of a female by a male with dating, flowers, songs, chocolates and other gifts. If it is the woman wooing the man, she is called a *suitoress*. Scientests often compare the human activity of courtship with mating rituals in the animal world. Today, the term has an anachronistic quality compared to the more modern "hanging out" or "hooking up." American literary references include HENRY WADSWORTH LONGFELLOW, THE COURTSHIP OF MILES STANDISH (1858), as well as THE COURTSHIP OF EDDIE'S FATHER (MGM 1963) and television spinoff (1969–72).

4. "Real Tennis" is the original racquet sport from which modern tennis descended. In France it is *jeu de paume,* in the United States *court tennis,* and "royal tennis" in United Kingdom. The term "real" may be a corruption of "royal" and related to the game's connection with royalty in England and France in the 16th and 17th centuries.

Modern tennis in Dubai

Going Courting

We go to court. In court we argue as *suitors.*[1] Our lawyers usually wear a *suit*—indeed, they are "*suits.*"[2] A lawyer can assess his suit, which either means he is evaluating his case or looking at his clothes. He can also use a particular ability or fact and thus, *play to his strong suit.*[3] If he plays it wrong, he *courts disaster.*

The Anglo-Saxon Courts

The Anglo-Saxon judges and ministers were *witans,* their courts *moots,* and their laws *dooms.*[4] For the Anglo-Saxons, justice was communal, a matter of custom, and connected with general governance. The local court called the *hundred* met every month and dispensed justice to *suitors* (giving our modern name for *lawsuit*). There were no lawyers or professional judges. Anglo-Saxon justice lacked executive power, being much more akin to a modern arbitration. Indeed, at that time the "kings peace" was something special, an extension of the peace of his own house, *i.e.,* his court, which later became his "courts."[5]

The *Witans* were wise men, counselors or ministers.[6] The *Witan* met as the king's counselors in the *Witenagemot* (from *witan* and the Old English *gemot,* meaning meeting or assembly).[7] *Gemot* is also the root word for *moot,* meaning an assembly or law court.[8]

The *Witenagemot* declared *dooms,* and the Anglo-Saxon county courts (shire *moots*) passed *witena doms,* which encompasses our modern notions of not just laws but also decrees, judgments and statutes. The *shiremoots* meet twice a year.[9] A *doom* also implicated divine judgment or fate and thus punishment from God, giving us our modern usage of the word.[10]

As a great counsel, the *Witenagemot* had what we would call today legislative and judicial functions.[11] As such, it was the precursor of not just Parliament, but the judicial function of a parliament. Thus, when Parliament tries a high public official or when the U.S. Senate tries a president after the House impeaches him,

1. A **Suitor** as far back as Anglo-Saxon times was a party in a dispute in the county courts (shire courts). BLACK'S LAW DICTIONARY 1286 (5th ed. 1979) (BLACK'S). Today, the term has several meanings, including a lawsuit and a business suit, swimsuit, spacesuit, environmental suit, jumpsuit, etc. *Suit* comes from the Latin *sequita* and *sequere* and means "something that follows," as in the English *secuence* or *sequitor*, the root of the words *sect* and *set.* There is also *suite,* as in a set or grouping in music or offices. *Suit* referred to the uniform of followers or a retinue of a king or lord giving us the modern notion of a suit. AYTO at 510.

2. The suit as formal wear has evolved from the *frock coat* to the *morning coat* (aka *cut-away*), which got its name because it allowed gentlemen to get their morning horseback exercise. The morning coat was a more casual form of half dress from the traditional *frock coat.* The once extremely casual *lounge suit* is now our business and formal suit. The slang "*suit"* to refer to professionals, establishment, management or government employees came first from Hollywood, refering to movie executives. Now beats, artists, working people and hackers use the term pejoratively for anyone in authority.

A formal frock, the morning suit or "cut away," and President Kennedy wearing the once very casual "lounge suit." The Solicitor General of the United States and his assistants still wear the morning coat to argue before the Supreme Court.

The movie TOMBSTONE (Hollywood Pictures 1993) has Kurt Russell's Wyatt Earp

in a full frock coat with Virgil and Morgan Earp in morning coats. Doc Holliday wears a "coachman's cloak," making it easier to hide the shotgun.

3. Suit in cards is one of four categories dividing a deck: spades, dimonds, clubs and hearts. Thus, playing to your "strong suit" is playing your best cards.

4. BLACK'S at 909, 1436. Even before the Anglo-Saxons, Julius Caesar wrote about Celtic priest–judges called Druids enforcing law and custom. J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 2 (2002).

5. Sir Fredrick Pollock, *English Law Before the Norman Conquest,* 14 L.Q. REV. 291, 292, 296, 301 (1898).

6. BAKER at 9. Our modern word "**witness**" comes from the old English *witnes* meaning "knowledge" and *witan* "to know." It is also the source of **witless**–destitute of wit or understanding; **whittling**–a person of little wit or understanding; a pretender to wit; one given to smart sayings but inferior in wit; **witmonger**–one who passes on smart or witty sayings; **witship**–a witty person; **witsnapper**–a maker of witty quips; **witted**–having wit or understanding; **witticism**–a witty saying, a sentence or phrase; a clever or amusing expressed conceit; formerly, a jeer or jibe; **wittisize**–to express oneself wittily or indulge in witticisms; **witified**–having wit; **witting**–knowledge; intelligence, judgment; **wittingly**–knowingly, knowledge of, by design; **witty**–possessed of wit; **witwanton**–using wit wantonly; **wittooth**–a wisdom tooth; **witess**–a female wit. WEBSTER'S at 2940 and 2942.

WITNESS (Paramount Pictures 1985) stars Harrison Ford and Kelly McGillis, with the feature film debut of Viggo Mortensen. http://en.wikipedia.org/wiki/Witness_%281985_film%29 (last visited Sept. 11, 2005). WITNESS FOR THE PROSECUTION (United Artists 1957) stars Tyrone Power, Marlene Dietrich, Charles Laughton and Elsa Lanchester from Agatha Christie's play. http://en.wikipedia.org/wiki/Witness_For_the_Prosecution (last visited Feb. 7, 2006).

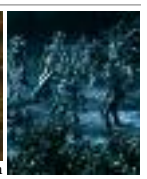
7. George Jarvis Thompson, *History of the English Courts to the Judicature Acts,* 17 CORNELL L. Q. 9, 11-13 (1932); R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 13 (1973); A.K.R. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW 11 (1958). *See also* Pollock at 292 and n.2 (arguing that correct pronunciation is Witena-Gemót rather than witanágemot). Witans would have included senior clergy, the leading *thegns* and *ealdormen* (from which we get our modern term *alderman*). All of the Anglo-Saxon kingdoms in England had the Witenagemot. At various times, especially in Wessex, the witan would elect the king. COLUMBIA ENCYCLOPEDIA 2343 (3d ed. 1963).

The British Isles 1799

8. In various parts of England one can still find Moot Halls as meeting places, the remnant of the old Folkmoot of the tribal Anglo, Saxons and Jutes. The Scandinavian people of Jämtland have the *Jamtamót* or assembly.

As for modern referances, the Wizard court in the Harry Potter books and movies meets in the *Wizengamot.*

Beowulf fights the dragon



Also, in J.R.R. TOLKIEN, THE LORD OF THE RINGS (1954), the Ents meet in an *Entmoot.* Tolkien was an expert in Old English literature and the epic poem BEOWULF.

Moot Halls in England

9. Pollock at 292.

10. From Old English *dom,* Proto Germanic *domaz,* means "judgment," "law" (compare Sanskrit *dhaman* "law").

Doom (id Software 1993) is also a fun and gory first-person-shooter computer game invoking the modern understanding of the word.

11. Pollock at 292.

it exercises the function from its predecesor, the *Witenagemot*.[1]

Although the Normans eventually replaced the *witenagemot* with the *curia regis,* or King's court, the *moots* continued to function in the counties or, as the Anglo-Saxons would say, the *shires*.[2] They existed at this time in the context of Norman law and custom, the King's emerging royal courts and an entire system of church courts that the Normans brought with them to England.[3] Thus, the *moots'* significance declined. By 1278, the *moots* had lost all jurisdiction over criminal prosecution, but the courts limped on until 1846.[4] This history gives us the modern concept of something that new facts and events makes "moot."[5]

The Normans Take Over

In 1066 A.D., William the Bastard conquered England and thus became "the Conqueror."[6] William did not replace the *Witenagemot*. Rather, he and his successors rolled it into the *Curia Regis*, providing the beginnings of a central court system that for a time allowed the Anglo-Saxons to keep their laws.[7] He did, however, separate the ecclesiastical and temporal courts. This was a change from the Anglo-Saxon system, which had both a magistate and a cleric jointly judging.

Over time, the Normans unified England and centralized the court system, applying the "custom of the realm," which led to the "Common Law."[8] In this new mix of Anglo-Saxon and Norman, the King became the source of justice for both. He was the unifier.[9] More and more subjects would seek redress from the King's courts rather than the Church, local lord or the old shire moots.

The nature of what subjects wanted from the King's courts was also changing. In Anglo-Saxon times through the early Norman period, justice was a private matter and so was prosecution of crime. Anything even resembling police, prosecutors or prisons was centuries away. But the Normans did start to provide judges to bring the King's justice to the people.

The Norman Courts

Norman courts start with the *Curia Regis,* or King's Court.[10] William the Conqueror took over the *Witenagemot* and its judicial functions, and William's successors developed the *Curia Regis* as a government institution.[11] For centuries the entire English government consisted of the "King in Council," with authority descending from him.[12]

But many courts existed in England—among them were Church courts, manor courts of great lords, Anglo-Saxon *shire* and *hundreds* courts, as well as the King's courts. With all of

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1. Thompson at 13, *citing* the High Court of Parliament in England and the General Court of Massachusetts (consisting of the governor and both legislative houses) as examples.

A king and his witan—11th-century Old English Hexateuch (British Library)

The 1999 U.S. Senate impeachment trial of Bill Clinton.

2. BAKER at 6. The "**Shire"** is also the home of the Hobbits in J.R.R. Tolkien's fictional Middle-earth in THE LORD OF THE RINGS.

J.R.R. Tolkien

***Bag End*, a Shire landmark, in THE LORD OF THE RINGS (New Line Cinema 2001-2003).**

The term "shire" is still found in a great number of place and regional names in England and even in the state name New Hampshire—the ninth state to ratify the U.S. constitution, the minimum number for it to take effect.

3. VAN CAENEGEM at 12-13. *Also* Thompson at 10 and n.3.

4. The County Court Act of 1846. *See also* The County Courts Amendment Act ending the Hundred Courts. *Cited in* Thompson at 13.

6. **The Bayeux Tapestry depicting events leading to the Battle of Hastings of 1066 A.D.** Getting your name changed for all history from "the bastard" to "the conqueror" is at least one way to treat an inferiority complex.

7. VAN CAENEGEM at 12; BAKER at 12. | 8. Thompson at 17-18.

9. VAN CAENEGEM at 18. On Norman feudalism in England, *see generally* Charles Sumner Lobingier, *The Rise and Fall of Feudal Law*, 18 CORNELL L. Q. 92 (1933).

10. In ancient Rome a ***curia*** was a somethng like a tribe or clan and came to mean its meeting place. The *Curia Romana*, or just the *Curia*, was the highest ecclesiastical court, with jurisdiction over all Europe including England. *See* Thompson at 399. It is still the government of the Vatican State.

St. Peter's Square

11. BAKER at 17. Thompson at 18 n.49 (noting that the *Curia Regis* was a feudal institution with membership based on land tenure, which the *Witenagemot* was not).

Edward I relief in U.S. House

House of Commons

More than two centuries later, Edward I saw an advantage of bringing the new middle class into the *Curia Regis*. He called the *Great Curiae* in 1295 and 1305, allowing many "common" knights and middle class. This was the beginning of Britain's House of Commons. Thompson at 20. For this reason, his portrait hangs in the U.S. Congress.

Edward I was the King in the movie BRAVEHEART (Paramount Pictures 1995), played by Patrick McGoohan.

12. Thompson at 22. The judicial function of Parliament's House of Lords came from this part of the *Curia Regis*. Until the Constitutional Reform Act of 2005 and the new Supreme Court of the United Kingdom, the House of Lords was the United Kingdom's court of last resort and the precursor of the United States Supreme Court. Historically, the House of Lords also functioned as a court of first instance for the trials of peers and for impeachment cases. This is the precedent for the American system in which the Senate sits as a court for impeachemnt trials. Technically, the Lords sit as "the king in Council in Parliament," hearkening back to the old role of the Curia Regis as being directly from the King's person. *See generally* Thompson at 432. *Also,* FREDERICK G. KEMPIN, HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW 42 (1990).

5. *See* BLACK'S at 909. The Moot also became part of the courtroom training in the Inns of Court system to teach lawyers. The moots were the oral training in courtroom argumentation and rhetoric. *See generally* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 77-93 (1953); A.W.B. Simpson, *The Early Constitution of the Inns of Court*, 28 CAMBRIDGE L. J. 241, 250-51 (1970). In a similar sense, the term is used today to refer to the Moot Court competitions in law schools.

these forums, the King's justice was sometimes hard to come by.[1]

Although the *Curia Regis* traveled with the King for centuries, King William Rufus made Westminster Hall in London its center.[2] Thus a place existed where the courts and the common law would develop. Henry I started delegating judges to go to counties to hear pleas as if they were the king.[3] These judges were eventually called "justiciae" or "justiciarius."[4]

A century after the Norman Conquest in 1166, King Henry II, William's grandson, periodically sent *Curia Regis* judges to every shire/county. These judges worked alongside the Anglo-Saxon courts, causing the later's decline.[5] These justices went out with the king's commission under the great seal to supervise the justice system. Their jobs were to either conduct an early form of investigative inquest, called *oyer and terminer* (to hear and determine), or to conduct the trials of prisoners already charged with crime and in jail called *gaol (jail) dilivery.*[6]

The central court he started called "the bench" became the "Court of Common Pleas." Justices of this central court in Westminster also had responsibility for a circuit.[7] When the justices when out on circuit, they held an *assize*.[8] These justices would apply the same law and returned to Westminster to compare notes. Thus, Henry II gets credit for starting the "common law."[9]

Justice was a moneymaker. The king's justices collected revenue from fees and fines to more than pay for themselves. Getting "tough on crime" was profitable, refuting the maxim that "crime doesn't pay"—it did for the King![10]

Henry II launched his "tough on crime" campaign.[11] Just like modern politicians, the fact that getting "tough on crime" increased his power and revenues and made him more politically popular probably had nothing to do with it!

The nature of justice was changing. Since Anglo-Saxon times, justice had been a private matter but now was becoming a public concern. This was a slow process, spanning the reigns of several monarchs.[12] But the trend had begun, and Henry II played to it.


Ruins of the Roman Forum

1. The word "forum" comes from Roman trials. POUND at 44. Roman trials, *in judicio*, originally happened in the outside marketplace of Rome called the *forum*, which later became the place of government and judicial proceedings. This is why we still call a court *a forum* to resolve legal questions, though today the statement tends to refer to jurisdiction or venue as in the statement, "This court is not the correct forum for this issue." Forum is also related to the Latin *foris,* meaning "out of doors," which is where we get our "forensic" as well as the word "forest." Later, Roman trials moved indoors to a large public building called a basilica. After the Roman Empire became Christian, the word basilica referred to a large and/or important church with special ceremonial status from the Pope. St. Peter's in Rome, for instance, is a basilica and not the cathedral of Rome.


Plautus (Titus Maccius Plautus) (c. 254-184 B.C.)

A FUNNY THING HAPPENED ON THE WAY TO THE FORUM (United Artists 1966) is musical comedy film starring Zero Mostel, from the stage musical with music and lyrics by Stephen Sondheim. The work is a comedic farce supposedly inspired by the ancient Roman playwright Plautus about Pseudolus, a bawdy slave who attempts to win his freedom by helping his young master woo the girl next door.

2. BAKER at 37. Thompson at 19.


William Rufus (William II) was the Conqueror's second son. The first son, Robert, got Normandy, the more valuable of dad's possessions. Henry, the next son, got squat from dad but by being smart and manipulative ended up with the whole realm. ANTONIA FRASER, THE LIVES OF THE KINGS AND QUEENS OF ENGLAND 27-31 (1975).


Henry I

3. VAN CAENEGEM at 20. These were *curiales* sent on *eyres* = *itinera* or journeys (*eyres* is the root of our modern word *itinerary*). BAKER at 16 n. 15.

4. BAKER at 15. This gives us our modern title "Justice" usually for the judges on the supreme court of a state or the United States Supreme Court.


Henry II

5. In 1166 Henry II by statute transferred the jurisdiction from the Shire courts to the King's court. From 1154-1189 the Shire courts also lost jurisdiction over land disputes. KEMPIN at 25.


A Town Crier

6. BAKER at 17.

The word *oyer* (to hear) is related to the word *oyez* (pronounced "O, yez and meaning "hear ye"—BLACK'S at 997). *Oyez* is the pronouncement many modern court bailifs still use to being a session such as the United States Supreme Court: "Oyez! Oyez! Oyez! All persons having business before the Honorable Supreme Court of the United States are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!" "Oyez" is law French, a form of Norman French that evolved over the centuries in the English law courts. Town criers traditionally yelled "Oyez" to attract attention before a proclamation. In the Supreme Court the Marshall of the Court, the Court Crier, does this.


An Assize Judge riding circuit

7. BAKER at 18; Thompson I at 24; Roger D. Groot, *The Jury in Private Criminal Prosecutions Before 1215*, 27 AM. J. LEGAL HIST. 113, 114 (1983). The Justices of the United States Supreme Court used to ride circuit and still have individual responsibility over the circuit courts of appeal and the Federal Courts of Appeals; the level between the district trial courts and the Supreme Court are called the Circuit Courts of Appeals. *See* David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007) (arguing that having justices return to circuit riding would help keep justices in tune with the country and help citizens know the court).

8. Thompson at 25. The Assize replaced the ancient *Eyres*. The term *Assize* comes from the Old French *assises* or "sessions" and is still the name of criminal courts in several countries, e.g., France, Belgium and Italy. This is the source of the modern legal term of a court "being in session" and "the court is now in session." *See* WEBSTER'S at 612.

9. DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 179 (2003); BAKER at 13. Later, *Magna Carta* stated "common pleas should not follow the king but should be held in some central place." BAKER at 19 citing *Magna Carta* 1215, cl. 17.

Westminster Hall continued as a law court for centuries, housing at various time the courts of Chancery, Common Pleas, and Kings Bench. BAKER at 37.


Westminster Hall in the early 19th century

10. *See* BAKER at 502-03. Justices from 1218-19, for example, raised £4,000 for the king. Edward I needed "great treasure" for the war on Scotland and raised it by "causing justice to be done on malefactors." *Quoted in* BAKER at 14. Thus, because justice was a moneymaker, Patrick McGoohan's Edward I got to beat up on Mel Gibson's William Wallace in BRAVEHEART.

11. Henry was a busy guy. In addition to justice reform, he started the Plantagenet (aka Angevin) dynasty by becoming King of England, being Duke of Normandy and Count of Anjou, and marrying Eleanor of Aquitaine (by accounts a hottie with a big chunk of land).


By his death, his dominion looked like this and his relationship with Eleanor scintillating enough for a movie: THE LION IN WINTER (Universal Pictures 1968).

12. *See generally* Daniel Klerman, *Was the Jury Ever Self-Informing*, 77 S. CAL. L. REV. 123, 130-32 and n. 44 (2003). In Europe, getting "tough on crime" spurred the inquisition. Richard M. Fraher, *The Theoretical Justification for the New Criminal Law of the High Middle Ages: "Rei Publicae Interest, Ne Crimina Remaneant Impunita,"* 1984 U. ILL. L. REV. 577. All of this was part of criminal law becoming a public concern rather than a private matter. *See also generally* Laura Ikins Stern, *Inquisition Procedure and Crime in Early Fifteenth-Century Florence*, 8 LAW & HIST. REV. 297 (1990).


The Ghent Altarpiece: The Just Judges 1427-30 showing continental judges riding circuit.

> *...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...*
>
> FIFTH AMENDMENT, DOUBLE JEOPARDY CLAUSE

Getting tough on crime in 12th-century England meant going after the Catholic Church. In criminal matters, the Church had a big chunk of jurisdiction that Henry II though should be his. Before the Norman Conquest, England had no separate ecclesiastical courts or independent ecclesiastical law.[1] The Norman Kings created a dual system of courts and law. This planted the seeds of the power struggle that was to play out over the centuries.

This power struggle involved the legal questions of what we today would call *subject matter jurisdiction* and *forum shopping*.[2] Where were people to be tried—the King's courts or the Ecclesiastical courts?[3] This was especially relevant when clergy violated civil law. As Henry II knew, as do modern lawyers, the outcome of a case often depended on who heard it—the King or the Archbishop. And who got the fees, fines and revenues made it all the more imperative.

Over history, jurisdiction between the King's courts and the ecclesiastical or canon law courts was very fluid.[4] For example, stealing and brawling were common law crimes, but if they were done in a church they became ecclesiastical crimes.[5] On these and other questions sometimes the King won and sometimes the Church.[6]

Henry vs. Thomas:
The Growth of English Criminal Procedure

Henry II's assertion of royal jurisdiction brought him to his fateful conflict with Archbishop Thomas Becket.

Henry II probably had his ex-friend Thomas Becket killed just over eight years after he made him Archbishop of Canterbury.[7] Henry thought he had his man in the right job to gain the upper hand in the church/state power struggle—Henry was wrong.

Their relationship soured when Becket began to take his job seriously, asserting the Catholic Church's jurisdiction and tax exemptions.[8] Before 1166, both a bishop and the King's magistrate presided over most English courts. In that year, however, Henry II passed new legislation at the Assize of Clarendon, making the King's courts only under royal authority.

Double Jeopardy: A key issue was Henry's wish to retry "crimonius clerks" in the King's courts after they ☛

1. LEVY at 43. This was part of William the Conqueror's deal for the Pope's blessing his English invasion. Under the Anglo-Saxons, bishops sat as judges. JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2250 (McNaughton ed. 1961), at 270. For the split of King's and church courts, *see* Thompson at 395-965, 400-02. *See also* Charles Donahue, Jr., *Ius Commune, Canon Law, and Common Law in England*, 66 TUL. L. REV. 1745 (1992).

2. *See generally* Thompson at 395-411; KIRALTY at 16-17; KEMPIN at 42. Modern cases of jurisdiction between state and federal courts still treat this issue.

3. During most of the medieval period, for example, if a suspect made it to the church altar he received sanctuary and a secular officer could not arrest him. KIRALFY at 363-64; BAKER at 512-13.

4. Over the centuries writs of prohibition and habeas corpus against church court jurisdiction became more common. VAN CAENEGEM at 19. These writs became a key tool in the struggle of the common law over what became after Henry VIII the king's church courts using inquisitorial procedures, including torture.

Tonsured monks

5. **Benefit of Clergy** allowed tonsured and clothed churchmen to claim they were outside the king's jurisdiction and be tried instead under canon law. Even if convicted, their likely punishment was penance, which even if severe was better than the hanging that awaited in the King's court. If the crime was really bad a clergyman could be defrocked (literally, lose his protective clerical clothes) and returned to the secular authorities for punishment, but this was rare. Later, the qualification became a literacy test because usually only clerics could read, though this expanded the privilege to anyone who could read. Unofficially, this legal loophole was even larger, because one could memorize Psalm 51 (Psalm 50 in the Vulgate and Septuagint): *Miserere mei, Deus, secundum misericordiam tuam.* (*O God, have mercy upon me, according to thine heartfelt mercifulness*), which became known as the "neck verse" because it could save your neck. Henry VIII tried to close this jurisdictional loophole and his frustrations in dealing with the Church, as well as his sexual frustrations in finding a wife who would give him a male heir, were part of his break with Rome.

Benefit of Clergy passed into the common law as a basis for granting leniency for first-time offenders. Instead of hanging, a first-time offender convicted of manslaughter would receive the "burnt in the hand" punishment of a branded "M" for "manslayer."

This is what happened to the only two soldiers convicted for the Boston Massacre of March 5, 1770. It was not just the Massacre but this leniency that helped spark the American Revolution. It also showed that John Adams, who defended the soldiers, was indeed a clever lawyer. Perhaps in reaction to the Boston Massacre case, Congress abolished Benefit of Clergy in 1790, though it survived in some states and may even remain technically available today. Parliament finally abolished Benefit of Clergy in 1827. *See* Jeffrey K. Sawyer, *Benefit of Clergy in Maryland and Virginia*, 34 AM. J. LEGAL HIST. 49 (1990).

Boston masacre—Paul Revere

6. In a sense, the issues did not resolve until Henry VIII effectively made himself pope of England. Three centuries later a similar drama played out between St. Thomas More, named after St. Thomas Becket and also Chancellor to a King Henry, this time Henry the VIII. Again, Thomas came off the worse after Henry VIII had him executed in 1535. Also, in 1538, Henry VIII had Thomas Becket's shrine destroyed.

7. "Oh won't somebody rid me of this Dammed priest!" cried King Henry II about Thomas Becket. The King's knights took him at his word and splattered the Archbishop's brains at vespers on Dec. 20, 1170.

Becket had started as Henry's great friend and Chancellor. Henry made him Archbishop of Canterbury on June 3, 1162 (to avoid the fact that Becket was not yet a priest, he was ordained the day before). Becket defied the King and the power struggle led to his murder; Henry got the blame (probably deserved). To avoid interdiction, he did public penance including a scourging at the archbishop's tomb. Henry was purged of any guilt for Becket's murder, but he had to continue Benefit of Clergy; Becket was canonized. The story is still the subject of high drama. *See* T. S. Eliot's 1935 play MURDER IN THE CATHEDRAL as well as the movie BECKET (Paramount 1964) with Richard Burton as Becket and Peter O'Toole as Henry II. As for Henry II's life and loves in film, *see* THE LION IN WINTER (Universal Pictures 1968), in which O'Toole again plays Henry II sparring with Katherine Hepburn's Eleanor of Aquitaine. Though these works have several historical inaccuracies, they make for good drama.

Earliest known portrayal of Becket's murder

Happier times, for the King at least, from the movie BECKET

8. King and Becket both talking.

had claimed benefit of clergy to avoid the King's justice. Invoking an ancient concept that we know today as double jeopardy,[1] Becket resisted.

We take for granted the concept of a prohibition against double jeopardy.[2] Becket, though, may have been asserting for the first time in England a longstanding principle of canon law.[3] The double jeopardy prohibition means that the same sovereign cannot try or punish you twice for the same crime.[4] Thus, it limits the state's power to try and retry a person until conviction. In this, it is a key concept of the rule of law.[5]

The reaction to Becket's murder in 1170 A.D. is a source of our double jeopardy clause.[6] After his canonization, English judges saw the wisdom in prohibiting double jeopardy. By 1300 A.D. the common law recognized *autrefois acquit* ("formerly acquitted") and *artrefois convict* ("formerly convicted") as a bar to future prosecution.[7] From at least this point, the prohibition on double jeopardy has been a mainstay of the common law.[8]

Seeking the King's Justice

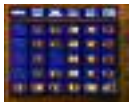
Despite this power struggle with the Church, most people wanted more of the king's justice, and they were willing to pay for it. To get the case heard in the King's court, a person had to buy a *writ* (order) from the king to his justices directing them to hear the case. This was a big source of royal income.[9] And what the people got for their money were the king's professional judges, an inquest, a jury of witnesses to find the facts—all backed up with royal muscle.

The people even demanded more of the king's justice from Henry II's fourth son, John, in *Magna Carta* Clause 18. Generally, *Magna Carta* limits the king's power, but this clause requires more rather than less of the king's power.[10] King John promised to send two judges to each county four times a year to hold assizes (sessions).

As for these judges, forget judicial independence. At that time there was no notion that a judge applies the law regardless of who

Noble chess players, Germany, c. 1320

Knights Templar playing chess, *Libro de los juegos*, 1283



2. It even shows up as a plot theme now and then. *See* DOUBLE JEOPARDY (Paramount 1999), starring Tommy Lee Jones and Ashley Judd, based on a common legal fallacy. *See also Double Jeopardy!*— the second round of the television gameshow *Jeopardy!*, when all points are doubled. http://en. wikipedia. org/wiki/Double _jeopardy (last visited Feb. 7, 2006).

3. The Catholic Church preserved the concept through the dark ages starting in 391 A.D. when Saint Jerome interpreted the Biblical Nahum text as promising that God would not to punish the same offense twice, and by 847 A.D. this interpretation formally entered canon law. *See* Creekpaum at n.17, *citing Bartkus v. Illinois*, 359 U.S. 121, 152 n.4 (Black, J., dissenting).

4. As the Bill of Rights discussion makes clear, the states of the United States intended to keep their sovereignty. Thus, they are "separate sovereigns" for purposes of the double jeopardy clause, meaning that a person can be tried both in federal and state court for the same offense as long as it is a crime in both.

1. Jeopardy (jocus paritus) is a chess term meaning a set problem. BAKER at 77.

See Kyd en Creekpaum, *What's Wrong With A Little More Double Jeopardy? A 21st Century Recalibration Of An Ancient Individual Right*, 44 AM. CRIM. L. REV. 1179, 1182, n. 17 (2007), noting that the double jeopardy prohibition goes back to 660 B.C. The Book of Nahum 1:9 (King James) states, "Affliction shall not rise up the second time."

The Ancient Greeks adopted the concept by 355 B.C. Also, criminal acquittals were final under Roman Law. On Greek and Roman double jeopardy law, *see also* David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM & MARY BILL OF RTS. J. 193, 199-202 (2005) (Rudstein, *Brief History*).

5. *See, e.g.,* Ronald J. Allen, Bard Ferrall & John Rathaswamy, *The Double Jeopardy Clause, Constitutional Interpretation and the Limits of Formal Logic*, 26 VAL. U. L. REV. 281 (1992) ("Without the double jeopardy prohibition, the state would possess almost limitless power to disrupt the lives and fortune of the citizenry."). Despite the rule's ancient pedigree, voices do call for exceptions. *See* David S. Rudstein, *Retrying the Acquitted in England, Part I: The Exceptions to the Rule Against Double Jeopardy for "New and Compelling Evidence,"* 8 SAN DIEGO INT'L L. J. 387 (2007).

St. Jerome, Ghirlandaio (1480)

6. Creekpaum at 1182-83 and n.21. The double jeopardy concept could also have come into English law from canon law after the Norman Conquest in 1066, or directly from ancient Roman law. Indeed, it could be that the concept is so fundamental that it evolved in England itself.

For more on the Becket theory of the double jeopardy clause origins as well as other sources, *see* Rudstein, *Brief History* at 205-11.

Blackstone

7. Creekpaum at 1183. From the French *autre* ("another") and *fois* ("time") forming the compound, *autrefois* meaning "formerly."

8. By the 1760s, William Blackstone summarized English double jeopardy jurisprudence in a pithy "universal maxim … that no man is to be brought into jeopardy of his life more than once for the same offence." WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 335-36, *quoted in* Creekpaum at 1183. Blackstone's "universal maxim" passed right through to the Fifth Amendment's wording that "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The first United States Congress passed the prohibition on double jeopardy without objection. *See* Steve Bachmann, *Starting Again With the Mayflower … England's Civil War and America's Bill of Rights*, 20 Q.L. REV. 193, 240 (2001).

9. Thompson at 22; KIRALFY at 21. For discussion of the writ system *see* BAKER at 54.

10. DANZIGER & GILLINGHAM at 176-78. BAKER at 20. Historians recognize King John's reign as a near total failure. He succeeded in losing nearly all of dad Henry II's empire, with the exception of England, winning him the nicknames "Lackland" (*Sans Terre* in French) and "soft-sword." No other English king or queen has since named their kid "John." He also is the bad guy in the Robin Hood movies, including Claude Rains' depiction in THE ADVENTURES OF ROBIN HOOD (Warner Brothers 1938), with Errol Flynn as Robin. Even Disney's animated ROBIN HOOD (Buena Vista Pictures 1973) picks on him, having him suck his thumb and cry for "mommy" whenever Robin steals his gold (an amusing reference to his mother, Eleanor of Aquitaine, a far more capable ruler than he). His weakness led him to sign the *Magna Carta*.

King John

Claude Rains

John signs Magna Carta

Hepburn as Eleanor in THE LION IN WINTER

John's mom— Eleanor of Aquitane

Magna Carta: This is not the original charter King John signed, which has been lost (though four copies survive), but the 1225 version by Henry III preserved in the UK's National Archives.

is in power. Judges in medieval England were the king's men, well paid for implementing the king's justice.[1] They sat in place of the king and held "court" as an extension of the King's court, the *Curia Regis*. They were more law enforcement than what we think of as judges. From this King's court developed the Norman Inquest, a mode of trial and a basis for the later common law courts.[2]

True, most of the early judges were clerics of one kind or another because generally the clerics were the only ones who could read or write.[3] Henry II began to change this. In 1179 he sent out 21 judges, most of whom were laymen—in other words, the king's men.[4]

Over time many courts developed in addition to the common law courts. As mentioned, a complete system of ecclesiastical courts already existed with very broad jurisdiction and ultimate appeal to Rome.[5] Courts also develop around the king's *Justiciar*, originally any officer of the *Curia Regis*.[6] Because the early Norman kings were often in France, the *Justiciar* became a viceroy in the king's stead. As the kings spent more time in England (especially after John lost most of France), the *Justiciar* became less necessary. After 1234, Justiciars were not regularly appointed, and the last one, Hugh le Despenser, had a very bad end in 1265.[7]

With the abolition of the office of Justiciar, much of his governing powers passed to the *Chancellor,* who became second to the monarch in dignity, power and influence.[8] As for the *Justiciar's* judicial powers, they divided up among what became the **Courts of Chancellery** and the three common law courts of **Common Pleas, King's (or Queen's) Bench** and **Exchequer.**

Courts of Chancellery grew up around the *Chancellor* developing and applying the law of Equity, for centuries the great rival of the common law.[9] In Chancellery court, if justice was on your side, you would win regardless of legal formalities, and the motto was *nullus recedat a curia cancellariae sine remedio* ("No one should leave the Chancery in despair").[10]

The Court of Common Pleas was the second-oldest common law court (after Exchequer), established during the late 12th century. It generally dealt with civil cases between private parties. *Magna Carta* provided that there should be a court—the Common Bench (later Court of Common Pleas)—that met in a fixed place, Westminster Hall in London.[11]

The Court of King's Bench grew out of the King's Court or *Curia Regis* and was not originally a law court, but the center of the King's administration. Generally, its cases were criminal and civil cases where the government (i.e., the king) had an interest. It also super- ☛

1. J. G. BELLAMY, THE CRIMINAL TRIAL IN LATER MEDIEVAL ENGLAND: FELONY BEFORE THE COURTS FROM EDWARD I TO THE SIXTEENTH CENTURY 10-11 (1998); KEMPIN at 88-91. Not until The Act of Settlement of 1701 did the King's justices get secure salaries and life tenure in reaction to the Stuart abuse of power. KEMPIN at 91-93; Fisher at 617. The U.S. Constitution protects judges in this regard at Art. III § 1:

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

2. Barnes at 349 and n. 26.

3. Kempin at 89. Judges and university professors, all of whom used to be clerics, still wear the robes, as do graduating university students.

Also, we get our modern word "clerk" from cleric. CATHOLIC ENCYCLOPEDIA, www.newadvent.org/cathen/04049b.htm (last visited May 13, 2007).

4. DANZIGER & GILLINGHAM at 179.

Regarding the power of early judges in Europe and England, *see generally* Walter Ullmann, *Medieval Principles of Evidence*, 62 THE LAW QUARTERLY REV. 77 (1946).

Pope John Paul II addresses the Rota in 2002

5. The ***Roman Rota*** often heard these cases and exists today. Since the Middle Ages, the case would go to "auditors" who would hear the evidence (Latin *audire-* to hear or listen). The *rota* referred to the round table (Latin *rota*) or the round room where they sat. THE CATHOLIC ENCYCLOPEDIA www.newadvent.org/cathen/02070c.htm (last visited May 15, 2007). *See also* BAKER at 126-27. The Roman Catholic Church's legal system is the oldest and one of the most advanced still in use today. In 1534, England severed this appeal by breaking the Church of England from Rome. BAKER at 130.

6. The term also applied to others, usually nobles or barons, who had legal jurisdiction over their own lands or anyone else who could act as a judge in the shire-courts.

Marceau as Isabella

7. BAKER at 15. Hugh le Despenser was a greedy man who wormed his way into Edward II's affections through a probable homosexual relationship.

Isabella and a young Edward III

This did not sit well with Edward II's wife, Isabella, who eventually deposed Edward II. In a variation of the normal execution of traitors by hanging, drawing and quartering, Hugh also had his penis and testicles cut off and burnt in front of him as punishment for his relationship with Edward II.

Isabella (aka *the She-Wolf of France*) was by all accounts as good looking as Sophie Marceau, who played her in BRAVEHEART. *See* ALISON WEIR, QUEEN ISABELLA (2005).

Execution of Hugh

8. Originally, Chancellors were clergy and the king's chaplain/confessor and thus "keeper of the king's conscience." They began to provide direct justice, dispensing with legal technicalities, later called the *law of equity*. **Sir Thomas More** was the most famous Chancellor, even though he resigned after only three years because of Henry VIII's break with Rome. *See* BAKER at 107 on More as Chancellor. The Lord Chancellor (now the Lord High Chancellor of Great Britain) is still one of the most important officers in Britain with judicial, executive and legislative functions, though the British have limited the office in modern times. *See* Diana Woodhouse, *United Kingdom: The Constitutional Reform Act 2005–Defending Judicial Independence the English Way*, 5 INT'L J. CONST. L. 153 (2007), and Susanna Frederick Fischer, *Playing Poohsticks with the British Constitution: The Blair Government's Proposal To Abolish the Lord Chancellor*, 24 PENN. ST. INT'L L. REV. 257 (2005).

Aristotle

9. ***Equity*** according to Aristotle was a way to correct general laws that could not cover every situation. It required decisions based on the law's intent rather than its wording. BAKER at 106, citing ARISTOTLE, NICOMACHEAN ETHICS vol. 10, tr. W. David Ross (Oxford 1925). *See* ARISTOTLE, NICOMACHEAN ETHICS (W. D. Ross trans.) www.constitution.org/ari/ethic_00.htm (last visited April 4, 2008).

10. BAKER at 102. Although equity grew to rival the common law, the Court of Chancellery worked in conjunction with the King's Bench. BAKER at 101. Chancellery offered swift and inexpensive justice, especially for the poor, as opposed to the common law courts' use of an inflexible system of *writs* to do business. BAKER at 104. *Writs* were orders to the king's officials to take action. They were expensive, and claims would fail just because a *writ* was incorrect. *See* Thompson at 209 *et seq.* and KEMPIN at 37-40. The king's *chancellor* could provide relief to injustice by issuing an injunction to the *writ*'s execution. *See* Justin C. Barnes, *Lessons From England's "Great Guardian of Liberty": A Comparative Study of English and American Civil Juries*, 3 U. ST. THOMAS L.J. 345, 352-354 (2005).

Regarding the jurisdictional turf battle between the common law courts applying law and Chancery applying equity, *see* William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983, 1015-18 (1978), reprinted in substance as Chapter 1 in WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980), and reviewed by Charles Alan Wright, *Habeas Corpus: Its History and Its Future*, 81 MICH. L. REV. 802 (1983). The common law lawyers did not like the loss of business to the chancery court's streamlined procedures and equity rulings.

11. *See* Thompson at 36-38, KEMPIN at 33; Baker at 44-47.

vised juridiction of all the courts by issuing writs of *error*, *mandamus* and *certiorari*.[1]

The Court of Exchequer had by 1190 exercised a judicial role, with judges known as **barons.** Originally this court dealt with actions by the Crown for monies owed to it and actions by private citizens.[2]

The jurisdiction between these courts waxed and waned over the centuries.[3] And there were other courts as well exercising jurisdiction over subject matter or place.[4]

The Writ of Habeas Corpus

A key weapon in the court turf battles was the *Writ of Habeas corpus*.

We know habeas corpus today as "the Great Writ" for its role as the securer of individual liberty.[5] But *habeas corpus* did not start as the guardian of individual liberty.[6] Originally, the king's traveling judges used it to get jurisdiction over a defendant who was otherwise not present. It was a way of securing a party's appearance after other more lenient ways did not work.[7]

> *The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.*
>
> U.S. CONSTITUTION, ARTICLE I, § 9

Later, judges of one court would use the writ of habeas corpus to get jurisdiction over individuals and their cases (*causa*) from other courts. This is a function like the modern use of the writ to secure the rights of individuals or their causes known then as the *habeas corpus cum causa*.

Eventually, the "king's judges" turned it back on the king by using the writ of habeas corpus to limit the jurisdiction of the ecclesiastical courts. This was a problem for the king because since Henry VIII

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Exchequer Court and Table

1. 11.*See* Thompson at 38-41, KEMPIN at 34-35; G. R. Elton, THE TUDOR CONSTITUTION 2ND ED. (1982). *Also see* BAKER at 41-44, 49-50.

2. *See* Thompson at 35 and Baker at 47-49. Over time through legal fictions, the Exchequer court's jurisdiction grew until, by 1290, it had become a regular common law court on par with King's Bench and Common Pleas. The Exchequer court got its name from the large table with squares. In ages before calculators and computers, or before Europe knew of the Chinese abacus, the table kept accounts straight by markers placed on the table to represent sums.

Our term for *checks* as well as the game *checkers* and the terminology of *chess* ("*check*" and "*checkmate*") refer to the same type of table. BAKER at 18 and n.22; KEMPIN at 35-36. It was the Court of Exchequer that issued the *Writs of Assistants* that started the Boston Writs cases, the precursor to the Fourth Amendment.

3. For a description of the original jurisdiction of the courts, *see* BAKER at 38. In 1880 the various courts were reorganized with Common Pleas, the King's (then the Queen's) Bench and Chancellery combined into the High Court of Justice. The jurisdiction of American courts has from the start included all the common law subjects as well as equity from Chancellery. *See* Thompson I at 42. Regarding early colonial courts, *see* KEMPIN at 44-47. Today, most U.S. courts are courts of law and equity. *See* FED.R.CIV.PRO. 2 (1938).

4. Other courts included Admiralty, Thompson at 414, the Courts of the Lord High Constable and Earl Marshal of England, Thompson at 421-24. The Earl Marshal was charged with marshalling the king's forces and is where we get the modern term "court marshal." *See also* BAKER at 122-24 and Lobingier at 213 on the precursor of the Courts Marshal being the courts of chivalry, owing much of its procedure to the three great crusading orders of the Knights (Hospitallers) of St. John, the Knights Templers and the Teutonic Knights.

There were also the King's prerogative courts, such as Star Chamber and High Commission. *See* Thompson at 203-229 and KEMPIN at 40-41; BAKER at 117-19. The abuses in these courts helped bring about the English Revolution and their abolition. Thompson at 240-43; KEMPIN at 75. Finally, the House of Lords, as part of the High Court of Parliament, is the precursor to the U.S. Supreme Court. Thompson at 432; KEMPIN at 42.

Below Four illuminations on vellum from around 1460 showing the four courts at Westminster Hall: Chancellery, Common Pleas, King's Bench and Exchequer. They are part of the Inner Temple Library's collections and provide the earliest known depictions of the English courts and court dress. Inner Temple Library at www.innertemplelibrary.org.uk/welcome.htm (last visited May 15, 2007).

Court of Chancellery

Court of Common Pleas

Court of King's Bench

Court of Exchequer

5. A "writ" is just lawyer-speak for "order."

6. **Habeas corpus** is Latin for "You have the body." This was an order commanding a person detaining another to produce the prisoner. Thus, the issue is the legality of the detention, not guilt or innocence. Habeas corpus is "the great writ of liberty" issuing from the Common Law courts of Chancellery, King's Bench, Common Pleas and Exchequer. BLACK'S 638-39. *See* U.S. Const. Art. I, § 9.

7. *See* Duker at 1000. Thus, it functioned more like a modern summons, arrest warrant or document of extradition, or for a person in custody like the still named *writ of habeas corpus ad prosecudum.* This was called the writ of *habeas corpus ad respondendum* directing a sheriff or other official to produce the body (the *corpus*) of a party to respond (*ad respondendum*) in court. Duker at 992 (placing this function by 1230 A.D.) and at 996 (outlining sheriff's duties) and at 1007.

Edward Coke

the ecclesiastical courts were the king's ecclesiastical courts.[1] Thus, through the writ of habeas corpus, the courts were limiting the king's power. This is the place of the writ of habeas corpus today: to limit the executive branch's prerogatives, be they kings or American presidents.[2]

The King's COPs

Kings actually did not have COPs as in the modern sense of police officer—the concept of police and policing was centuries away.[3] There was a *constable*, but during the middle ages this was a high military office.[4] Only later did the term become associated with policing.[5] What the king did have were *sheriffs* and *coroners*.

The *sheriff* was the King's representative in the *shire*. It was an older Anglo-Saxon office that the Normans kept. The sheriff was supposed to be a moneymaker for the king and collect the royal revenue in the shire, as can be seen in the name itself, *shire-gerefa* or in Norman French *shire-reeve* for "shire revenue."[6]

The only appeal from the sheriff, or his courts, was to the King. However, the King was often overseas (and, in the early Norman period, did not even speak English), so the Justiciar, Regentor Lieutenant heard the appeal. As the king's interest in criminal cases grew, the sheriff started having a law enforcement role. They would summon prosecuting victims to court and jail defendants. Overtime, they ran the jails as well, a role county sheriffs still play.

Offsetting some of the sheriff's power was another crown official—the *coroner*.[7] Coroner means "keeper of the pleas of the crown" or *"crowner"* or *"coronator."*[8] It was his duty to enforce the king's right to forfeited chattel.[9] He did this using an *inquest* (Latin *inquisitio*) or cornoner's court, often presiding over an early form of jury trial.[10] Where a death was involved he would make sure the king got his death tax, and if it was a homicide or suicide even better, because *all* the goods and chattel of the murderer or suicide went to the king.[11] This is where the modern understanding of the role of the coroner derives.[12]

For most of the medieval period, the sheriff and coroner were the extent of law enforcement. In reality, however, the king had another cop. Judges from the Middle Ages had executive and judicial powers. In fact, they were law enforcement with extensive powers over the jury. Not only would the judge examine the witnesses and comment on the evidence, he would often tell the jury what he thought its verdict should be. He could reject the verdict ☛

1. As discussed later, a key period of this struggle was in Coke's day the struggle between the common law courts and the ecclesiastical courts. Duker at 1018-23. During the later struggles between Parliament and the Stuart monarchs, the common law courts responded to petitions for writs of habeas corpus directly challenging the king, or at this point, the executive branch. Duker at 1031-36. Indeed, this challenged the very notion that justice flowed from the king to the subjects and the king's courts merely dispensed his justice. The import of this is that courts, through habeas corpus, were emancipating themselves from the king's rule—they could now follow the rule of law. The proponents of this view basically created a history that the writ of habeas corpus sprang somehow from Magna Carta as a basic right. Duker at 1031. Of course, Oliver Cromwell was no greater supporter of judicial independence than the Stuarts. But the Habeas Corpus Act of 1679 came from this period, the precursor to our habeas corpus rights in the American constitution. For copy of the Habeas Corpus Act of 1679 *see* http://press-pubs.uchicago.edu/founders/documents/a1_9_2s2.html (last visited February 26, 2008).

2. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), holding Yaser Esam Hamdi, a U.S. citizen being detained indefinitely as an "illegal enemy combatant," must have the ability to challenge his detention before an impartial judge.

See generally Clay V. Bland Jr., *A Constitutional Limitation: The Controversy Surrounding the Military Commissions Act Of 2006 and the Writ of Habeas Corpus*. 53 LOY. L. REV. 497-557 (2007).

For a good brief outline of the history of habeas corpus and its modern application, *see* James Robertson, *Quo Vadis, Habeas Corpus?*, 55 BUFF. L. REV. 1063 (2008).

3. **Sir Robert Peel,** Britain's Conservative Prime Minister, helped create the modern police force in the 1860s while Home Secretary. The father of modern policing, Peel developed the Peelian Principles defining police ethics. His most memorable principle was, "The police are the public, and the public are the police." English police are still called "Bobbies" or "Peelers."

4. The "constable" used to be a stable boy keeping the lord's horses, from the Latin *comes stabuli* (attendant of the stables). Later it became a high military rank, the Lord High Constable of England, essentially the King's Field Marshall. Constables also defended castles, and there is still a Constable of the Tower of London. *Magna Carta* uses the term in this sense to denote a castillian with more limited power than the sheriff. *See* Irwin Langbien, *The Jury of Presentment and the Coroner*, 33 COLUM. L. REV. 1329, 1343 n. 47 (1933).

5. The term "COP" could be short for "constable on patrol." Or "COP" comes from Latin and Old French *capere* to capture (hence a *copper* is one who "cops criminals" as in "to cop a feel" or "to cop out"). "COP" could also derive from the copper buttons on police uniforms.

The Sheriff of Nottingham collecting money in Disney's ROBIN HOOD.

Melville Cooper as Sheriff in The Adventures of Robin Hood.

6. VAN CAENEGEM at 13; W.A. Morris, *The Sheriff and the Justices of William Rufus and Henry I*, 7 CAL. L. REV. 235, 240 (1910). *See also* DANZIGER & GILLINGHAM at 175-76. Regarding the sheriff as the king's representative in the Anglo-Saxon hundred and shire courts, *see* Pollock at 293. For royal control of the Sheriff, *see* BAKER at 23.

7. *See* Charles Gross, *The Early History and Influence of the Office of Coroner*, 7 POLITICAL SCIENCE QUARTERLY 656, 660 and 665 (1892). The coroners were probably more popular than the sheriff as they were popularly chosen and not just the king's representative. Conversely, sheriffs often bought their office, intending private gain. *Id.* at 664. This is what Robin Hood fought against.

Rathbone played Guy of Gisbourne, a suckup to King John. Actually, Rathbone was an accomplished competitive fencer, and Flynn would have been no match for him in real life. Here, Flynn lunges poorly, which Rathbone deflects with a number-four parry.

For mention of Robin Hood and the law of outlawry *see* BAKER at 65.

8. Irwin Langbien, *The Jury of Presentment and the Coroner*, 33 COLUM. L. REV. 1329, 1334 (1933). This role as "keeper of the pleas of the crown" used to be the Justiciar's. *Id.* at 1341.

The term *coroner* comes from the Latin *corona* (crown) as in the English *coronation* for the crowning of a monarch. *See also Corona* for the crown on the beer label.

9. The word *cattle* derives from **chattel** as it originally referred to any domesticated quadruped livestock including sheep, goats, swine, horses, mules and asses, not just today's meaning of bovines such as steers, cows and bulls. WEBSTER'S at 425-26 and 455.

On the coroner's role in forfeitures to the crown, *see* Gross at 659, and in defending the king's interest against the local lords, *see* Gross at 667.

10. Gross at 663, 672. The inquest jury functioned more as the king's investigatory panel rather than a modern jury. Justin C. Barnes, *Lessons Learned from England's "Great Guardian of Liberty": A Comparative Study of English and American Civil Juries*, 3 U. ST. THOMAS L. J. 345, 349 (2005).

11. Thompson at 31-32. The coroner office probably started under Henry II and is mentioned in *Magna Carta* and the Eyre of 1194. *See* Gross at 656; Langbien at 1334; Barnes at 348-49 for tie-in with inquest. John Henry Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 456 (1904), noting the coroner's inquest as an exception allowing hearsay before Justices of the Peace.

12. Some states maintain a variant of the old Coroner's Inquest.

and send the jury to re-deliberate or even put the jurors in jail or fine them.[1]

Judges Start To Become Judges

As stated, in medieval times judges were the king's law enforcers. By and large this remained their role through the Tudor monarchs. Over time, though, they started to become professional and trained. Customarily they did their job with little oversight from the king. To the dismay of monarchs, the judges started to become independent.

Of Coke and King

Edward Coke is a biggie in common law history.[2]

King James I made Edward Coke (pronounced "Cook") Chief Justice of the Court of Common Pleas in 1606, three years after Coke got Walter Raleigh's conviction. For this and other services to the Crown, King James thought he had his man—James was wrong.

Coke led the judges of his day in asserting the supremacy of the common law over the other courts both temporal and ecclesiastical. But even more than that, Coke fought for the supremacy of the rule of law over magnates, lords, and even the King.[3]

James I, however, was a big advocate of the divine right of kings—being one, it came easy to him. In 1598 he wrote The Trew Law of Free Monarchies, asserting among other things "rex est loquens" (the King is the law speaking).[4] Thus, only God could judge him.[5]

Technically speaking, James was not saying he was above the law but that he was the law.[6] One can debate which is the more maniacal. In effect, though, it is hard to seem much of a difference between "the King is the law speaking" and "the King is above the law."

This divergence of opinion between Coke and King played out before the Privy Council in 1608.[7] Coke argued with Bishop Bancroft and King James about ecclesiastical court jurisdiction.

Bancroft: "All judges, temporal and ecclesiastical, are but delegates of the King who might repossess jurisdiction in whatever cases he pleased. This was clear in divinity that such authority belongs to the king …"

Coke: "But under Magna Carta Chapter 39, the King cannot personally decide any case nor remove any from his courts of justice; the judges alone decide this."[8]

King James: "Common law judges are like papists who quote scripture and then put forth their interpretation to be unquestioned! I, the King, am the Supreme Judge and all courts are under me. If I choose, I may sit on the bench and decide cases.[9] The law is founded on reason, which I possess, and I, the King, protect the law."

Coke: "The king lacks legal knowledge, and the law protects both the king and the subjects."

Now James was really pissed; rising, he shook his fist in Coke's face.

King James: "Yours is traitorous speech! The king protects the law, not the law the king!"

Coke, no dummy, fell on all fours begging the king's pardon, which James eventually gave.

But Coke kept on with his Magna Carta 39 arguments against the ecclesiastical courts, causing James to remark on Coke's "perverseness" and that "My spirit shall be no longer vexed with this man." After unsuccessfully trying to co-opt Coke, James dismissed him in 1616.[10]

Judges were becoming judges—not just the king's men or law enforcement. They were beginning to view themselves under the law, not just under the king, and the king was under the law as well. King James knew this was revolutionary. His son Charles I was to find out just how much so.

Look for the conclusion of *Going Courting* in the November issue of ARIZONA ATTORNEY.

Edward Coke

James I of England (James VI of Scotland)

1. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 291-95 (1977-78) (Langbein, *Before the Lawyers*).

2. Coke was a prosecutor, law teacher and writer, a legal historian, and eventually the Lord Chief Justice of England. His INSTITUTES ON THE COMMON LAW OF ENGLAND is our main source of much of the history and procedure of the common law. Coke had been Speaker of the House in Parliament as well as Queen Elizabeth's Solicitor-General at the same time. In this dual role he used any number of delaying tactics to defend royal prerogative. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 199-200 (1968).

3. Coke's tool of choice in these jurisdictional disputes was the writ of *habeas corpus*: "It manifestly appeareth, that no man ought to be imprisoned but for some certain cause …" *Quoted in* Duker at 984.

4. *See* LEVY at 243. During the reign of James' son, Charles I, in 1644, Samuel Rutherford would write ***Lex, Rex (The Law is King),*** expounding the theological arguments for the rule of law over the rule of men and kings. *See* The Liberty Library of Constitutional Classics, www.constitution.org/sr/lexrex.htm (last visited Dec. 5, 2005) for the text.

5. In a speech to Parliament, James asserted that kings are not just God's "lieutenants upon earth, and sit upon Gods' throne, but even by God himself they are called Gods." *Quoted in* LEVY at 207. From the last quote one has to wonder whether James was all that clear that even God would judge him.

6. James seemed to consider himself the end-all of criminal procedure. On his trip from Edinburgh to London to be crowned, he had an alleged pickpocket hanged without trial. *Reported in* LEVY at 206. The reaction of Sir John Harrington sums up what Englishmen thought: "I hear our new king has hanged one man before he was tried; it is strangely done: now if the wind bloweth thus, why may not a man be tried before he has offended?" *Quoted in* LEVY at 473 n.1.

7. **Privy Council:** In England this started out as the King's council of close advisers, thus the name "privy" for private. Later, powerful sovereigns would use the Privy Council to circumvent the courts and Parliament. For example, a committee of the Council—which later became the Court of the Star Chamber—could inflict any punishment except death without regard to evidence rules or the burden of proof.

8. LEVY, at 243, states that Coke cited Magna Carta chapter 29, but depending on the numbering system this is also numbered Chapter 39:

No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.

Bishop Bancroft

King James I

9. Actually, James could rely on considerable historical precedent. *See* BAKER at 98. The Norman kings did just this. Coke's argument that *Magna Carta* limited the king's power on this point is really unconvincing. In fact, *Magna Carta* clause 18 requires the king to be more active in justice administration.

10. LEVY at 254.

Going Courting

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