Going Courting
Where We Got Courts and the Rule of Law

PART 1

BY ROBERT J. McWHIRTER

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


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 ed. (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).

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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. Scientists 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.
We go to court. In court we argue as *suitors.* Our lawyers usually wear a *suit*—indeed, they are “*suits.*” 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.* 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.* 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 “kins peace” was something special, an extension of the peace of his own house, *i.e.*, his court, which later became his “courts.”

The Witans were wise men, counselors or ministers. The Witans met as the king’s counselors in the Witenagemot (from *witan* and the Old English *gemot,* meaning meeting or assembly). *Gemot* is also the root word for *moat,* meaning an assembly or law court.

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

As a great counsel, the Witenagemot had what we would call today legislative and judicial functions. 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,
it exercises the function from its predecessor, the Witenagemot.  

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. 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. Thus, the moots’ significance declined. By 1278, the moots had lost all jurisdiction over criminal prosecution, but the courts limped on until 1846. This history gives us the modern concept of something that new facts and events makes “moot.”

### The Normans Take Over

In 1066 A.D., William the Bastard conquered England and thus became “the Conqueror.” 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. He did, however, separate the ecclesiastical and temporal courts. This was a change from the Anglo-Saxon system, which had both a magistrate 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.” In this new mix of Anglo-Saxon and Norman, the King became the source of justice for both. He was the unifier. More and more subjects would seek redress from the King’s courts rather than the Church, local lord or the old shire moors.

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. William the Conqueror took over the Witenagemot and its judicial functions, and William’s successors developed the Curia Regis as a government institution. For centuries the entire English government consisted of the “King in Council,” with authority descending from him. 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.
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. 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.
4. The County Court Act of 1846.
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 RUSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 77-93 (1963); 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. Although the Curia Regis traveled with the King for centuries, King William Rufus made Westminster Hall in London its center. 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. These judges were eventually called “justicæ” or “justiciarius.”

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 shire/jurisdiction over land disputes. Kempin at 25.

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. When the justices when out on circuit, they held an assize. These justices would apply the same law and returned to Westminster to compare notes. Thus, Henry II gets credit for starting the “common law.”

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.

Henry II launched his “tough on crime” campaign. 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. But the trend had begun, and Henry II played to it.

Rain of the Roman Forum

1. The word “forum” comes from Roman trials. Plautus at 44. Roman trials, in justice, 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 fons, 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. (c. 254-184 B.C.) from the Pope. St. Peter’s in Rome, for instance, is a basilica and not the cathedral of Rome.

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 Pentidattus, a bawdy slave who attempts to win his freedom by helping his young master woo the girl next door.

II. 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 his domains, being smart and manipulative ended up with the whole realm.


3. Van Cadensem at 20. These were curialae sent on eyres = itineraries 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.

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.

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Going Courting

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 “criminous clerks” in the King’s courts after they

1. LEV at 43. This was part of William the Conqueror’s deal for the Pope’s blessing his English invasion. Under the Anglo-Saxon, bishops sat as judges.
2. JOHN W. WISEMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2550 (McNaughton ed. 1961), at 270. For the split of King’s and church courts, see Thompson at 905-906, 400-02. See also Charles Donahue, Jr., Ius Commune, Canon Law, and Common Law in England, 66 TUL. L. REV. 1745 (1992).
3. See generally Thompson at 395-411; KHALY at 16-17; KEMP at 42. Modern cases of jurisdiction between state and federal courts still treat this issue.
4. 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. KHALY at 363-64; BAKER at 512-13.
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.
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 Damned 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 interdictation, 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 I. 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 I
had claimed benefit of clergy to avoid the King’s justice. Invoking an ancient concept that we know today as double jeopardy, Becket resisted.

We take for granted the concept of a prohibition against double jeopardy. Becket, though, may have been asserting for the first time in England a longstanding principle of canon law. The double jeopardy prohibition means that the same sovereign cannot try or punish you twice for the same crime. 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.

The reaction to Becket’s murder in 1170 A.D. is a source of our double jeopardy clause. 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 *autrefois convict* (“formerly convicted”) as a bar to future prosecution. From at least this point, the prohibition on double jeopardy has been a mainstay of the common law.

## 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. 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. 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

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1. *Jeopardy* (jocus paritus) is a chess term meaning a set problem. *Batsch* at 77.
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 to God that He would not punish the same offense twice, and by 847 A.D. this interpretation formally entered canon law. See *Creepkaum* at p.17, citing *Bartholomew v. Bishop*, 359 U.S. 121, 152 n.4 (Black, 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.
6. *Creepkaum* 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.
7. *Creepkaum* at 1183. From the French *autrefois* (“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 BLACKSTONE 250 (1765). 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.”
9. Thompson at 22; *Krause* 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 “mommie” 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*. See *DOU B LE J EOP ARDY (Param ount 1999)*, 359 U.S. 121, 152 n.4 (Black, dissenting).

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Noble chess players, Germany, c. 1320

King John

St. Jerome, Ghirlandaio (1480)

Blackstone

COMMENTS ON THE LAWS OF ENGLAND 333-36, quoted in *Creepkaum* 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 Bachman, *Starting Again With the Mayflower… England’s Civil War and America’s Bill of Rights*, 20 Q.L. Rev. 193, 240 (2001).

John’s mom—Eleanor of Aquitaine

Magna Carta: This is not the original charter. King John signed, which has been lost (through 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 Chancery and the three common law courts of Common Pleas, King’s (or Queen’s) Bench and Exchequer.

Courts of Chancery grew up around the Chancellor developing and applying the law of Equity, for centuries the great rival of the common law.⁹ In Chancery court, if justice was on your side, you would win regardless of legal formalities, and the motto was nullus recreat 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-

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¹ J. G. Bellamy, The Criminal Trial in Late Medieval England: Felony Before the Courts from Edward I to the Sixteenth Century 10–11 (1998), Kempin at 89-91. 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 Kemp in at 89. Judges and university professors, all of whom used to be clerics, still wear the robes, as do graduating university students.


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 rotunda) or the round room where they sat. See The CATHOLIC ENCYCLOPEDIA www.newadvent.org/cathen/04040k.htm (last visited May 13, 2007).

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.

⁷ Baker at 15. Hugh le Despenser was a greedy man who seemed his way into Edward II’s affections through a probable homosexual relationship. This did not sit well with Edward II’s wife, Isabella, who eventually deposition 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 BRADSHAW. See Alison Weir, Queen Isabella (2005).

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 CONST. L. REV. 153 (2007), and Susanna Frederick Fischer, Playing Post hoc with the British Constitution: The Blair Government’s Proposal To Abolish the Lord Chancellor, 24 PENN. INT’L L. REV. 257 (2005).

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 1225). See ARISTOTLE, NICOMACHEAN ETHICS (W. D. Ross trans.) www.constitution.org/arist/ethic_00.htm (last visited April 4, 2008).

¹⁰ Baker at 102. Although equity grew to rival the common law, the Court of Chancery worked in conjunction with the King’s Bench. Baker at 101. Chancery 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 200 et seq, and Kempin at 37-40. The king’s chancellor could provide relief to injustice by issuing an injunction to the w_r’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).

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

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
the ecclesiastical courts were the king’s ecclesiastical courts. 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.

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. There was a constable, but during the middle ages this was a high military office. Only later did the term become associated with policing. 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-gerfa or in Norman French shire-reeve for “shire revenue.”

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. Coroner means “keeper of the pleas of the crown” or “crownyer” or “coronator.” It was his duty to enforce the king’s right to forfeited chattel. He did this using an inquest (Latin inquisitio) or coroner’s court, often presiding over an early form of jury trial. 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. This is where the modern understanding of the role of the coroner derives.

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. Duke 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. Duke 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. Duke 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).


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 “Boobies” or “Peelers.”

4. The “constable” used to be a stable boy keeping the lord’s horses, from the Latin comen stalbul (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 castellian with more limited power than the sheriff. See Irwin Langbien, The Jury of Presentment and the Coroners, 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.

6. Van Cauwenberge 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 DANDIS & 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 sheriff, 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 Bixler at 65.

8. Irwin Langbien, The Jury of Presentment and the Coroners, 33 COLUM. L. REV. 1329, 1334 (1933). This role as “keeper of the pleas of the crown” used to be the Justiciary’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.


11. Thompson at 31-32. The coroner office probably started under Henry II and is mentioned in Magna Carta and the Eye of 1194. See Gross at 666; Langbien at 1334; Barnes at 348-49 for tie-in with inquest. John Henry Wigmore, The History of the Hearsay Rule, 19 HARV. L. REV. 437, 466 (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:

**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.”

**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. 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 traitor’s 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 1616.8

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.9

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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 190-200 (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/or/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 LR 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 pick-pocket hanged without trial. Reported in Privy Council: In England this started out as the King’s council of close advisors, 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.

7. Privy Council: In England this started out as the King’s council of close advisors, 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.

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.