

# **‘British Justice is the Finest in the World’**

## **An Examination of Anglo-American Boasting**

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*Until the late 1960s people commonly asserted that ‘British justice is the finest in the world’. Americans were content that they had improved on it and established the world’s only democracy. The constitution, law and legal system were continually compared with the French system, where the accused was ‘presumed guilty’ and tortured. This paper examines the history of this ‘world’s best’ rhetoric back to the pre-Magna Carta era.*

When I started in practice [1959], it was an almost universal article of faith that English law and legal institutions were without peer in the world, with very little to be usefully learned from others. (Lord Bingham)<sup>1</sup>

In the early 1960s, people commonly asserted that ‘British justice is the finest in the world’, warning about other systems ‘In France, you’re guilty till proved innocent’. Working in the United States, I have heard the same mistake about the French and a conviction that ‘American justice is the best in the world’. Twentieth century Americans travelled the world, drafting constitutions for emergent democracies, like their British predecessors. It was taken for granted that they enjoyed the world’s only democracy.<sup>2</sup> The hyperbole appears to have been attached to both substantive law and procedure, and rested on these concepts: the ancient origins of the common law, Magna Carta as a source of fundamental rights, habeas corpus, the rule of law, the system of precedent, jury trial, the absence of torture, the method of proof and rules of evidence, and the superiority of English judges. It was intertwined with ideas of constitutional superiority. English Parliamentary democracy was favoured over European absolute monarchy. Later, Americans were keen to emphasise their constitutional rights and democracy.<sup>3</sup>

The power of the rhetoric went further than boasting. Centuries-old comments and expressions of ideals about what the law *should be* were later taken to be statements *of* the law. Early writers were not careful to separate statements of law from rhetoric. Writers like the prolific and influential Coke simply invented ‘ancient maxims’ and ‘fundamental law’, yet his and other such works were and still are treated as books of authority.

### **THE ANCIENT COMMON LAW**

The common law rightly boasts of being old, but it is not just English and some of it is not that ancient. Given modern hostility to the French legal system, ironically, the

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<sup>1</sup> “‘There is a World Elsewhere’: The Changing Perspectives of English Law’, *The Business of Judging* (2000).

<sup>2</sup> N. Demleitner remarked on the illusion of superiority of these “missionaries”, in ‘Combating Legal Ethnocentrism: Comparative Law Sets Boundaries’ (1999) 31 *Ariz. St. L.J.* 737.

<sup>3</sup> ‘British’ and ‘English’ were used as synonyms.

roots of the common law are both Anglo-Saxon and Norman French.<sup>4</sup> English law started out as Anglo-Norman, shared by the feudal society on both sides of the Channel. After 1066, the *Franci* and *Anglici* were amalgamated under a common law and spoke one language.<sup>5</sup> By the time that Roman law was received around Europe, there was no chance that it would supplant centuries of English law. ‘The common law of England...is the oldest national law in Europe...the oldest body of law that was common to a whole kingdom’.<sup>6</sup>

The use of rhetoric appealing to and romanticising ancient law is older than the common law. It started in the Anglo-Saxon literature. Many English-language royal declarations survive, from the time when England was a collection of tiny kingdoms. The charters were sometimes ‘rhetorical and fanciful’.<sup>7</sup> Magna Carta followed a line of charters. Henry I’s coronation charter 1100 promised to confirm the law of Edward the Confessor, ‘establishing a mythological golden age of justice before 1066’.<sup>8</sup> The first legal writing appeared in the Anglo-Norman literature of 1113-18 (Henry I). In *Laws of Edward the Confessor*, the anti-Norman writer ‘endeavoured to show the good old law which in his opinion ought to prevail...Unfortunately Coke and all the older historians took this book seriously, and so a good deal of legend came to pass into history’.<sup>9</sup>

## MAGNA CARTA 1215

The Great Charter is the common law world’s most prolific source of romantic rhetoric and symbolism on ‘ancient’ rights, epitomised by Kipling’s poem, *Runnymede*. A Google search retrieves two million references. This charter of promises was extracted from King John by the barons to secure *their* rights. It is treated as a universal declaration of rights but it did nothing for the non-propertied majority, who ‘were to remain without an active voice in government for another 700 years’.<sup>10</sup> It was immediately annulled. Jenks thought that ‘the great secret of the false glamour which invests Magna Carta’ was the misinterpretation of ‘freemen’ as ‘the man in the street’. He thought some clauses worked ‘cruel injustice’ on the dispossessed for centuries.<sup>11</sup>

The best modern authority, Holt, was less cynical and argued that it was the longest living legal enactment. Thanks to its adaptability, ‘Magna Carta has been preserved not as a museum piece, but as part of the common law of England.’<sup>12</sup> It was reissued in 1216, 1217 and 1225. The last became law. Magna Carta was the first document in the first Statute Book. Three and a half clauses of the 1297 version are still law. From 1216 to 1417, it was confirmed by all monarchs. More or, indeed, all

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<sup>4</sup> R.C. Van Caenegem, *The Birth of the English Common Law*, 2<sup>nd</sup> ed., (1988), viii. Also P. Brand, *The Making of the Common Law* (1992).

<sup>5</sup> A useful map of the Angevin empire appears in N. Vincent, *Magna Carta: A Very Short Introduction* (2012), p. 23.

<sup>6</sup> Van Caenegem, 88.

<sup>7</sup> T.F.T. Plucknett, *A Concise History of the Common Law* (1956), 255.

<sup>8</sup> Vincent.

<sup>9</sup> Plucknett, 256.

<sup>10</sup> J. McCarthy, ‘Magna Carta and its American Legacy’, National Archives and Records Administration, website of The Baronial Order of Magna Carta.

<sup>11</sup> E. Jenks ‘The Myth of Magna Carta’ (1904) 14 *Independent Review* Vol. IV, 260, at 268.

<sup>12</sup> J.C. Holt, *Magna Carta*, 2<sup>nd</sup> ed. (1992), ch.1. Also 3<sup>rd</sup> ed., 2015.

clauses are technically still law in the Antipodes.<sup>13</sup> By 1300, Magna Carta's 'international career' was already launched 'for anyone else seeking to share in English 'liberties''. Norman lawyers argued that it should apply there too and so the 1300 *Très Ancien Coutumier* contains strikingly similar principles.<sup>14</sup> Holt showed that in 1331-68, through a series of interpretive statutes, the meaning of clause 39 was already broadening. This is the British Library translation:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

'Lawful judgment of peers' was interpreted to require jury trial. 'The law of the land' was broadened to 'due process of law' and most astonishingly, 'no free man' was broadened to 'no man'. From 1500, all Inns of Court students read collections of statutes which began with Magna Carta.<sup>15</sup> It was in the turbulent seventeenth century that it became an ubiquitous source of revolutionary rhetoric and its meaning became more far-fetched. Over the centuries, lawyers routinely jumbled the wording of the different editions but by now, everyone assumed it to be part of fundamental law. Coke expanded 'liberties' to individual liberty, asserting that it outlawed monopolies. In the debate on the Petition of Right 1628 and elsewhere, lawyers wrongly asserted it as the source of habeas corpus. For radicals such as Hobbes and Locke, it switched meanings and turned into part of their concept of natural law and rights. Meanwhile, colonists in America similarly regarded it as their 'birthright', along with the Petition of Right, the Habeas Corpus Act the Bill of Rights and the Act of Settlement 1701.<sup>16</sup> Settlement began in 1606 with the Virginia Charter. As this was partly drafted by Coke, unsurprisingly, James I granted that Englishmen would take with them their domestic constitutional rights. All of the colonial legislatures used the reinterpreted wording of Magna Carta. Books on rights were among the first seven printed in the colonies (including Care, cited below). In 1687, William Penn published an edition of Magna Carta. When the colonists objected that the Stamp Act constituted taxation without representation, they invoked Coke in claiming that it was 'against Magna Carta and the natural rights of Englishmen'.<sup>17</sup> Crucially for our story, after independence, the rhetoric of English rights and liberties was preserved within the embedded Bills of Rights. The 1789 constitution repeats various declarations of the rights of men. It declares itself the supreme 'law of the land', a phrase lifted from Magna Carta. The fifth and fourteenth amendment were based on clause 39. The first, second and eight amendment originated from the English Bill of Rights. Importantly, the 'due process of law' clauses were applied as a check on legislatures, which was never the intention in England.<sup>18</sup> So Magna Carta does have more real and symbolic power in the United States than in the UK. The Runnymede memorial was erected by the American Bar Association in 1957. In the US, Magna Carta is still taken seriously

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<sup>13</sup> A. Lock and J. Sims, 'Invoking Magna Carta: locating information objects and meaning in the 13<sup>th</sup> to 19<sup>th</sup> centuries' [2015] L.I.M. 74.

<sup>14</sup> Vincent p. 89.

<sup>15</sup> Lock and Sims.

<sup>16</sup> H.D. Hazeltine, 'The Influence of Magna Carta on American Constitutional Development' (1917) XVII Colom. L.R.1.

<sup>17</sup> McCarthy.

<sup>18</sup> Hazeltine 1917.

as an interpretative tool. It was referred to or relied on as a direct or indirect source of principles by the US Supreme Court over 40 times in the last 43 years.<sup>19</sup>

In the UK, any claim to fundamental law needs qualifying. Thanks to the unwritten constitution and the doctrine of parliamentary supremacy, like all other documents that claim to be constitutional foundations, Magna Carta only means what a contemporary UK Parliament deems it to mean. Lord Chancellor Irvine, giving the 2002 inaugural Magna Carta lecture at the Australian House of Representatives was hard pressed to cite contemporary application in the UK. Typically, in the 2004 ‘Belmarsh case’ on indefinite detention of foreign terrorist suspects,<sup>20</sup> Lord Bingham acknowledged the detainees’ argument that clause 39 was the original source of habeas corpus but he did not rely on it, later explaining that this was an unhistorical myth.<sup>21</sup> The other eight judges did not mention it, though it was emblazoned on newspapers the following day. An advocate’s reliance on Magna Carta is more likely to be rejected by modern UK judges. Magna Carta’s *indirect* power, as a source of the rule of law,<sup>22</sup> is, though, a tool of judicial review of executive action in the UK.

### MORE THIRTEENTH CENTURY MYTHOLOGY

Bracton,<sup>23</sup> who Coke declared ‘the flower and Crown of English jurisprudence’, demonstrated that the common law was separate and distinct from other legal systems<sup>24</sup> but he carefully selected his cases to illustrate the law as he thought it *ought* to be. Henry Maine considered him something of a fraud, passing off Roman law as English. After 1350, he went out of fashion but enjoyed an influential revival from 1569 when the printing press established him, like Glanvill, as a common law authority. Judicial citations of Bracton in the seventeenth and eighteenth centuries settled some elements of English private law on Roman principles. He provided a useful tool for Coke. Another source for Coke, *The Mirror of Justices* (1290) ‘is certainly the most fantastic work in our legal literature... a puzzling mixture of sense and nonsense’ which ‘introduced a good deal of legend into our legal history’.<sup>25</sup> It mixed Anglo-Saxon law with canon law and description with comment and jokes. It was printed in 1642 and was treated as ‘solemn history’, by Coke.

### FORTESCUE LAUNCHES THE FIRST ATTACK ON THE FRENCH (c. 1395 - c.1477)

*In Praise of the Laws of England* (1468-71)<sup>26</sup> was written when Fortescue, Chief Justice of the King’s Bench, was exiled in France, as a didactic dialogue between an imaginary ‘Chancellor’ and the exiled Prince Edward, in which the Chancellor extolled the virtues of English law and government. In this book, and *The Governance*

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<sup>19</sup> Westlaw.

<sup>20</sup> *A. (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56.

<sup>21</sup> 2010, 13.

<sup>22</sup> Bingham, 2010, examined it as one of the ‘milestones on the way to the rule of law’.

<sup>23</sup> 1220s-1230s: a King’s Bench and assize judge.

<sup>24</sup> Plucknett, 260.

<sup>25</sup> Plucknett.

<sup>26</sup> S.B. Chrimes, *Sir John Fortescue: De Laudibus Legum Angliae* (1942).

of England,<sup>27</sup> ‘like many people who live abroad, he found it difficult to resist the tendency to idealise his own country’.<sup>28</sup> He praised an English monarchy, supposedly limited by parliamentary assent. The prime duty of a king was to ensure justice according to law, therefore English ‘political and royal’ law was a better guarantee of justice than the ‘only royal’ kingship of France.<sup>29</sup> England was ‘always really or potentially governed by the most excellent laws’.<sup>30</sup> Fortescue’s ‘Chancellor’ appeared to be in denial of the absolute monarchy in England, despite his own exiled status.

English law’s long survival was proof that it was the most just. Fortescue compared the French justice system, ‘a pathway to hell’, using ‘so many kinds of tortures... that the pen shrinks from putting them into writing’, plus an inadequate system of taking testimony, with an incorruptible English system, featuring the attain jury.<sup>31</sup> If an English jury were found to have made a false oath, they could have ‘all their possessions seized into the king’s hand, their houses and buildings demolished, their woods cut down... Now, is not this procedure for revealing the truth better and more effective?’<sup>32</sup>

Fortescue was ‘the major English political theorist of the fifteenth century’.<sup>33</sup> Hazeltine<sup>34</sup> considered him one of its most eminent lawyers. He was the first English jurist to perceive that English common law was materially different from Continental civil law. His rhetoric had a profound effect on institutional and legal systems and legal and political thought in Europe. His emphasis on theory prompted Coke, Hale and Bacon to seek and explain the fundamental ideas of the common law. He was the first to deal with the constitution in a systematic manner. Chrimes considered him ‘the true founder of the English school of comparative law and comparative politics’.<sup>35</sup> As a judge, Fortescue made a contribution to the common law, in case law. He was the first writer on the common law jury and the first to describe the legal profession.

His importance in our story is that his fanciful eulogy was treated as authority. Lockwood said this was a mistake. *Praise* was a rhetorical, ‘critical and reforming’ work, ‘the author seeks to persuade the reader of the value of English law and government as it should be’.<sup>36</sup> For example, the title of one chapter prescribed how jurors ‘ought to be’ chosen. Lockwood said the process of distorting his work began in the sixteenth century. Nevertheless, I suggest that, given his effusive style, it is unsurprising that later readers misinterpreted him.

#### COKE INVENTS ‘ANCIENT’ LAW (1552-1634)

Coke’s works were highly influential on the common law in England, as ‘books of authority’ and are still regularly cited throughout the common law world. All the more alarming, then, that they are replete with rhetoric and that he made up much of the law as he went along. Coke’s *Reports* (1572-1616) were ‘an uncertain mingling of

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<sup>27</sup> Presented after 1471. S. Lockwood (ed.), *Sir John Fortescue On the Laws and Governance of England* (1997).

<sup>28</sup> Plucknett.

<sup>29</sup> *Praise*.

<sup>30</sup> Lockwood, 29.

<sup>31</sup> Pollock and Maitland’s comment, S.C.F. Milsom, ed., *The History of English Law Before the time of Edward I* by Sir Frederick Pollock and Frederic William Maitland Vol. II, 2<sup>nd</sup> ed. (1968), 631.

<sup>32</sup> Lockwood, 39.

<sup>33</sup> Lockwood, xv.

<sup>34</sup> Preface to Chrimes’ translation of *Praise*, xxix.

<sup>35</sup> P. xxxii.

<sup>36</sup> Pp. xxiv to xxv.

genuine report, commentary, criticism, elementary instruction, and recondite legal history'.<sup>37</sup> He prefaced each volume with a 'to the reader' section, typically:

[T]he ancient and excellent laws of England are the birthright, and the most ancient and best inheritance that the subjects of this realm have, for by them he enjoyeth not only his inheritance and goods in peace and quietness, but his life and his most dear country in safety.<sup>38</sup>

Coke's *Institutes* (1628-1644), along with his other books, were 'the first comprehensive statement of the common law since Bracton'.<sup>39</sup> Coke never ventured outside the common law.<sup>40</sup> It was self-evident to him that had any other system been superior, it would have supplanted English law, 'If the ancient laws of this noble island had not excelled all others, it could not be but some of the several conquerors... would... have altered or changed the same'.<sup>41</sup>

He had so mastered the mass of year books and was so deep in erudition that 'most people were inclined to take his word for almost any proposition'.<sup>42</sup> Consequently 'The triumph of Coke's view in many cases meant the triumph of doctrines which were already nearly obsolete in his own day'. He 'eliminated foreign influences' and helped establish 'a supreme common law', said Plucknett. He made up 'spurious Latin maxims, which he could manufacture to fit any occasion and provide with an air of authentic antiquity'.<sup>43</sup> He ignored precedents that he did not want to follow. Instead, he would assert in an 'outrageously unhistorical statement' that 'this is and always has been the common law'.<sup>44</sup>

Coke's works show no evidence of a coherently thought out constitutional position.<sup>45</sup> He praised 'the High and Most Honourable Court of Parliament' (*Fourth Institutes*), 'tracing' the mid-thirteenth century institution back to the ninth century.<sup>46</sup> His second *Institutes* venerated Magna Carta, which he saw as the foundation of English law. 'Magna Charta was a living person to him'.<sup>47</sup> It took on meanings it had never had before. His approach suited the founding fathers of American common law. Jefferson and Adams cited him. A partial set of his *Reports* travelled over on *The Mayflower*. The new colonial courts sent for copies of his work and 'until well into the nineteenth century *Coke on Littleton* was a book every lawyer knew'.<sup>48</sup> Thorne concluded that the English and Americans could thank Coke for much 'fundamental constitutional law not entirely supported by the authorities'.<sup>49</sup>

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<sup>37</sup> Plucknett, 281.

<sup>38</sup> Coke, Sir Edward, *The Reports of Sir Edward Coke Part III* (1827), v.

<sup>39</sup> S. E. Thorne, *Sir Edward Coke 1552-1952*, Selden Society inaugural, 1952 (1957), 5.

<sup>40</sup> Plucknett.

<sup>41</sup> C. Drinker Bowen *The Lion and the Throne: The life and times of Sir Edward Coke (1552 – 1634)* (1957), 56.

<sup>42</sup> Plucknett, 283.

<sup>43</sup> Thorne, 7.

<sup>44</sup> Thorne, 12.

<sup>45</sup> T. G. Barnes, introduction to Coke's *First Institutes*, Vol. II (1985), 28.

<sup>46</sup> P. 23.

<sup>47</sup> P. 29.

<sup>48</sup> P. 3.

<sup>49</sup> P.17.

## HALE (1609-76)

Hale's *History of the Common Law*, 1713, was the first comprehensive text of this nature.<sup>50</sup> He praised the common law in a relatively calm manner. His third chapter is entitled *Concerning the Common Law of England, its Use and Excellence, and the Reason of its Denomination*, but he was simply comparing it with statute law. When things went wrong and 'the right Order of Government' was disturbed, the common law was there to restore it.<sup>51</sup> In Chapter XI, he illustrated 'the many preferences that the Laws of England have above others'<sup>52</sup> but was, otherwise, restrained until Chapter XII, *Touching Trial by Jury*, which 'seems to be the best Trial in the World'.<sup>53</sup> Hale's rhetoric has been remarked upon but he simply had an extravagant writing style. Hyperbole was reserved for jury trial.

### SEVENTEENTH CENTURY PRO-JURY POLEMIC

Lesser known commentators were not so enamoured of English law<sup>54</sup> but were soon shouted down in the rhetoric of Coke. In 1651, Robinson petitioned Parliament for some reforms of 'our own Lawes, which some...prefer before all the worlds, because they never well understood their own, much less those of other Countries'.<sup>55</sup> They were a 'nose of wax'. The customs of the Turks were preferable. He appended suggestions for more 'speedy, cheap, and equall distribution of Justice', including seven objections to jury trial. He was swiftly slapped down by Walwin: even William the Conqueror 'unjust and unworthy...never attempted to take away Juries'. To do so would be 'subversion of the fundamental Laws of the Nation'. Jurors had 'served their country justly and faithfully...without fear or favour'. Such 'English Liberties, contained in *Magna Charta*...' were the means by which 'an Englishman is to be known from a Frenchman amongst a thousand'.<sup>56</sup>

The superiority complex over the French had taken hold. Even more extravagant pro-jury rhetoric is to be found in 1680, in Hawles' *The Englishman's Right a Dialogue between a Barrister and a Jury-Man*.<sup>57</sup> The juryman announced 'I am summon'd to appear *upon a Jury*, and was just going to try if I could get off'. The barrister replied that jury trial was an ancient English liberty, confirmed by Magna Carta and 'brought down to us as our undoubted Birth-right, and the best inheritance of every English man', quoting Coke. 'Observe the miserable condition of the poor people in most other Nations...subject to the despotick arbitrary lust of the

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<sup>50</sup> C. M. Gray (ed.) Sir Matthew Hale, *The History of the Common Law* (1971), xiii.

<sup>51</sup> Pp. 30-31.

<sup>52</sup> P.133.

<sup>53</sup> P.160.

<sup>54</sup> Cockburn said that in the previous century, jury criticism was almost universal. Only lawyers praised it, 'Twelve Silly Men? The Trial Jury at Assizes, 1560-1670' in J.S. Cockburn and T. A. Green, *Twelve Good Men and True - The Criminal Trial Jury in England, 1200-1800* (1988).

<sup>55</sup> *Certain Considerations*, reproduced by D. S. Berkowitz and S. E. Thorne in *Classics of English Legal History in the Modern Era* (1978).

<sup>56</sup> *Juries Justified or A Word of Correction to Mr. Henry Robinson*, same volume.

<sup>57</sup> As Robinson.

rulers...(subject to) Judges, most times mercenary, and creatures of Prerogative, sometimes malicious and oppressive, and often partial and corrupt...upon mere suspicions they are obnoxious to the tortures of the Rack...<sup>58</sup>

In 1682, Care published *English Liberties, or the Free-Born Subject's Inheritance*. Turkey and France were attacked again. 'The Constitution of our *English* Government [the best in the world] is no Arbitrary *Tyranny*, like the *Turkish* Grand Seignior's; or the *French King's*'. He repeated Fortescue's arguments.<sup>59</sup>

## REVOLUTIONARY APPEALS TO FUNDAMENTAL LAW AND THE POWER OF JURIES

The English and American revolutions were fuelled by appeals to fundamental law, rather than common law. Magna Carta, reinterpreted by Coke, came in especially handy. As Stimson remarked in *The American Revolution in the Law*, 'It is notoriously common to summon the restorative myths of history, tradition, and 'the good old law''.<sup>60</sup> She said the rhetoric did not reflect any coherent theory of politics and law. It was unclear what constituted fundamental law, what its origins were, whether Parliament was its originator, its equal or bound by it. Coke was its most frequently cited proponent in the colonies. By the eighteenth century, the French were copying American grand designs and words. Their Declaration of the Rights of Man and the Citizen 1789 was drafted and promoted by Lafayette, inspired by the Declaration of Independence in a trip to America.<sup>61</sup>

Appeals to a fundamental law were meaningless. The rule of law was meant to be a promise that the sovereign would rule by the law, not arbitrarily, but it was unenforceable. In exercising his prerogative, the king was largely his own judge.<sup>62</sup> Judges were not independent. They 'did not regard themselves as arbiters between the Crown and the people, or (later) between Parliament and the people'.<sup>63</sup> Judges, including Coke, were appointed and dismissed by monarchs for political reasons.

Gough said that nowadays, fundamental law has a precise, technical meaning in political science, referring, for instance, to the entrenched clauses of a written constitution. There was and is no such thing in the UK. Consequently, English writers such as Holdsworth were unsympathetic to the notion, whereas American writers welcomed seventeenth century references to fundamental law as forerunners of their own constitutional principles. Gough concluded that there had never been fundamental English law. What were really being referred to were fundamental principles of morality, of right and wrong.

Leveller John Lilburne made extravagant claims about jury-power, assuring the jurors in his first trial that they were judges of law as well as fact. Analysing those early trials, Stimson pointed out that they did not, as is popularly supposed, establish

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<sup>58</sup> Other examples include, J. Towers, in *AN ENQUIRY Into the QUESTION, Whether JURIES are not, JUDGES OF LAW, As well as of FACT, &c* (1764) 'This great privilege...the boast of our ancestors...the admiration of foreigners...'

<sup>59</sup> See also A.W.B. Simpson, *Human Rights and the End of Empire* (2001), 23-25. Care and Blackstone did not use the phrase 'rule of law' but Simpson traces the history of Dicey's ideas and examines rights literature between Blackstone and Dicey.

<sup>60</sup> (1990), 13. See also J.W. Gough, *Fundamental Law in English Constitutional History* (1955).

<sup>61</sup> Bingham, 2010, 27.

<sup>62</sup> R. Pound, 'The Development of American Law and its Deviation from English Law' (1950) 67 L.Q.R. 49, 58.

<sup>63</sup> Stimson, 24.



English juries as judges of law, even in Bushell's case.<sup>64</sup> They were confined to fact-finding in England. Their potential as law-finders was debated in America, with many seeing them as John Adams did, as 'the voice of the people'. What this meant and who 'the people' were, in terms of jury eligibility, was the subject of several centuries' debate.

While not challenging Stimson's thesis, I would point out that in the ancient and modern pro-jury rhetoric, juries are defended precisely because they do have the effective power to nullify the law, as Americans call it, or apply their own equity, as the English call it. This amounts to the same thing. Juries take an oath to deliver a verdict according to the evidence but are morally valued because in practice, they do have freedom to acquit in the face of the evidence and the law. There was outrage at Auld LJ's recommendation in the 2001 Criminal Courts Review that if the jury applied their own equity, their verdict might be overturned.<sup>65</sup>

### THE SHAKESPEAREAN POWER OF BLACKSTONE

Blackstone, the first professor of English law, is central to our story. He bears most responsibility for modern 'world's best' assertions. His 1765-69 *Commentaries on the Laws of England* were a collection of his Oxford lectures, explaining the whole common law in a simple, attractive style, much more digestible than Coke, 'lost under sedimentary annotation'.<sup>66</sup> His readability and attachment to fundamental law partly explain his longevity as a source of law in America, and the popularity of his rhetoric. It did not matter that 'His history was not very profound' and 'His equipment in jurisprudence was also somewhat slender'.<sup>67</sup>

Blackstone boasted that 'our laws and liberties' and constitution, 'this noble pile', were 'the best birthright and noblest inheritance of mankind'.<sup>68</sup> He emphasised the virtues of the common law, warning against legislation. He adopted Coke's reverence of Magna Carta, and its mythological status. They both thought Clause 39 established a right to jury trial (Devlin copying two centuries later). The jury was the 'palladium' of English justice<sup>69</sup> and 'grand bulwark of liberty'.<sup>70</sup> '...[W]e cannot but admire, how...impartially just the law of England approves itself...trial by jury ever has been, and ever will be, looked upon as the glory of English law'.<sup>71</sup> It was 'the best [forum]...for investigating the truth of facts, that ever was established in any country'.<sup>72</sup> Blackstone reminded his audience how lucky they were, not to be suffering arbitrary judicial power exercised in 'France or Turkey'.<sup>73</sup>

It is difficult to find modern jury rhetoric which does not use Blackstone's or Devlin's assertions. Blackstone's sentiments penetrated the English language in the same way as Shakespeare's phrases, such as 'it is better that ten guilty men go free than that one innocent should be convicted'. This ratio has been variously expressed as 5:1, 20:1, 50:1 (Fortescue), 100:1 (Bentham) and 1000:1 but it is no coincidence

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<sup>64</sup> Pp. 20-28.

<sup>65</sup> *Review of the Criminal Courts of England and Wales* (London), chs. 6, 11.

<sup>66</sup> S.F.C. Milsom, 'The Nature of Blackstone's Achievement', Selden Society lecture, (1981) 5.

<sup>67</sup> Plucknett, 286.

<sup>68</sup> Concluding words of *Commentaries*, 435-6.

<sup>69</sup> *Commentaries on the Laws of England A Facsimile of the First Edition of 1765-1769*, Vol. IV (1979), 349.

<sup>70</sup> Vol. IV, 342.

<sup>71</sup> *Commentaries*, Vol. III, 365 and 379.

<sup>72</sup> Vol. III, 385.

<sup>73</sup> Vol. I, 349.

that we adopted Blackstone's 10:1 ratio in popular language.<sup>74</sup> Glendon said that Coke coined the idea that a man's home is his castle but it is Blackstone's and Locke's language of absolute property rights that fuels modern American rights talk: the 'illusion of absoluteness'.<sup>75</sup>

Blackstone is incomparably more important in the development of American law than England, where he was influential for only a century.<sup>76</sup> His reputation never recovered from attacks by Austin and Bentham, who, at 15, had attended Blackstone's lectures.<sup>77</sup> Blackstone's rhetoric stuck in Bentham's craw. Rhetoric was 'the art of misdirecting the judgment by agitating and inflaming the passions'.<sup>78</sup> Dinwiddy remarked, 'There was something almost obsessive about his animosity...'<sup>79</sup> Bentham never stopped writing his unfinished *Comment on the Commentaries*, published posthumously. He called Blackstone 'the dupe of every prejudice, and the abettor of every abuse'.<sup>80</sup> He attacked the common law as much as Blackstone idolised it.<sup>81</sup> Twining said that Bentham was appalled by the contrast between Blackstone's complacent glorification of the common law and the realities of practice.<sup>82</sup> Blackstone deprecated the growth of statute law but Bentham campaigned for codification. He ridiculed Blackstone's invocation of natural law. Austin too attacked the *Commentaries* as a 'slavish and blundering copy' of Hale, without 'a single particle of original or discriminating thought...fitted to tickle the ear' in a 'rhetorical and prattling manner'.<sup>83</sup> Most English lawyers, if they have heard of Blackstone, may not know the century he inhabited, let alone what he wrote.

#### MEANWHILE, THOUGHT AND RHETORIC IN COLONIAL AND INDEPENDENT AMERICA – AND DE TOCQUEVILLE

Some early rural pioneers around 1800 despised the common law, in a patriotic loathing of anything British.<sup>84</sup> Miller quoted Root: 'The Common Law comes from a people grown old in the habits of vice' and a New Hampshire judge, 'It is our duty to do justice between the parties; not by any quirk out of Coke and Blackstone – books that I never read and never will'. 'Feudalists' law was inimical to modern democracy.<sup>85</sup>

This hostility was pointless. The 1774 Declaration of Rights claimed the common law of England as the 'birthright' (Coke's word) of the colonists.<sup>86</sup> Rantoul, in 1836, uttered the last rant against the common law.<sup>87</sup> The lawyers won. Within

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<sup>74</sup> Darbyshire, 'The Lamp That Shows That Freedom Lives – is it worth the candle?' [1991] *Crim.L.R.* 740, 749; W. Twining, *Theories of Evidence: Bentham and Wigmore* (1985).

<sup>75</sup> *Rights Talk* (1991), ch. 2.

<sup>76</sup> Milsom, 2.

<sup>77</sup> A. J. Ashworth, 'The Making of English Criminal Law (4) Blackstone, Foster and East' [1978] *Crim.L.R.* 389-90.

<sup>78</sup> J. Bowring (ed.), *Works of Jeremy Bentham*, Vol. II (1843), p. 253-4, cited by J. Dinwiddy, *Bentham* (1989) 40.

<sup>79</sup> P. 55.

<sup>80</sup> P. 55.

<sup>81</sup> J.H. Burns and H.L.A. Hart (eds.) *An Introduction to the Principles of Morals and Legislation* (1970), cited by Dinwiddy, 56.

<sup>82</sup> *Blackstone's Tower* (1994).

<sup>83</sup> Ashworth, 390, quoting Dicey on Austin.

<sup>84</sup> P. Miller, *The Life of the Mind in America from the Revolution to the Civil War* (1965), 102.

<sup>85</sup> Also Pound, 56.

<sup>86</sup> P. 51.

<sup>87</sup> Miller, 108.

forty years of their ‘chaotic condition’ around 1790, the emergent American legal profession secured ‘a position of political and intellectual domination’.<sup>88</sup> Lawyers claimed credit for steering the revolution. ‘[T]he Constitution had been nurtured on the Common Law’.<sup>89</sup> Langbein concluded that ‘American law came to be... a body of law so strongly patterned on the learned English law that we still... think of the English and American legal systems as comprising an inseparable entity called Anglo-American law’.<sup>90</sup>

Blackstone was originally attacked for being enamoured with British forms of government. Inconveniently, however, Blackstone’s were often the only law books available. By 1775, more copies had been sold in America than England.<sup>91</sup> His work went into far more editions and, whereas production peaked in 1770 in England, it peaked in 1890 in America. He replaced Coke as a more readable source<sup>92</sup> and he organised his account according to categories of law, instead of the old writ system. He emphasised natural law. ‘English common law would apply in the new nation not because the king’s judges commanded it, but because the common law embodied enduring principles of natural justice. Blackstone gave the common law a seeming universality that allowed the Americans to retain it despite its English taint’.<sup>93</sup> Glendon said it would be hard to exaggerate the degree of esteem in which the *Commentaries* were held.<sup>94</sup> John Adams was on the first list of subscribers. Jefferson prescribed Blackstone as essential to legal studies. Lincoln, when asked the best way to study law, advised that a student should read Blackstone and, when he had finished, should start all over again.<sup>95</sup>

Unsurprisingly, the statue of Blackstone in the Royal Courts of Justice, London, was donated by the American Bar Association.<sup>96</sup> G. Wickersham unveiled it in 1924, with a highfalutin flourish of his own:

So long as the principles of the Common Law endure as the basis of your jurisprudence and ours; so long as the great conceptions of civil liberty which were embodied in the Magna Carta, in the Petition of Right and the Bill of Rights and the Habeas Corpus Act and which have been enshrined in the American Constitution continue fitly to express the fundamental principles of the common civilization of the men of English speech throughout the world, all men may have confidence that liberty will not perish from the earth, and that the highest type of civilization will be secure.<sup>97</sup>

Blackstone’s *Commentaries* live on as a source of common law, legal and political thought and rhetoric in the United States. The Library of Congress has 143 versions. There are over 700 volumes of various editions in the Yale library. Blackstone was cited by the U.S. Supreme Court in no fewer than 20 cases in 30 months, recently, and in over 700 cases in total.<sup>98</sup>

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<sup>88</sup> P.109.

<sup>89</sup> P.111.

<sup>90</sup> J. Langbein, ‘Chancellor Kent and the History of Legal Literature’ (1993) 93 Colum. L. Rev. 548, 567.

<sup>91</sup> Miller, 115.

<sup>92</sup> A. Schaufelberger, *Blacks and the Trial by Jury* (1973), 54.

<sup>93</sup> J.H. Langbein, ‘Blackstone, Litchfield and Yale: The Founding of the Yale Law School’, in A.T. Kronman (ed.), *History of the Yale Law School* (2004), 22.

<sup>94</sup> P. 23.

<sup>95</sup> Glendon, 23.

<sup>96</sup> Another stands outside the US Supreme Court.

<sup>97</sup> Abridged speech, beside the statue.

<sup>98</sup> *Westlaw*.

When Blackstone was reaching his American peak, de Tocqueville commented as an outsider, on *Democracy in America*.<sup>99</sup> He considered the ‘aristocratic character’ of lawyers to be much more marked in England and America than elsewhere, because the system of precedent gave them a role as interpreters of the law<sup>100</sup> and the courts controlled the democracy.<sup>101</sup> Everyone was obliged to borrow the ideas and language of the law because ‘Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question’.<sup>102</sup>

De Tocqueville’s language has entered modern American rhetoric, notably ‘The jury is, above all, a political institution’.<sup>103</sup> Unlike the English jury of aristocrats, ‘The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage’.<sup>104</sup> Modern, educated Americans still refer to De Tocqueville and describe the jury as a political institution, democratically representing ‘the voice of the people’, words borrowed from Adams. They justify the jury as a control on judicial power but it goes deeper. In the 1990s, at Berkeley, I found that verbal questioning of the American jury system was often met with incredulity. I abandoned writing a critical analysis when an eminent sociologist remarked ‘I don’t know why you’re doing this. Don’t you realise the jury is as important to Americans as the Presidency?’ A mere challenge to the institution was seen by many not as mild eccentricity, as in England, but as heresy.

De Tocqueville did not heap unqualified praise on American democracy, however. Chauvinistic rhetoric got on his nerves:

Nothing is more embarrassing...than this irritable patriotism of the Americans...a free country in which...you are not allowed to speak freely of private individuals or the state<sup>105</sup>...I know of no country in which there is so little independence of mind and real freedom of discussion.<sup>106</sup>

And in Volume II, ‘The Americans...unceasingly harass you to extort praise, and...fall to praising themselves...If I say to an American that the country he lives in is a fine one, ‘Ay,’ he replies, ‘there is not its equal in the world’...’<sup>107</sup>

#### ‘IN FRANCE, YOU’RE GUILTY TILL PROVED INNOCENT’

By the twentieth century, this was uttered in the same breath as English or American justice being ‘the finest in the world’. For instance, in England, in 2011, a non-lawyer asked me, ‘The presumption of innocence – it’s a quirk of English law isn’t it?’ In 2002, a first-week postgraduate student asked if it were true. A poll of her class mates showed that one fifth shared her mistake. In Berkeley, my French-born LLM student

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<sup>99</sup> 1835; 1840, translated: H. Reeve; revised, F. Bowen, P. Bradley (eds.) (1945).

<sup>100</sup> Vol. I, 287-8.

<sup>101</sup> P. 289.

<sup>102</sup> P. 290.

<sup>103</sup> P. 293.

<sup>104</sup> P. 297.

<sup>105</sup> Vol I, 253.

<sup>106</sup> P. 273

<sup>107</sup> P. 236. ‘Such is not the case with the English.’

avoided jury service by exaggerating her accent and asserting in court, 'I am French. In France we believe people guilty until proved innocent'.<sup>108</sup>

Hostility to the French system dates back to Fortescue. Furthermore, English lawyers condemned the use of torture,<sup>109</sup> 'the great European blunder', as Langbein called it,<sup>110</sup> as a method of proof. The difference arose thus: when the Fourth Lateran Council of 1215 abolished ordeals as a method of proof, a substitute had to be found. The English developed jury trial. Most of Europe adopted judicial torture to extract confessions.<sup>111</sup> Continental use of torture, the absence of a formal plea, the use of judicial fact-finding and other differences in criminal procedure fuelled common lawyers' hostility for centuries and have somehow been reinterpreted in Anglo-American popular mythology into a French reverse burden of proof. Quintard-Morenas explained one 1899 source of this idea, 'The Dreyfus case, in which... Dreyfus... was falsely accused of high treason, crystallized in the common law world the widely shared belief that suspects in France were presumed guilty. The reporter... for *The Times* reminded his readers how fortunate they were to live in England'.

In 1955, Glanville Williams tackled this misapprehension, in *The Proof of Guilt*.<sup>112</sup>

In England every man is presumed to be innocent until he is proved guilty. This proposition, dear to the hearts of Englishmen, is popularly supposed to epitomise the difference between English and French criminal law. Of course it is not true... there is a sense in which it would be correct to say that the presumption does not hold in either country.

In the US, eminent comparative lawyers, Damaska, Ehrmann and Langbein, tried to correct the same mistake. It stemmed from the labelling of Continental systems as 'inquisitorial', when being compared negatively with 'accusatorial', common law systems. Williams had warned against the imprecise use of these terms.<sup>113</sup> Ehrmann considered the designations misleading, a product of cultural ethnocentricity.<sup>114</sup> Langbein said 'Continental criminal procedure is thought to be unjust and oppressive. It is called 'inquisitorial'... an epithet harkening back to the witchcraft trials... Among English speaking peoples the belief is widespread... that in Continental procedure the accused is presumed guilty...'<sup>115</sup> Damaska thought that the terms were used indiscriminately.

The dichotomy... purports to represent the distance between the old continental inquisitorial procedure at its historic worst, and a variable selection of somewhat idealized features of modern American criminal proceedings... the only alternative to some lofty conceptions of Due Process is a lapse into the horrors of a procedural system where charges are not specific, the accused is not accorded the benefit of the doubt, his confession is coerced, his detention

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<sup>108</sup> For more examples, see F. Quintard-Morenas, 'The Presumption of Innocence in the French and Anglo-American Legal Traditions' (2010) 58.1 Am. J. Comp. L. 107.

<sup>109</sup> The English superiority complex was bolstered by writers like Voltaire, praising the rejection of torture: Bingham, 2010, p. 15.

<sup>110</sup> J. H. Langbein, *The Origins of the Adversary Criminal Trial* (2003), 339.

<sup>111</sup> J. H. Langbein, *Torture and the Law of Proof* (1977). Star Chamber used torture until 1640.

<sup>112</sup> P. 127: a Hamlyn lecture. See Denning, first lecture, 1949, and Schreiner, 1967, below.

<sup>113</sup> P. 27.

<sup>114</sup> H. W. Ehrmann, *Comparative Legal Cultures* (1976), ch. 5.

<sup>115</sup> *Comparative Criminal Procedure: Germany* (1977), 1.

before trial is unlimited, he has no right to counsel, and is not advised of his constitutional rights.<sup>116</sup>

There was a repetitive argument as to which model of criminal procedure was better at uncovering ‘the truth’, and/or fairer. Such views, concluded Damaska, must be examined with suspicion. This did not stop Langbein, in the context of civil<sup>117</sup> or criminal procedure: ‘Adversary criminal trial depends on the deeply problematic assumption that combat promotes truth...truth will emerge even though the court takes no steps to seek it...The lawyer-dominated system of criminal trial that emerged in eighteenth-century England was not premised on a coherent theory of truth-seeking...Truth was a by-product’.<sup>118</sup>

In examining how this ‘truth deficit’ came to prevail, he pointed to English disdain of the European model ‘...as late as the eighteenth century, European criminal procedure exhibited defects that made it appear self-evidently unworthy of emulation’. This is best illustrated in the work of High Court judge, J. F. Stephen, below.

Mutual hostility continues. The detention of British plane-spotters in Greece provoked months of press attacks on foreign procedure. A 2002 *Times* letter said ‘Every other EU country has a different system of criminal justice from that which makes us the envy of those ‘less happier lands’’.<sup>119</sup> There were critics of French delay in murder investigations.<sup>120</sup> British media criticised the time taken to investigate the death of Diana, Princess of Wales, in 1997. Criticism of Portuguese procedure was rampant after Madelaine McCann’s 2007 disappearance.

Unsurprisingly, common law devices, imported into Continental systems, have not always been welcomed. In 2004, French lawyers demonstrated against the importation of Anglo-Saxon concepts such as the plea and plea-bargaining, in a procedure aimed at organised crime.<sup>121</sup>

#### BRITANNIA RULES THE WAVES (1860-1960)<sup>122</sup>

A Victorian assault on French criminal procedure came from Sir James Fitzjames Stephen, in *A History of the Criminal Law of England*.<sup>123</sup> 73 pages document his trial observations. His 22-page criticism befitted an era of empire and triumphalism over the French.

The accused is cross-examined [by the judge] with the utmost severity, and with continual rebukes, sarcasm, and exhortations, which no counsel in an English court would be permitted... [placing him] in a position essentially undignified and inconsistent with his other functions...he is in a position to give the jury the full benefit of his thoughts...[The enforcement of rules of evidence] gives to English trials that solid character which is their special characteristic. They seem to be quite

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<sup>116</sup> M. Damaska, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’ (1973) 121 U. Pen L. Rev. 506, 569. See M. Delmas-Marty and J.R. Spencer, *European Criminal Procedures* (2002), introduction.

<sup>117</sup> ‘The German Advantage in Civil Procedure’ (1985) 52 U. Chic. L. Rev. 4.

<sup>118</sup> 2003, 338, 333, 339.

<sup>119</sup> Letters, 13 May.

<sup>120</sup> A. Sage, ‘It seems a crime to take so long’, *The Times*, 28 October 1997.

<sup>121</sup> J. Lichfield, ‘French lawyers go on strike over ‘Anglo-Saxon’ criminal justice laws’, *The Independent*, 12 February; A. Sage, ‘French judges take to the street’ *The Times*, 20 November 2001.

<sup>122</sup> The British Empire was at its height in 1921: National Maritime Museum.

<sup>123</sup> (London 1883), Vol I.

unknown in French procedure. Witnesses say what they please and must not be interrupted, and masses of irrelevant, and often malicious, hearsay which would never be admitted into an English court at all, are allowed to go before French juries... [English rules of evidence] seem to me to be just what is wanted to bring French trials into a satisfactory shape... French juries habitually take the law into their own hands... English practice is in every way superior to the French.<sup>124</sup>

As for Victorian bombast on the common law, the English legal system and the constitution in general, Van Caenegem cited some flowery examples, including Pollock himself, who considered the common law to be divinely ordained.<sup>125</sup> ‘Our Lady the common law’ was reasonable because it was English and the English were reasonable people. It encapsulated common sense, from an ‘immemorial antiquity’.<sup>126</sup> Europeans naturally considered their law to be a gift from God too.

Dicey shaped the self-image from 1885. He lauded the ‘English’ constitution and empire, ‘The system of leaving the self-governing colonies alone... made it possible for the English inhabitants and... the foreign inhabitants, of the Dominions to recognise the benefits which the Empire confers’.<sup>127</sup> The rule of law was ‘a special attribute of English institutions’, disregarding Aristotle’s writings.<sup>128</sup> Written bills of rights were pointless. He attacked the French 1791 constitution. By contrast, the Habeas Corpus Acts ‘declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty’.<sup>129</sup> As Bingham warned, though, ‘His foreign comparisons were shown to be misleading, and he grossly understated the problems which, when he wrote, faced a British citizen seeking redress from the government’.<sup>130</sup>

Lord Chancellor Haldane ‘assumed without question that British justice was the best in the world and that the dominions and colonies would always be of the same opinion’.<sup>131</sup> Bingham commented on this period’s ‘unquestioning belief in the superiority of the common law and its institutions... In so far as comparisons were drawn with what went on elsewhere, they were to England’s advantage’.<sup>132</sup>

Abel-Smith and Stevens pointed out that in the 1940s, ‘it became customary to refer to judges in hushed tones of awe. The Lord Mayor’s dinner set the tone... In Parliament too, the mere mention of the English judges led a whole symphony of cloying praise’. They were seen as the guarantors of the world’s highest standards, the superlative ‘British justice’.<sup>133</sup>

This, then, was the level of superciliousness affecting the British, when they drafted the European Convention on Human Rights 1950. A.W.B. Simpson explained that lawyers’ thinking ‘was still dominated by Dicey’s simplistic and impoverished discussion of the domestic protection of rights’.<sup>134</sup> Despite the fact that the British thought ‘bills of rights were evil simply because they were foreign’, governmental circles believed it was in Britain’s interests to take a prominent part in the human

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<sup>124</sup> Pp. 543-553.

<sup>125</sup> P. 99.

<sup>126</sup> N. Duxbury, *Frederick Pollock and the English Juristic Tradition* (2004), 142-145.

<sup>127</sup> *Introduction to the Study of the Law of the Constitution* 8<sup>th</sup> ed. (1885; 1915), introduction.

<sup>128</sup> Bingham, 2010, 4.

<sup>129</sup> Dicey, 199, cited by Simpson, below, 36.

<sup>130</sup> 2010, 5.

<sup>131</sup> In 1921: J. Graham Hall and D. F. Martin, ‘The Future of the Judicial Committee of the Privy Council’ (1994) 144 N.L.J. 1652.

<sup>132</sup> (2000).

<sup>133</sup> B. Abel Smith and R. Stevens, *Lawyers and the Courts* (1967), p. 290.

<sup>134</sup> *Human Rights and the End of Empire* (2001), p. 37.

rights movements in Europe and the UN because ‘The Foreign Office, as ever, had encountered some slight problems with foreigners, who tended to get things wrong’ and because of the ‘received truth’, that ‘Britain was the country which had invented effective protection of fundamental individual rights, or liberties, through the rule of law...England was ‘the land of the free’. The English had provided a model...and others would do well to follow them’.<sup>135</sup>

The French Declaration and the US constitutional documents were merely ‘derivative of English constitutional thought, and owed much to the works of John Locke and William Blackstone... [and in any event] Neither the USA, nor France, appeared...for much of their history, to take their supposed commitment to liberty particularly seriously’.<sup>136</sup> The Convention’s adoption was handled by junior FO officials, some of whom had not heard of the phrase ‘human rights’.<sup>137</sup> Naturally, the Convention was not seen as an instrument against which UK arrangements might be found wanting so it came as a shock when Greece took proceedings against the UK in 1956.<sup>138</sup> As for the UN, this was seen as a Foreign Office responsibility, with no domestic interest. British diplomats worked out their frustrated rage at negotiating with foreigners in their diaries.<sup>139</sup> The Conservatives are still indignant that the Strasbourg court criticises the UK: ‘Europe’s War on British Justice’, as the *Daily Mail* calls it.<sup>140</sup> There is an ‘absurd notion that human rights are a creation of European federalism, foisted on the British’.<sup>141</sup>

#### MISS HAMLYN TEACHES THE ENGLISH COMMON PEOPLE HOW LUCKY THEY ARE

The well-travelled Edwardian, Emma Hamlyn (1860-1941) was an admirer of English law and institutions. She provided in her will for a trust for

the furtherance by lectures...among the Common People of this country of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European Countries including our own...to the intent that the Common People of our Country may realise the privileges they enjoy in comparison with other European Peoples...

English intellectual giants among the lecturers found themselves apologising to her ghost that their cynicism prevented their sharing her unbridled triumphalism.<sup>142</sup> In 1951, F.H. Lawson said he *must* criticise English law, ‘I am not living in a fool’s paradise’.<sup>143</sup> Glanville Williams, in *The Proof of Guilt*, noting that the English considered their system ‘the best in the world’ criticised their criminal trial for the next 294 pages. Sir William Wade started his 1980 lecture ‘with an uneasy conscience’. He could not bring himself to invite the common people to feel unqualified satisfaction in their constitution.<sup>144</sup>

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<sup>135</sup> Pp. 5 and 18. Some considered Hoffmann’s speech in *A v SS for the Home Department* [2004] UKHL 56 to be a Diceyan throwback: D. Dyzenhaus, ‘An unfortunate outburst of Anglo-Saxon Parochialism’ (2005) M.L.R. 673.

<sup>136</sup> Pp. 20-21.

<sup>137</sup> Simpson 38.

<sup>138</sup> Pp. 5-7.

<sup>139</sup> Pp. 40-41.

<sup>140</sup> 12 January 2012.

<sup>141</sup> G. Bindman, ‘Blame culture gone too far?’ (2006) 156 N.L.J. 1001.

<sup>142</sup> Lord Scarman (1974); Lord Hailsham, *The British Legal System Revisited* (1983).

<sup>143</sup> *The Rational Strength of English Law*.

<sup>144</sup> *Constitutional Fundamentals*.



Polite foreigners lectured the English on how lucky they were. In 1964, Griswold rued the American loss of an experienced, permanent judiciary. ‘You are fortunate in the United Kingdom that you have been spared such excesses of democratic zeal.’<sup>145</sup> In 1950, O’Sullivan started *The Inheritance of the Common Law* with ‘The Common Law of England is one of the great civilising forces of the world’. From Magna Carta, a ‘sense of human equality passed into the texture of English thought and language’.<sup>146</sup> The Scot, Lord Kilbrandon, in 1966, thanked the English for the rule of law: ‘world civilisation owes to England ... a great debt of gratitude...’<sup>147</sup> but apologised that some of his conclusions might favour other systems. Others lectured on the predominant influence of English law over theirs, such as South African Justice Schreiner, in 1967: *The Contribution of English Law to South African Law; and the Rule of Law in South Africa*.<sup>148</sup> British justice had other admirers, including Chief Justice Burger, who said he always considered it ‘the best in the world’.<sup>149</sup>

Only the exceptional English lecturers, like Denning, praised elements of English law and the constitution.<sup>150</sup> Goodhart, in 1952, sounded like Dicey:

England has been a nation founded upon law for a longer period than any other State in the history of the world... Law and freedom are here so closely bound together that we cannot think of one without the other... English polity has for centuries been regarded as a model for all those who seek liberty throughout the world.<sup>151</sup>

In 1956, Lord Devlin was effusive on the virtues of *Trial by Jury*, this ‘little parliament... the lamp that shows that freedom lives’.<sup>152</sup> Devlin’s propaganda was outstandingly successful. There is barely a mention of the jury in England and Wales that does not quote his words. Elsewhere, he claimed that all ex-colonies had kept the common law as the greatest safeguard of their freedoms.<sup>153</sup> By 1974, however, Scarman, like Wade, was typical of later lecturers, providing a more measured evaluation:

The common law has been... one of our most successful exports... (but), despite its worldwide expansion, it learnt surprisingly little from other legal systems. Paradoxically, now that its days of expansion are over, it is more open to foreign influence and challenge than when it strode the world as part of the British colossus.<sup>154</sup>

## VOX POP

By the late 1960s, faith in British justice was wavering, as it was in all European and some American institutions. The complacency of previous centuries had had a fossilising effect on elements of English law. ‘It was a proud boast of Lord Bathurst the 18<sup>th</sup> century Lord Chancellor, that when he left office, he had left English law

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<sup>145</sup> *Law and Lawyers in the USA*, 20.

<sup>146</sup> P.11.

<sup>147</sup> *Other People’s Law*, 5.

<sup>148</sup> Pp. 22, 24.

<sup>149</sup> W. E. Burger, ‘“Cheers!” A Tribute to Justice Byron White’ [1994] B.Y.U.L. 220.

<sup>150</sup> *Freedom Under the Law* (1949).

<sup>151</sup> *English Law and the Moral Law*. He was American-born.

<sup>152</sup> P. Darbyshire (1991).

<sup>153</sup> Thirteenth Legal Convention of the Law Council of Australia, (1963) 36 *Australian LJ* 277, p. 282, cited by Griswold, 152.

<sup>154</sup> *English Law – The New Dimension*.

exactly as he had found it.’<sup>155</sup> By the 1960s, little had changed in the English legal system since the Judicature Acts 1873-75. In the new crisis of confidence, the English abolished the death penalty when they realised they had hanged innocent people. Cynicism was manifest in law schools by 1970. Baby boomers were taught just how flimsy ‘civil liberties’ were. Griffith’s *Politics of the Judiciary*<sup>156</sup> portrayed judges as ‘parasitic’ conservatives who did not ‘stand out as protectors of liberty, of the rights of man, of the unprivileged’.<sup>157</sup> The BBC and Ludovic Kennedy produced programmes like *Rough Justice*, about wrongful convictions. The Royal Commission on Criminal Procedure 1981 brought statutory protection for the accused in the Police and Criminal Evidence Act 1984 but confidence reached its nadir in 1991, after exposés of cases such as the Birmingham Six prompted the establishment of the Royal Commission on Criminal Justice. Criminal procedure is now under constant review and change, following Auld’s Criminal Courts Review 2001. The civil justice system, scandalised by Dickens, has been overhauled, after the Civil Justice Review 1988, the Woolf Report 1996<sup>158</sup> and the Jackson Review 2009-10.<sup>159</sup> Tribunals were restructured from 2010.

Since the 1980s, people are more likely to assert that they *used* to think that British justice was the finest in the world:

- Cambridge Professor John Spencer, in 1987, ‘If British justice is really the best in the world it ought to be able to correct [mistakes]’.<sup>160</sup>
- Hugh Callaghan, of the Birmingham Six, in 1989, ‘My father was in the British Army...He always used to tell me British justice was the best in the world. What would he say if he could see me now?’<sup>161</sup>
- P. Ashman, on the litany of wrongful ‘IRA’ convictions, ‘the image of British justice as “the best in the world” has been badly tarnished’.<sup>162</sup>
- Iris Bentley, in 1990, on the campaign to exonerate Derek, wrongfully hanged, ‘My father taught us British justice was the best in the world’.<sup>163</sup>
- Retired Judge, James Pickles, in 1991, on the unsuccessful first appeal of the Birmingham Six, ‘People in this country believe that British justice is the best in the world, but they don’t know any other system’.<sup>164</sup>
- N. Lezard, in 1999, reviewing Geoffrey Robertson’s *The Justice Game*, ‘a necessary corrective to the idea that British justice is the best in the world’.<sup>165</sup>
- Darsham Chohar, on the failure to investigate the death of his son, in 2000, ‘I was brought up in India believing that British justice was the best in the world’.<sup>166</sup>

<sup>155</sup> Carnwath L.J., ‘The Art of the Possible’, *Counsel*, February 2002, 20.

<sup>156</sup> (1977), penultimate page.

<sup>157</sup> Abel Smith and Stephens, 1967, above, catalogue attacks on judges from about 1956: ch. XI.

<sup>158</sup> *Access to Justice – Final Report to the Lord Chancellor on the civil justice system in England and Wales* (Department for Constitutional Affairs). D. Gladwell remarked ‘Perhaps we’d become rather complacent. British justice was the best in the world’, (1999) 149 N.L.J. 90.

<sup>159</sup> Judiciary website.

<sup>160</sup> *The Times*, 28 April.

<sup>161</sup> H. Mills, ‘The Birmingham Six’, *The Independent*, 5 December.

<sup>162</sup> ‘Miscarriages of Justice’ (1989) 149 N.L.J. 8.

<sup>163</sup> R. Shrimley, ‘Family’s plea to clear man hanged for murder’ *The Daily Telegraph*, 21 July.

<sup>164</sup> *The Times*, 15 March.

<sup>165</sup> *The Guardian*, 13 March.

<sup>166</sup> C. Alba, ‘The Deaths of Surjit Singh Chohar and Damilola Taylor’, *The Sunday Times* 3 December.

- Lotfi Raissi, British pilot accused of knowingly training the ‘9/11’ hijackers, in 2002, ‘It was a shock for me... I believed British justice was the best in the world...’<sup>167</sup>
- B. Reade, in 2001, on the £3,500 compensation paid to parents of fans killed in the Hillsborough football disaster, ‘can we please pass a law allowing us to smack anyone who says that British justice is the best in the world?’<sup>168</sup>
- John Batt, in 2001, solicitor of the wrongfully convicted Sally Clark, ‘We have the best legal system in the world if you are guilty but it doesn’t do you a hell of a lot of good if you are innocent’.<sup>169</sup>
- Tom McNamara, father of Alan, victim of a wrongful conviction, in 2002, ‘If you’d have told me three years ago that this sort of thing could have happened now I would have just laughed... we’re supposed to have the best justice system in the world...’<sup>170</sup>
- Keir Starmer Q.C., in 2006, on the McLibel case, ‘We pride ourselves on having the best legal system in the world but...’<sup>171</sup>
- Imran Khan and Michael Mansfield Q.C., in 2006, ‘It is often said that the Legal Aid system is the envy of the world ... however...’<sup>172</sup>
- Ann Widdecombe in 2009, ‘There was a time, when British justice was the envy of the world, when innocent until proved guilty meant just that’.<sup>173</sup>
- Richard Ingrams in 2010, ‘Like many of my generation, I was brought up to believe that British justice was the finest in the world... That was before we discovered that, thanks to incompetence and corruption, innocent men and women had been sent to prison and sometimes even hanged’.<sup>174</sup>

A 1993 *Solicitors Journal* survey showed that only 21 per cent of people agreed that British justice was the best in the world.<sup>175</sup> Lord Taylor LCJ said he would like people to feel that it was.<sup>176</sup> Such was the drop in confidence in the criminal process that, from 2001, the Government aimed to bolster it.<sup>177</sup> Hazel Genn’s 1999 book, *Paths to Justice* showed a similar lack of confidence in the civil courts.

Nowadays, it is difficult to find a non-lawyer asserting that British justice is the best in the world.<sup>178</sup> Barristers claim to be the world’s greatest advocates<sup>179</sup> and the Judges Council, in 2003, claimed our judiciary were ‘admired round the world’

<sup>167</sup> S. O’Neill, ‘Lotfi Raissi...’ *The Daily Telegraph*, 15 February.

<sup>168</sup> ‘A Powell of Good in a White Shirt’, *The Mirror*, 3 March and ‘Comment on British Justice’, *The Mirror*, 19 April.

<sup>169</sup> *The Lawyer*, 23 July.

<sup>170</sup> *Panorama – Fingerprints on Trial*, 19 May.

<sup>171</sup> *Storyville: McLibel*, BBC4, 30<sup>th</sup> January.

<sup>172</sup> ‘Access to Justice’, *Counsel*, July, p. 25.

<sup>173</sup> ‘Tainted by a crime you did not commit’, 11 February.

<sup>174</sup> ‘Business and politics can be a dangerous mix’, *The Independent*, 20 November.

<sup>175</sup> F. Gibb, ‘Only 21% see British justice as the best in the world’, *The Times*, 5<sup>th</sup> July.

<sup>176</sup> F. Gibb, ‘Taylor sworn in as Lord Chief Justice’ *The Times*, 28 April 1992.

<sup>177</sup> Home Office Research Study 245, B. Chapman, C. Mirlees-Black and C. Brown, ‘Improving Public Attitudes to the Criminal Justice System: The impact of information’ (2002); sections in *British Crime Surveys; Justice for All*, white paper, CM. 5563 (2002).

<sup>178</sup> There are some confident exceptions. The morning after the Birmingham Six were released, Nick Ross hosted a Radio 4 phone-in. An elderly caller deprecated the tenor of the programme, insisting that British justice was the best in the world. When asked how she knew this, she retorted ‘Well, would you like to be tried in any other country?’

<sup>179</sup> T. Dutton Q.C., Bar chairman, ‘Competing at home and abroad’ (2008) 158 N.L.J. 41; see solicitor D. Greene cited at (2008) 158 N.L.J. 1693.

and ‘entirely free of corruption’, which Stevens considered a ‘degree of hubris’ that bore ‘some of the hallmarks of 1960s complacency’.<sup>180</sup> Smulian, examining why London was losing international arbitration business, cited litigators who blamed the cultural arrogance of English and US lawyers and English judges, who were convinced that their legal systems and methods were innately superior.<sup>181</sup>

Exposés of the defects of the US justice system were sometimes still met with ‘the best in the world’ rhetoric. The 1991 beating of black motorist Rodney King by Los Angeles police officers was broadcast in 83 countries. Their acquittal provoked riots. Attorney General William Barr nevertheless assured Americans that ‘Our criminal justice system...is the fairest known to man’<sup>182</sup> and in the early hours of Independence Day 1993, Fred Graham, manager of *Court TV*, seemingly oblivious of international scorn and derision, said his daily broadcasting of the trial had enabled the world to see how fair the trial was and how well justice was done in ‘the greatest justice system in the world’.<sup>183</sup> Public opinion clung to this hyperbole. A 1999 ABA survey showed 80 per cent of respondents agreed that the American justice system was the best in the world.<sup>184</sup> Confidence may have diminished by now, though. The 2015 annual Harvard Institute of Politics survey showed that 49 per cent of young Americans distrusted the justice system.<sup>185</sup>

## CONCLUSION

Why does all of this matter? A boasting nation comes to believe itself, as the story above has shown. We have only been developing the capacity for self-criticism since the late 1960s. It barely needs mentioning that slavery flourished in both lands of the free. US segregation served as a model for South African apartheid. Friedman described the Victorian ‘extreme and blatant hypocrisy’ in America, in divorce law, ‘the whole of the criminal law’ and civil law. ‘Convenient ideologies and myths’ buttressed arrangements.<sup>186</sup> In England, there ‘was a huge hypocrisy, which in some ways Locke personified - that the property rights were peculiar to white men’.<sup>187</sup> Criminal procedure was shocking. Until 1984, suspects had no statutory pre-trial protection. Bingham said that well after 1950, some judges still summed up to the jury in favour of a conviction. Civil procedure was a pre-Dickensian game exploited by lawyers, resulting in 63 critiques before Lord Woolf’s 1998 reforms. Recent ‘legal origins’ theories that the common law promotes healthy capital markets have been countered by historians drawing attention to the severe handicap the (corrupt) English legal system posed to the commercial world in the industrial revolution.<sup>188</sup> Brunel and others resorted to arbitration. As for human rights, Simpson attacked the ‘myth’ that the courts protected liberties. ‘The British judicial tradition of always backing the authorities has only in relatively recent times been weakened’.<sup>189</sup> But this colonial habit continues. When elderly Kenyans sued the UK in 2010-11 for torture in 1953,

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<sup>180</sup> ‘Reform in haste and repent at leisure’ (2004) 24 LS 1, p. 10.

<sup>181</sup> M. Smulian, ‘City feels the heat’, LS Gaz, 19 June 2003.

<sup>182</sup> NPR, *Morning Edition*, 21 May 1992. The Attorney was testifying before a House subcommittee.

<sup>183</sup> Speech, 26 June 1993.

<sup>184</sup> *Perceptions of the U.S. Justice System*, ABA website.

<sup>185</sup> A. Dobuzinskis, 29 April, Harvard website.

<sup>186</sup> L.M. Friedman and H.S. Scheiber (eds.), *American Law and the Constitutional Order* (1989), ch. 2.

<sup>187</sup> N. Ferguson, ‘The Landscape of the Law’, BBC Reith Lecture, 2012.

<sup>188</sup> Ferguson.

<sup>189</sup> 2001, above, 51.

the High Court was told there were no files, until one persistent civil servant found them hidden, prompting *The Times* leader to comment on ‘This country’s culture of secrecy...and mendacious cover-ups [contriving to hide] 2000 boxes...relating to 37 former British administrations...the end of Empire was bloody, protracted and involved abuses...’<sup>190</sup>

The rhetoric becomes empty and is used for attacking other systems. Lord Bingham cited academics who suggested that the phrase ‘rule of law’ had degenerated to a meaningless, Anglo-American self-congratulatory device, cited, for instance, by both sides in *Bush v Gore*, the challenge to the validity of the 2000 presidential election.<sup>191</sup>

Complacent democracies cannot see their degree of hypocrisy. The UK only dismantled the problematic role of Lord Chancellor and took the top court out of Parliament in the Constitutional Reform Act 2005, after the Council of Europe sent a rapporteur into the UK Parliament to complain that it was embarrassing trying to teach emergent European democracies about the separation of powers in the face of the UK setup. ‘Every day...I am in confrontation with the new democracies from central and Eastern Europe...and they say “What about the British?”’<sup>192</sup>

Having boasted for centuries of its rule against torture, the UK Government had to compensate 12 Guantanamo detainees who alleged British complicity in American torture.<sup>193</sup> Both countries indefinitely detained terror suspects without trial, in a ‘monstrous failure of justice’, as Lord Steyn called it.<sup>194</sup> The British readily tortured foreign combatants abroad in the twentieth century and UK citizens in the Northern Irish ‘troubles’, not to mention recent detainees like Baha Mousa in Iraq, in 2003. Critical lawyers have condemned a ‘Retreat from due process’<sup>195</sup> and from the rule of law<sup>196</sup> in both countries.

There is a dangerous resurrection of the superiority complex.<sup>197</sup> The Conservatives and UKIP attack EU and European Human Rights law.<sup>198</sup> We would do well to remind ourselves of Karl Llewellyn: ‘Nowhere more than in law do you need armor against that type of...snobbery – the smugness of your own tribe in your own time: We are the Greeks, all others are barbarians’.<sup>199</sup>

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<sup>190</sup> ‘Secrets and Lies’, 8 April 2011.

<sup>191</sup> 531 US 98 (2000).

<sup>192</sup> Erik Jurgens, 2003, discussed in *Darbyshire on the English Legal System* (2014), ch. 4.

<sup>193</sup> ‘Government to compensate ex-Guantanamo Bay detainees’, BBC News, 16 November 2010.

<sup>194</sup> F.A. Mann lecture, 25 November 2003.

<sup>195</sup> M. Lake, (2006) 156 N.L.J. 86.

<sup>196</sup> J.F. Murphy, *The United States and the Rule of Law in International Affairs* (2004).

<sup>197</sup> For instance, Reith lectures 2012; *The Long View*, BBC Radio 4, 9 July 2012. On 4 July, barrister Harry Potter concluded his TV series, *The Strange Case of the Law* by asserting that the legal system was ‘England’s greatest gift to the world’.

<sup>198</sup> In 2015, on the UKIP website, Diane James says “British justice is still the best in the World, but is being destroyed by the EU”.

<sup>199</sup> *The Bramble Bush* (1951), cited by Demleitner, above, 742.