Becoming Responsible: Conceptual Change in the Emergence of Tort Law

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Table of Contents

List of Figures

Introduction

This project is an examination of the dynamics by which standards of responsibility changed in seventeenth century England, and it argues that our current models of responsibility are partial in the sense that they focus on elements of responsibility that remain fixed, while overlooking the significant role conceptual change plays in determining the sorts of behaviors that can be expected of citizens. The conceptual framework within which claims to responsibility are made both limits and motivates new forms of responsibility, as well as the sorts of citizens that people are able to become. Understanding the processes by which responsibility has previously changed is important today as we often find our efforts to hold people responsible frustrated, and our abilities to address emergent wrongs stymied.

Today, in moments of outrage, we often want to hold the guilty responsible, or at least see them held responsible. For those who live in a country with a representative government, it seems that the practices of responsibility ought to in some way represent the aspirations of the citizenry. Yet, our most serious efforts to hold people responsible often either fail or feel inadequate, and as a result the language of responsibility can feel like trite moralizing in a tough-minded world. The problem is not a lack of executive power rendering our attempts at responsibility inadequate. Rather, if we understand practices of responsibility as part of a larger "politically emancipatory" project that frees

citizens through participation, a failure of responsibility looks like a failure of that larger project of political emancipation.[1]

Coming to terms with the mismatch between our desires for responsibility and our successes and failures in holding people responsible is an important part of giving an account of our political place in modernity since practices of responsibility touch on many of our most pressing problems. Robert Putnam has recently renewed his long-running argument that a breakdown of responsibility between people and between generations is at the heart of American inequality. The beginning of a solution to class and generational inequality, he argues, is to, "acknowledge our responsibility to [poor] children. For America's poor kids do belong to us and we to them. They are our kids."[2] Taking responsibility for inequality within our communities is both spatial and temporal: *those* kids live *over there* and represent a future that is coming into being. Yet, when confronted with the task of making responsibilities binding, especially through the legal system across space and time, we are often confounded by uncertainty, complexity, and the limitations of the legal form to control other forms of governance, like global economic pressures. In assessing the process of assigning responsibility after the 2008 financial crisis, former Federal Reserve Chair Alan Greenspan cautioned that our natural "inbred sense of justice in seeking to punish wrongdoers" was bound to be unfulfilled.

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[1] Margaret Urban Walker, *Moral Contexts*, (Lanham, MD: Rowman and Littlefield, 2003), pg. 104.
[2] Robert Putnam, *Our Kids: The American Dream in Crisis*, (New York: Simon and Schuster, 2015), pg. 261.

"Revenge may be soul satisfying," he argued, "but it is rarely economically productive."[3] We inhabit a world that both requires responsibility and disables some forms of it, revealing that our aspirations and practices of responsibility are fissured.

Our practices of responsibility are fissured because we want them to be at once participatory, democratic, and egalitarian, but also to have the force of law when appropriate. To some degree this diversity of socially held expectations and aspirations is fulfilled by formally and informally putting responsibility on a continuum and vesting the authority of enforcement in people ranging from parents to police: practices of holding people responsible range from a stern glance to a death sentence. The deal we have made in modernity is that everyone gets to participate in stern glances, very few participate in death sentences, and many of our daily actions fall somewhere in a contested middle of who has authority to assign responsibility, how, and why. For every Putnam who would like a broad and inclusive discussion about mutual obligation, there is a Greenspan insisting that the task be left to experts lest the delicate balance of our moral and material economies be disrupted. The contest over who participates, how, and on what terms in the assignment of responsibility is an essential part of our practices of responsibility.

Some scholars argue that there is or ought to be a positive relationship between political inclusion and participation in practices of responsibility. Yet, by examining the emergence of modern standards of responsibility during the seventeenth century in England, the link between responsibility and emancipation seems oppositional. Even as the English were engaged in popular revolution, there was a simultaneous

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[3] Alan Greenspan, *The Map and the Territory 2.0: Risk, Human Nature, and the Future of Forecasting*, (New York: Penguin, 2013), pg. 237.

counterrevolution undercutting popular participation in formal practices of responsibility. Even as representation increased, traditional popular mechanisms of responsibility were repressed and lost authority. The democratization of the English state also included the centralization of the authority to hold people responsible in the hands of state agents, so that the relationship between democratization and popular participation in practices of responsibility is negative rather than positive. Which is not at all to say that the forces of popular participation in practices of responsibility were indifferent. They just lost. And while this is a story of how the state centralized the authority to define, assign, and punish irresponsibility, it is also a story of how traditional actors and agents of responsibility were defeated. I am not the first to notice the counterrevolutionary forces of modernity that attached themselves to democratization. Scholars ranging from James Tully, to Stephen Holmes, to Michael Hardt and Antonio Negri have all differently made the case that the early modern project of democratization was accompanied by new forms of power and governance that constricted the horizon of political possibilities by centralizing juridical power in the hands of experts.[4] I build on their insights here, showing how the legal form of holding citizens responsible for harm developed in a similar manner that drained power from local and traditional offices and put that power in the hands of national agents of the Crown.

[4] James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), pgs. 179-241. Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995), pgs. 42-68. Michael Hardt and Antonio Negri, *Empire*, (Cambridge, MA: Harvard University Press, 2000), pgs. 69-92.

The relationship of practices of responsibility to a counterrevolution in early modernity is developed throughout this dissertation. In order to frame the significance of that linkage, I want to begin here with an overview of the ways we understand responsibility today in order to demonstrate the significance of putting political emancipation and responsibility in an oppositional relationship rather than a relationship of mutual reinforcement.

1) Visions of Responsibility

The ways that we think about responsibility today can be divided into temporal, spatial, and relational categories. Temporalists include both those who are backward looking, focusing on assigning responsibilities for past wrongs, as well as those who are forward looking, and concerned about justice between generations. Drawing out the concept of *desert* from Aristotle, Jill Frank argues that responsibilities and the distributions of good and bad things that they entail, are always both backward and forward looking.[5] Some temporalists are backwards looking in that they assign responsibility from the standpoint of the present for past events. This is very much a theme of reflection upon war crimes and particularly the Second World War in a variety of Arendt's works, as well as reparations for slavery and other historical injustices.[6] Indeed, Eric Posner and Adrian Vermeule argue that a backward looking perspective is

[5] Jill Frank, Democracy and Distribution: Aristotle on Just Desert, *Political Theory,* 26.6 (Dec. 1998), pg. 790.

[6] Examples of Arendt's particular concern for assigning responsibility after the publication of *Eichmann in Jerusalem* (1963) include *The Deputy: Guilty by Silence?* (1964) and *Auschwitz on Trial* (1966) in Responsibility and Judgment, ed. J. Kohn (New York: Schocken, 2003), pgs. 214-265.

the only one that can justify a large scale form of redistributive reparations pursuant of the rectification of past wrongs.[7] In contrast, other temporalists are forward looking, insisting that the people of the present have certain responsibilities toward the people of the future. Traceable to Jan Narveson's utilitarian examination of whether today's humans have a responsibility to procreate in order to further the aggregate happiness or goodness of future generations[8], as well as John Rawls' deontological principle of just savings[9], current forward-looking temporalists often mix and merge utilitarian, consequentialist, and deontological positions to address current events with longterm consequences, such as environmental degradation and climate change. For example, in arguing for the responsibility of current generations to take care of the planet for future generations, Brian Barry makes the case that the present has an obligation based both on principle and the thriving of future generations to take care of the earth today. The question is not one of principle *or* outcome, but rather both: a principle of not obliterating the potential for future generations to thrive exists alongside the reality that our actions should not have the consequence of significantly curtailing or even destroying future life.[10] Terence Ball has repeatedly insisted that no such obligation toward future

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[7] Eric Posner and Adrian Vermeule, Reparations for Slavery and Other Historical Injustices, 103 *Columbia Law Review* 689 (2003), pg. 692.

[8] Jan Narveson, Utilitarianism and New Generations, *Mind*, 76.301, Jan. 1967. pgs. 62-72. For a more recent interpretation of this argument that makes a case for intergenerational responsibility based on consequences, see Tim Mulgan, *Future People: A Moderate Consequentialist Account of our Obligations to Future Generations* (Oxford, 2006).

[9] John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, [1971] 1999), pgs. 251-258.

[10] Brian Barry, Sustainability and Intergenerational Justice, *Theoria: A Journal of Social and Political Theory*, 89, June 1997, pgs. 42-64.

generations can exist because the concept of intergenerational justice is internally conflicted[11], and is outside of the western political tradition[12] and conceptual framework.[13]

Others do not focus on time so much as space. Spatialists, like Jeremy Waldron, argue that proximity plays a key role in assigning responsibility.[14] If, as Peter Singer posed the problem in a classic article, we are faced with the prospect of either saving a toddler from drowning in front of our eyes or writing a check to save starving children overseas, Waldron argues that it we have a responsibility to rescue the child from drowning instead of turning our backs to go write a check for the starving children overseas. For Waldron, personally seeing a harm puts people in a special type of relationship that entails responsibilities not present in more distant relationships.[15] For spatialists like Waldron, proximity is a critical component of how responsibility ought to be assigned in a world of many possible actions.

Both time and space are types of relationships that people have with one another, and relational theorists argue that responsibilities are rightly felt more strongly toward those with whom we have a relationship, and that different types of relationships create

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[11] Terence Ball, The Incoherence of Intergenerational Justice, *Inquiry*, 28.1-4, 1985.
[12] Terence Ball, 'The Earth Belongs to the Living': Thomas Jefferson and the Problem of Intergenerational Relations, *Environmental Politics*, 9.2, 2000, pgs. 61-77.
[13] Terence Ball, New Ethics for Old? Or, How (Not) to Think About Future Generations, *Environmental Politics*, 10.1, 2001, pgs. 89-110.
[14] Spacial partiality is probably the most common method in practice of distributing felt responsibilities, and is often taken as a default position. Indeed, Adam Smith problematizes this by giving an account of the "man of humanity" who feels some empathy for those distant from him.
[15] Jeremy Waldron, Who Is My Neighbor?: Humanity and Proximity, *The Monist*, 86.3, 2003, pgs. 333-354. Also, Peter Singer, Famine, Affluence, and Morality, *Philosophy and Public Affairs*, 1972, pgs. 229-243.

different types of responsibilities. These relationships are more than simply relations, because as Soran Reader puts it, "a relationship involves an actual connection between agent and patient, a real 'something in between' then which links them together."[16] Such relationships include physical proximity, biology, shared history, and shared projects, as well as lesser relationships like trade, conversation, and play.[17]

The multiplicity of our relationships can lead to conflicts between resulting responsibilities, and we need to think of ways to adjudicate those conflicts. As Joan Tronto has noted, "Because people and institutions exist within a complex, often competing, set of relations, responsibilities are also likely to be complex and competing," so that "being irresponsible towards some of the responsibilities in our lives will be a matter of course for most humans."[18] For Reader, relationships exist in an "expanding circle of sympathy" in which we intuitively are related to family most closely and have the greatest responsibilities toward them, and other lesser relationships and responsibilities "shade outward toward the whole universe."[19] In contrast, Samuel Scheffler has argued that relationships create responsibility not simply because of the interaction between two people or intuitions about which relationships matter most, but because of the non-instrumental value that the parties attach to that relationship.[20] Insofar as our values are a matter of choice, our responsibilities remain weakly voluntary rather

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[16] Soran Reader, Distance, Relationship, and Moral Obligation, *The Monist*, 86.3, 2003, pg. 370.
[17] Ibid.
[18] Joan Tronto, Partiality Based on Relational Responsibilities: Another Approach to Global Ethics, *Ethics and Social Welfare*, 6.3, 2012, pg. 310.
[19] Reader (2003), pg 376.
[20] Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*, (New York: Oxford University Press, 2001), pgs. 101-104.

than inherent in particular relationships.[21] It is the clarity of the uneven distribution of the consequences of responsibility and irresponsibility in the relational model that Tronto argues makes it well suited to a clear-eyed examination of our actions. A relational approach makes clear that, "assigning, accepting, deferring, deflecting, and meeting responsibility involves power," so that we can productively consider the politics in which the use of responsibility participates.[22]

2) When Did We Become Killers?

Thus far I have said very little about the conceptual development of responsibility, and it is to that subject I want to now turn. Indeed, Tronto has drawn our attention to responsibility's recent linguistic vintage in the mid-seventeenth century,[23] and Terrance Ball has argued that our moral categories often change.[24] The dynamics of emergence and change over time seem vital to an understanding of what it means to be a responsible person. Yet in making this historical turn it is worth noting Richard Niebuhr's cautions us that there may be a great deal below the surface of responsibility: "the symbol of responsibility contains, as it were hidden references, allusions, and similes which are in the depths of our mind as we grope for understanding of ourselves and toward a definition of ourselves in action."[25] To make use of the language of responsibility is to mobilize a set of references to the past that remain present.

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[21] Ibid, pgs. 106-107; 51.
[22] Tronto (2012), pg. 308.
[23] Tronto (2012), pg. 305.
[24] Ball (1985).
[25] Richard Niebuhr, *The Responsible Self*, (New York: Harper and Row, 1963), pg. 48.

Making the question of responsibility one of conceptual development as well as analysis challenges some conventional questions of responsibility. One line of questioning for assessing responsibility for indirect harm is to ask ourselves what degree of causal efficacy and/or knowledge we must have for an extreme crime like murder before we are actually murderers. G.E.M. Anscombe, Joel Feinberg, and Marion Smiley have all examined responsibility from this vantage point, disagreeing about what degree of knowledge or causal efficacy must exist in order to become responsible for a death such that the person in question becomes a murderer. The question for all three is what we must commit, omit, remember, or forget to be responsible.[26] Smiley presents the following as a paradigm case of clear responsibility in which an action has the immediate consequence of bringing harm to another person:

> Consider the case of a man who shoots his neighbor. Most of us consider shooting a gun to be a standard means of killing others. (Indeed, most of us would probably consider killing to be the primary function of shooting a gun.) Moreover, the distance in a causal chain between shooting a gun and another's death is relatively short. Hence, in most cases we consider the causal connection between a man who shoots a gun and his neighbor's death as immediate, even if the man did not intend to shoot his gun.[27]

For Smiley, shooting another person, whether accidental or not, is a clear cut case of the shooter bearing responsibility for the outcome.[28] Many, perhaps most moderns would

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[26] G.E.M. Anscombe and Sidney Morgenbesser, The Two Kinds of Error in Action, *The Journal of Philosophy*, 60.14, 1963, pgs. 393-401. Joel Feinberg, *Doing and Deserving*, (Princeton: Princeton University Press, 1970), pgs. 38-54. Marion Smiley, *Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View*, (Chicago, University of Chicago Press, 1992), pgs. 219-224.
[27] Smiley (1992), pg. 222.
[28] Smiley uses this example to illustrate the "accordion effect" in ethics, or the tendency of some immediate actions to spread and have secondary effects. In such cases, the question becomes what degree of responsibility moral agents have for the secondary or

intuitively agree with Smiley: if Kelly shoots Pat, Kelly bears responsibility for the resulting injury.

Yet, that intuition is uniquely modern because what we now understand as responsibility was not always so, which I now want to illustrate using an example from the mid-seventeenth century in England. In 1662, Christopher Satterton caused "mischief" when he accidentally shot William Angell with a cannon, maiming him by removing one leg and one eye. Angell sued Satterton for damages and lost: Satterton acknowledged that he had indeed shot Angell with a cannon at very close range, but argued that he was not at fault since it was an accident. The King's Bench agreed.[29] Today, though, any court would certainly find for Angell because Satterton would have a responsibility to shoot his cannon safely. Angell brought his suit under what is now known as tort law - the set of laws that spell out citizens' responsibilities and liabilities to one another. *Angell v. Satterton* reveals just how much tort law changed in the latter half of the seventeenth century. The idea that we have a general responsibility for our property and the outcome of our actions that we assume today was not always a legal standard. The belief that a citizen is "answerable for all mischief proceeding from his neglect or his actions, unless they were of unavoidable necessity" had to be slowly

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tertiary consequences of their actions. Her example of the accordion effect is an industrialist dumping chemical waste into public water supplies with ripple effects throughout the community. In contrast, shooting someone is her example of how a harm is direct and the responsibility clear. See Smiley (1992), pgs. 220-222.

[29] In Baker and Milsom, *Sources of English Legal History: Private Law to 1750*, 2nd edition, (New York: Oxford, 2010): 376-377.

cultivated and established.[30] And so between 1662 and 1700 occurred an important legal change: "mischief" became strictly illegal. In the span of thirty-eight years appeals to *accident* lost their currency and ceased to excuse mischief, allowing nascent standards of liability and due care to emerge from the English bench as legally enforceable standards of responsibility.[31] Smiley's question of when and how we become responsible for killing others is partly one of responsibility's conceptual development and history as a practice, and it is an understudied and under-investigated area.

3) The Distribution of Power and Responsibility

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[30] See *Mason v. Keeling* (1700) in J.H. Baker, *An Introduction to English Legal History*, 4th edition, (Butterworths-LexisNexis: Bath, 2002): 411.

[31] At the outset I also should acknowledge that this project works from a basic understanding of what we now know as "private" law is deeply political in the sense that it governs human life by restricting, enabling, incentivizing, and disincentivizing various actions from the profound to the banal; for example, tort law provides the basic incentive structure under which doctors decide which patients should receive CT Scans and the interval at which hospital maintenance staff salts sidewalks. "Private" law marks and limits what is possible, reasonable, sensible, and irrational. That sort of thoroughgoing power appears political on its face, and so I treat it as a form of politics. The quantity of political power camped under the banner of private law is, according to Richard Helmholz, a product of seventeenth century English politics. In an effort to limit the monarchy, the nobility argued that some of their actions (under some conditions, and in some places) were *private*: they were not subject to the king's prerogative, and decisions were not appealable to the King's Bench.[31] The creation of private law was itself a political act, and continues to be an important political category. In stressing the import of these everyday regulatory structures, Danielle Allen reminds us that, "Little laws, and not just constitutional ones, construct this world."[31] Treating private law as a political subject – as this project does – helps to detail the manner that law plays a basic role in social and political life. Richard Helmholz, *Roman Canon Law in Reformation England*, (Cambridge: Cambridge University Press, 1990), chapter 5. Danielle Allen, *Talking to Strangers: Anxieties of Citizenship Since* Brown v. Board of Education, (Chicago: University of Chicago Press, 2006), pg 170.

Margaret Urban Walker has recently drawn our attention to the role power plays in the process of assigning responsibility by distinguishing between what she takes to be two rival ethical models: the theoretical-judicial model, and the expressive-collaborative model. What Walker describes as the theoretical-judicial model she argues derives from Henry Sidgwick's *Methods of Ethics* (1874) that focuses on the judgment of action and theories of action. Walker argues that, "The conception is 'juridical' twice over: Moral theories are themselves seen as delivering or justifying verdicts on cases (jury or judge, as it were); and moral philosophy is a tribunal under which competing moral theories are scrutinized and judged for (especially their logical and epistemological) adequacy."[32] Moral philosophy then takes as its primary task that of judging both individual action and the general theories of right action. In Walker's view, the theoretical-judicial model is a reflection of the interests of a, "class of male citizen-peers assuming authority in the context of political and economic modernization" seeking a model of, "morality as an individual action-guiding system within and for a person."[33] The clear problem with this model is that it is one in which a small group of (white) male citizen-peers guide the actions of their (non-white, non-male) non-peers through proper moral theories.

As a replacement, Walker proposes what she calls an expressive-collaborative model. This model focuses on practices rather than theories, and emphasizes open participation in the process of creating moral knowledge with the ultimate goal of political emancipation for previously ignored and/or repressed identities and points of

[32] Margaret Urban Walker, *Moral Understandings: A Feminist Study in Ethics*, 2nd ed, (Oxford: Oxford University Press, 2007), pg. 43.
[33] Walker (2007), pg. 67.

view. An expressive-collaborative model, "looks at moral life as a continuing negotiation *among* people, a practice of mutually allotting, assuming, or deflecting responsibilities of important kinds, and understanding the implications of doing so."[34] While Walker does not use the word, we might look at this as a more *discursive* model of moral negotiation that de-centers authority and power from those authorized to propound moral knowledge and into the members of a community. If we assume with Walker that the creation and expression of morality is also an expression of power, by including all who are affected by the discourse in the creation and recreation of its terms, our ethical life is made more democratic and egalitarian because power and authority are more evenly distributed in the community.[35]

The primary purchase of Walker's expressive-collaborative model lies in the claim that it is newly descriptive of twentieth century social movements, and that it makes a new normative prescription for the inclusion of marginalized voices. Yet, part of what this is uncovered in the subsequent chapters is very similar dynamics of moral contestation in seventeenth century England. On one side was the Crown and Bench, arguing that moral and legal knowledges were true insofar as they expressed true moral

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[34] Ibid.

[35] Walker is herself very transparent that this project has political goals, writing that:

> The descriptive and critical tasks of my alternative conception are shaped by interests in the social recognition and participation that individuals claimed as members of excluded or subordinated groups in many progressive movements of the twentieth century. […] The expressive-collaborative view is designed to capture interpersonal and social features of morality that the theoretical-judicial model hides (Walker [2007], pg. 67).

Walker's project is a self-aware political intervention in the distribution of ethical authority that seeks to unsettle the distribution of power by first revealing and then revising its structure.

and legal laws that exist independent of human judgment about them. As we will see, this line of thought presages Sidgwick's assessment that ethics in his time was most commonly directed to the knowledge of "true moral laws or rational precepts of conduct" whose use is in helping us, "discover some true moral rules telling us how to behave."[36] These rules are most commonly expressed in the language and conceptual framework of sin, although nature sometimes serves a similar foundational role.[37] The theoretical-judicial form, in which true moral laws are discovered and applied deductively to particular cases, was dominant in seventeenth century England, and it is the context in which Sidgwick writes, and against which Walker frames her model.

A form of moral contestation reminiscent of Walker's expressive-collaborative model reacted against the seventeenth century version of the theoretical-judicial model as well. It occurred as citizens of all social classes mobilized the ancient common and traditional rights to sanctuary, to common property, and to traditional behaviors against a set of evolving "moral laws" articulated by the Crown and parts of the Bench. There are two primary differences between the seventeenth century contestation over responsibility and Walker's expressive-collaborative theory. The first is that the equation of moral pronouncement with power was not explicitly and routinely made, so that Walker's

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[36] Sidgwick, *The Methods of Ethics*, ed. J. Bennett, full text freely accessible via earlymoderntexts.com, pg. 1. It is worth noting as well that Sidgwick is acknowledging this position as the most common in his day, but he is not advocating for it. His definition of ethics is more broad and less law-governed: "Ethics is the science or study of what is right or what ought to be the case, so far as this depends on the voluntary actions of individuals" (pg. 2).

[37] See Smiley (1992), pgs. 63-66; Helmut Puff, *Nature on Trial: Acts "Against Nature" in the Law Courts of Early Modern Germany and Switzerland*, in The Moral Authority of Nature, ed. L. Daston and F. Vidal (Chicago: University of Chicago Press, 2004), pgs. 232-253.

criterion for the participants to be self aware of the moral stakes of the contest was not met, present, or possible. Second, in contrast to Walker's narrative whereby the expressive-collaborative model gained ground on the theoretical judicial model in the twentieth century, in the seventeenth century the theoretical-judicial model supplanted the expressive-collaborative model. Indeed, the story to come is in many ways one of the traditional model of expressive community governed by informal understandings being disciplined into a modern community governed by formal rules and contractual obligations.

Relational understandings of responsibility, such as Walker's expressive-collaborative model, succeed at throwing light on the political and power dynamics inherent in making moral claims, but they do so at the expense of giving due consideration to the role of constraining circumstances – institutional or conceptual – that form the outer boundaries of that discourse. Relational understandings of responsibility emphasize the actions of participants in an ethical discourse as decisive factors in the distribution of responsibility and irresponsibility. In contrast, this project presents a vision of responsibility as a process bounded not only by the claims of other members of the ethical community, but also by the existing conceptual framework within which claims to responsibility are made. As a community's conceptual framework changes over time, so also the sorts of claims to responsibility that can be made within that community evolve and diversify. The example of seventeenth century England illustrates this dynamic especially well due to a high rate of change in a short amount of time.

4) Roads Lightly Travelled

This project focuses on the development of responsibility as a community practice, but it has other resonances that occupy a relatively less privileged place in the narrative. Particularly, this project could tell a story of the development of the Rule of Law, focus on the development of torts as a narrowly legal concept, or look more broadly at the way that responsibility exemplifies a form of modern disciplinary power in a Foucauldian vein. I outline each of those three possibilities below, and explain why they remain on the periphery, if still important, in this analysis, before turning to the main outline of the argument. In the main, each lies outside of the understanding of community conceptual development that I aim to recover.

4a) The Rule of Law and Disciplinary Power

Given that this project looks at the process by which legal forms of responsibility changed, it may seem that it is a project in the development of the Rule of Law (ROL), and particularly how the ROL began to exercise a disciplinary power by governing everyday affairs and expectations for behavior. This path may be doubly invited by the way that this project takes the unusual step of analyzing the development of tort law as a foundation for the ROL, and by so doing dismantles a modern legal distinction that has acted to cover over significant ways in which law acts politically and governs everyday life. The distinction between public law and private law was the legal expression of a general movement in sixteenth and seventeenth century England to limit the power of monarchs and parliaments over a variety of areas of human life, especially property rights

and religious practices.[38] By taking significant activities "off the political table" – namely torts, contracts, property, and commercial law – contingent economic relations were and are reified, taking on the appearance of necessary or natural structure. Stock visions of the ROL have contributed to this reification by abstracting present concepts of the ROL from historical circumstances and portraying them as a static set of understandings. From A.C. Dicey to Joseph Raz, the ROL is especially prone to definition through listing necessary and sufficient conditions without reference to concrete particulars.[39] This abstract analytic approach depoliticizes the ROL by covering

[38] Brian Tamanaha argues that through the Glorious Revolution there was no sharp distinction between private and public law, while Morton Horwitz sees its origins in late medieval regulation of monarchical lands. Horwitz argues that it developed slowly in the early modern common law, and only in the nineteenth century did the public/private distinction fully take hold. He writes that, "one of the central goals of nineteenth century legal thought was to create a clear separation between constitutional, criminal, and regulatory law – public law – and the private law of transactions – torts, contracts, property, and commercial law" (pg. 1424). Horwitz argues that the main motivation for this split was jurists' desire to have a "legal science" free from politics. See Mortin Horowitz, *The History of the Public/Private Distinction*, The University of Pennsylvania Law Review, (Jun. 1982). Also, Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge: Cambridge University Press, 2004), pg. 56.

[39] A.C. Dicey's *Introduction to the Study of the Law of the Constitution* (1885) is commonly cited as the first articulation of the ROL as a distinct and important concept. Jonathan Rose summarizes Dicey's version of the ROL in three points: "(1) the absence of arbitrary or wide discretionary governmental power and the presence of regular law with the important corollary that no individual can be punished except for a distinct breach of law established in the ordinary legal manner by courts; (2) that no individual is above the law and that everyone, whatever the rank or condition, is subject to the ordinary law and jurisdiction of ordinary tribunals; and (3) general constitutional principles including individual rights resulting from judicial decisions determining the rights of private persons in particular cases brought before the courts" (2004, 458). Dicey held that these universal, procedural guarantees went in principle back to the Norman Conquest and existed only in England and subsequent common law countries, removing the possibility of historical or comparative study. Rose, *The Rule of Law in the Western World: An Overview*, Journal of Social Philosophy, Winter 2004. Contemporary scholars like Joseph Raz argue normatively that the ROL should remain at a level of abstraction

over how it was made and continues to be remade by political forces, making this literature a poor fit for the conceptual change this project works on.

Conventional understandings of the ROL have taken the public/private distinction for granted, and discussions of the ROL have been a proxy debate over the depoliticization of basic economic presumptions. On one side the free marketeers wanted to insist on a version of the ROL containing very little political content (excluding rights, welfare, democracy, etcetera) while those on the left variously sought to critique this minimal vision of the ROL from a perspective of equity and/or equality.[40] The result, as Judith Shklar put it, was a situation in which debate about the ROL looked like, "a football game between friends and enemies of free market liberalism."[41]

In the past fifteen years this close relationship between the ROL, free market liberalism, and the public/private distinction has begun to break down. Both right and left have begun to accept the ROL as a central political concept. For example, in his recent introductory undergraduate text *Governing Subjects* (2010), Isaac Balbus takes the

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that makes it generic. If it becomes identified with a particular community's traditions or practices, it will be inadequate for communities characterized by a mobile labor force and "a high rate of technological change fuelled by the needs of capitalism for continuous innovation to make continuous growth possible" (1990, 333). In order to be transportable or sufficiently general, principles rather than particular practices must define the ROL. For Raz's defense of an abstract conception of the ROL, see *The Politics of the Rule Of Law*, Ratio Juris, December 1990. His original definition of the ROL came in *The Authority of Law*, (Oxford University Press, 1979).

[40] William Scheuerman, *The Rule of Law at Century's End*, Political Theory, Oct. 1997, 740. In recapping the general discussion of the ROL, Scheuerman writes that, "The free marketeers cut the rule of law down to a guarantee of economic liberty for the economically privileged, whereas their left-wing counterparts in the legal academy too readily advocate trading it in for a (vaguely conceived) promise of greater social and economic equality" (pg. 740).

[41] Cited in Scheuerman (1997): 740.

ROL as his first, foundational concept.[42] Given that Balbus made his name with a book called *The Dialectics of Legal Repression* (1973), his current willingness to reproduce what he once saw as an inherently repressive tool is significant.[43] Balbus's seeming conversion is part of a general trend on both the political right and left toward accepting the ROL as a given and instead debating its content and functional definition. In a 1997 review essay, William Scheuerman argued that the "football game" between the right and left articulated by Shklar ten years earlier had been largely disbanded abroad, but remained current in the United States.[44] Balbus's embrace of the ROL as a fundamental political concept signals that Shklar's football game is now turning out the lights.

What caused such change in the debate over the ROL? The central motivating factor in decoupling the ROL from neoclassical economics is a questioning of the public/private distinction as an accurate description of how law governs, which has in turn expanded the horizon of what the ROL is, or should, be. Danielle Allen's remark

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[42] Isaac Balbus, *Governing Subjects: An Introduction to the Study of Politics* (New York: Routledge, 2010): 3-9.

[43] A few years after his initial study, Balbus reaffirmed and clarified his theoretical position. He argued that the law is autonomous from social actors, but not autonomous from capitalism. It is, for Balbus, law's very autonomy from social actors that allows it to serve capitalism as a system and thereby capital as a social class. See Balbus, *Commodity Form and Legal Form: An Essay on the Relative "Autonomy" of the Law*, Law and Society Review, Winter 1977, esp. 572-573 and 585-586.

[44] He writes that, "We are witnessing a renaissance of scholarship among legal and political thinkers who clearly understand that the traditional divide between free market jurisprudence and its left-wing "mirror image," egalitarian rule of law bashing is an intellectual and political dead end. Yet, one place where this insight has yet to hit home with sufficient force is the United States, where free marked defenders of the rule of law continue to do battle with their left-wing antilegalist opponents, oblivious to the fact that legal scholarship elsewhere has begun to move beyond the paradigm of Dicey, Hayek, and their left-wing 'mirror images'" (Scheuerman 1997, 741-742). As noted above, this situation has changed in the last fifteen years.

that, "Little laws, and not just constitutional ones, construct the world," grasps the need to rethink the ROL as a political concept: traditional conceptions of the ROL focused exclusively on (public) institutions fail to grasp how the law acts to govern (private) citizens.[45] It is an elite-centric vision of the law, focused on political offices and officeholders. It does not consider the law as a cause for and restraint on human action in the everyday world, reducing its capacity to function as a unifying framework for understanding conceptual change over time.

Yet, the discussion of how law rules focuses on activities previously considered private, and invites us into a conversation about the dynamics of the public/private distinction. From contraception to marriage to home mortgages, the way law governs citizens focuses less and less on institutions and more and more on practices. Recently, Foucauldian legal scholars have insisted, with Austin Sarat, that "the law is all over," meaning that it thoroughly permeates everyday activity and acts as an inescapable part of the disciplinary apparatus.[46] Starting from Francois Ewald's questioning of the

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[45] Allen, *Talking to Strangers: Anxieties of Citizenship Since Brown v. Board of Education*, (Chicago: University of Chicago Press, 2006): 170. The context of this quotation is a discussion of race in the American South, but I think the general idea that all sorts of "little laws" construct our world is generally applicable.

[46] Sarat attributes this quotation to a man on public assistance by the first name of "Spencer" who was describing his need for legal services. See Sarat, *"...The Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, Yale Journal of Law and the Humanities, 1990: 343. Victor Tadros furthers this argument by making the case that too much emphasis has been put on the idea that law is inherently "juridical" at the expense of thinking about how law functions. Tadros argues instead that law functions "between government and discipline," as a form of biopower. Victor Tadros, Between Governance and Discipline: The Law and Michel Foucault, *Oxford Journal of Legal Studies*, 18.1, pgs. 75-103. The most thorough recent argument that Foucault does not expel law from his understanding of power is Ben Golder and Peter Fitzpatrick, *Foucault's Law*, (New York: Routledge, 2009).

separation between law and norm previously superimposed upon Foucault's work, scholars have gone to work dismantling the false distinction between social norms and laws.[47] In the place of J.L. Austin's vision of the law as the command of the sovereign backed up with the threat of force/punishment, the current model bears a striking resemblance to Hans Kelsen's foundation of law upon hierarchical norms.[48]

The confounding fact for Foucauldian legal scholars who would collapse some of the distinction between law and norm is that legal practices look different than practices of normalization: they happen in different spaces, are conducted by different offices, and rely on different types of knowledge. If there is in fact no serious distinction between law and norm, then these apparent boundaries must be more permeable than previously thought. Nikolas Rose and Mariana Valverde suggest that if it is indeed true that law and norm are not as separate as previously thought, then we need to examine, "the ways in

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[47] See Ewald, *Norms, Discipline and the Law*, Representations, 1990: 138-161. The conventional understanding of Foucault's treatment of law is that it is a negative sanction that functions as part of juridico-soverignty power that is not productive of behavior and is now outmoded, which Alan Hunt has called the "expulsion thesis." For this position, see Alan Hunt, Foucault's Expulsion of Law: Toward a Retrieval, *Law and Social Inquiry*, 17.1, Jan 1992, pgs. 1-38; Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance*, (Chicago: Pluto Press, 1994); Gary Wickham, Foucault, Law, and Power: A Reassessment, *Journal of Law and Society*, 33.4, Dec. 2006, pgs. 596-614. Duncan Kennedy articulates the division as follows: "On the one side, there is the state, the Law-and-Sovereign nexus. On the other, there are institutions – the army, the prison, the church, the medical hospital, the boarding school, the family – and professions." Duncan Kennedy, The Stakes of Law, or Hale and Foucault!, *Legal Studies Forum*, 15.4, 1991, pg. 353. The expulsion thesis sees institutions as nexuses of disciplinary power, while law exists as part of sovereignty that is separate and apart from discipline.

[48] A contemporary take on the effort to ground the ROL in foundational norms can be found in Patrick Brennan, *The Rule of Law in the Human Subject*, Boston College Law Review, 2002, pg. 227. Although Brennan speaks a language of subjectivity, he uses presumptions of natural law in order to use the human subject as a foundational norm on which to build the ROL.

which non-legal knowledges can be introduced into legal forums."[49] If indeed there is significant back and forth between the legal and non-legal in which the non-legal can become sanctioned, blessed, and authoritative in court, that process is extremely important for understanding how the ROL may be dependent upon conceptual change.

When we approach the ROL as a process of developing and vesting processes, claims, and knowledges with authority – when we study it as a dynamic concept – returning to key junctures and disjunctures in that process can be instructive in understanding the dynamics by which law changes the ways it rules. Such a narrative is not so much a conventional ROL case study though, and to the extent that this project contributes to the ROL literature it is as a demonstration that the dynamics of conceptual change are of significant importance for understanding legal development.

4b) Tort Law

Tort law is an adjacent narrative to the ROL and an important part of this project that does not take center stage for a number of reasons that I discuss below. The process by which tort law was excluded from the ROL remains obscure, and that lack of knowledge is a significant omission in both how the ROL came into its current form as well as in our understanding of the process by which the ROL changes over time. This gap is important because of the breadth of human behavior that falls within it. *Tort* comes from the Norman word for "wrong". In the common law – the system developed in England and exported to its colonies – torts govern more human action than any other

[49] Rose and Valverde, *Governed by Law?* Social and Legal Studies, 1998, pg. 548.

body of law. Any interaction between people that isn't either criminal or governed by an explicit contract falls under torts, which is most of our actions.

Mainstream legal scholarship has long maintained that torts came into being to regulate business relationships during the aftermath of the industrial revolution to protect the public. In his classic history of torts, G. Edward White begins by arguing that although Blackstone wrote of torts as a unified field, "much of that history before 1850 would be difficult to generalize about."[50] For White, the story of torts really begins with Oliver Wendell Holmes making negligence the standard of tortious conduct, a standard developed with Nicholas St. John Green and the other original members of the Metaphysical Club. Having located the origin of tort law in a period of innovation in capitalist production techniques and casting pragmatists as the central protagonists, White writes a history of tort law that focuses on the material and economic problems that tort law tries to solve: torts exist to make right the damage caused by negligence. And in this understanding White represents the mainstream view. In their standard introduction to the field, Prosser, Wade, and Schwartz outline four "major purposes of tort law": "(1) to provide peaceful means for adjusting the rights of parties who might otherwise 'take the law into their own hands'; (2) to deter wrongful conduct; (3) to encourage socially responsible behavior, and (4) to restore injured parties to their original condition, insofar

[50] G. Edward White, *Tort Law in America: An Intellectual History*, (New York: Oxford, 2003 [1979]): xxiii.

as the law can do this, by compensating them for their injury."[51] #4 receives far and away the most attention in contemporary tort scholarship.

The traditional understanding of torts as a product of the Industrial Revolution misconstrues their purpose and perpetuates an understanding in the present that torts are a product of noncontractual exchange relationships. Such an understanding casts torts as a legal solution to economic problems, while marginalizing the moral and political currents that have always been present in their practice. Beginning any intellectual history in the exceptional moment of the Industrial Revolution would lead to a skewed perspective, and the history of torts is no exception. This project not only pursues an accurate dating of tort law, but through that repositioning it breaks our understanding of torts out of a framework of modern capitalism and instead recovers the moral and political forces that originally shaped torts.

Critical Legal Studies has also reacted strongly against the traditional alliance of torts with capitalism. The most scathing recent critique comes from James Hackney Jr. (who studied under Duncan Kennedy). Hackney argues that during the seventeenth century the logic of the legal system changed from the skepticism of the Renaissance to a modern scientific logic that he associates with figures like Descartes, Bacon, Newton, and Montaigne.[52] While Hackney is correct in locating an important legal moment alongside the scientific revolution, he goes too far, moves too quickly, and paints with

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[51] William Prosser, John Wade, Victor Schwartz, Kathryn Kelly, and David Partlett, *Prosser, Wade, and Schwartz's Torts: Cases and Materials*, (New York: Foundation Press, 2010): 1-2.

[52] James Hackney Jr., *Under Cover of Science: American Legal-Economic Theory and the Quest for Objectivity*, (Durham: Duke, 2007): xvii; 1-37.

too broad of a brush in telling the story of how the law picked up and made use of scientific concepts. For Hackney, the incorporation of scientific principles, logics, and languages into the law was an attempt to achieve certainty through the deductive method, and through that certainty gain legitimacy and power.[53] The history of science interacting with the law, then, is an effort to weaponize scientific innovations in the legal arena for relative advancement of the profession, to protect property interests, and to discourage government intervention.[54] Hackney's hyper-critical stance also mischaracterizes how torts developed in a social context of excitement over science. By characterizing the relationship of law and science as one dominated by ambition, Hackney again marginalizes the moral and political factors in legal decision-making. Also, insofar as he is telling a history of the present, he writes a history of the "winners" that ignores the dead ends and possibilities that were not pursued, leaving the reader with the impression that the fact of the present was necessary or perhaps even intended by men now dead for centuries. By making the past so present, Hackney violates the dictum articulated by Quentin Skinner that good history seeks to make the past foreign and unfamiliar rather than domestic and friendly.

In contrast to these two interpretations of torts, Alan Calnan has made a strong case that torts did not emerge as an ad hoc solution to the problems of industrialization or an effort to weaponize scientific concepts for professional advancement, but were rather produced by a set of idealistic renaissance judges consciously setting out a new field of law. Although Calnan traces the practice of torts back to the Anglo-Saxon period, he

[53] Ibid, 13-16.
[54] Ibid, 18.

determines they are of "limited relevance" because they were more public law than private law,[55] and that the late medieval sources are "indeterminate" because they fail to articulate a standard of liability (either strict or no fault).[56] Calnan does not present a clear moment that torts emerged – he argues that the history of tort law is "one of continuity, not transformation" – but he indicates they started to be practiced in the twelfth century with Henry II's formation of a professional judiciary.[57]

Further, Calnan argues for an organic conception of how torts developed. He argues that torts grew "like a tree," in three concentric layers or rings. The innermost ring or core is the natural law duty to do no intentional harm to others – the standard that since the early 13th century has been called trespass "with force and arms."[58] The next ring, he says, is based on the natural law of doing justice to others that he argues emerges in the late 13th century with the standard of trespass "on the case": insofar as each citizen was expected to behave reasonably, he could be held liable for hurting those with whom he had a direct relationship through unreasonable action. Trespass on the case extended obligation beyond intentionality to consequences, but the sphere of those consequences was limited to known relationships; it did not extend to strangers or society generally. The outermost ring – the one that is still with us – is the standard of negligence that seeks

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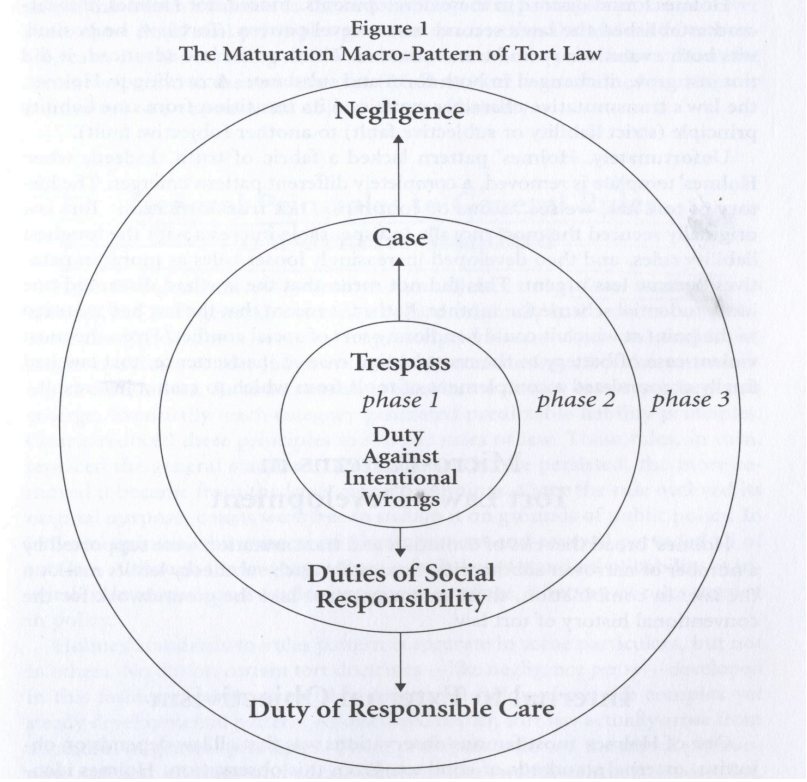
[55] Alan Calnan, *A Revisionist History of Tort Law: From Holmesian Realism to Neoclassical Rationalism*, (Durham: Carolina Academic Press, 2005): 81-98.
[56] Ibid, 99-115. Calnan argues that it was only during the renaissance that a clear theory of liability emerged. He argues that, "tort law did not exist before the 1100s. It erupted in the twelfth century from a volcanic wave of classicism" (pg.181). Here the connection between English law and a classical renaissance is thin, and it shoehorns his later discussion (unhelpfully) into issues of agency, reason, and natural law.
[57] Ibid, 277.
[58] Ibid, 105.

to enforce a society-wide standard of fairness. Calnan argues that the standard of negligence extends the concept of trespass on the case to all of society: instead of just having duties to those close to us, we also have a duty not to harm those who are at some remove. This emergence of negligence, then, is a transformation of reason as a type of judgment internal to a person into a standard of behavior. This transformation is the beginning of modern tort law. Calnan diagrams this progression in the top half of the figure below:[59]



[59] Ibid, 279.

While Calnan has been pioneering in his effort to break the story of tort law free from industrialism and instrumental reason, there are a number of problems with his story. In various ways, these problems stem from his desire to interpret the rise of torts through the lens of a late Scholastic Aristotelian renaissance, a move that he largely fails to connect to the English case law. He presents scanty evidence that the judges, attorneys, or litigants were influenced by Scholasticism, and the assumption that they were under this influence leads him to ascribe a form of grand intentionality to their actions without evidence. First, this project approaches tort law without assuming a Scholastic outlook in the legal system.

Second, Calnan's equation of trespass on the case with a type of responsibility is not accurate. He assumes that "reason and responsibility went hand-in-hand," when in the English system the legal standard of trespass on the case predates the usage of *responsibility* by about two hundred years. In terms of Calnan's diagram above, the top and bottom appear contemporary when they were actually separated by two centuries. Ignoring this historical gap leads Calnan to overlook the dynamic rupture that occurs between the standard of *case* and the standard of *negligence*. This project takes Calnan as an inspirational but flawed starting point for explicating how negligence developed as a legal standard as citizens became responsible.

While the ROL and the development of torts are both important parts of this project, neither is a primary focus. The ROL is most evident in legal proceedings to which the very rich and powerful are a party (when the law limits their behavior), and the very weak and/or poor are a party (as they do, or do not, have access to the justice

system). A focus on these sorts of proceedings would have two primary consequences. First, it would collapse the concept of responsibility into its legal manifestations, causing this project to miss nonlegal changes in and manifestations of responsibility. Second, the sorts of parties involved in paradigmatic cases of the ROL are likely not representative of society broadly, and the social concept of responsibility, as shared and practiced broadly, is what this project aims to capture. A focus on the ROL would certainly capture some elements of responsibility, but it would likely exclude many as well. Torts, for their part, are an important part of responsibility as well, but they are only one part. An exclusive focus on torts traps responsibility within the confines of the legal process, ignoring other forms of responsibility that may be practiced within the community. In order to capture the interplay between conceptual development and legal development, this project orients itself more broadly to consider the changing concepts underpinning formal and informal mechanisms of responsibility.

5) Space, Time, Responsibility

Rather than these paths not taken, this project takes the approach of historically tracing the development of responsibility in England as a hybrid moral and legal practice and concept. It examines how the current categories upon which responsibility rests emerged and gained currency, namely special categories and temporal categories. The partialist/impartialist debate rests in large part on these categories: Are our responsibilities defined by physical proximity (Waldron), or aggregate goodness (Singer)? Do we have a responsibility to foresee the impact of our actions on future

generations (Berry), or is achieving that sort of foresight impossible and misguided (Ball)? Yet, space and time provide little space for the particularities of identity. One of Walker's significant innovations in the debate about responsibility is to marginalize this space and time framework by focusing on power and participation in ethical discourse. Indeed, the movement to relationships present in Smiley and Reader also displaces time and space as exclusive ways of being in relation to one another, allowing for other forms of connection.

The space and time framework for thinking about responsibility has deep conceptual and practical roots and currency in the present, so that part of what is at stake in Walker's expressive-collaborative model is the marginalization of a long-held conceptual framework. The subsequent chapters uncover some of these conceptual roots, not in an effort to argue that Walker's project is implausible, undesirable, or impossible, but rather to demonstrate just how radical of a departure it would be from historical practice. In the process of this excavation, I draw attention to the politics at stake in using space and time as a framework for responsibility. These politics are not only the framework of an economy of blameworthiness, but also a set of limits, incentives, and horizons for citizens with consequences for the types of people they can become.

I take as my period of study seventeenth century England because it was an era of significant conceptual innovation out of which the time and space framework for responsibility emerged. In very basic ways like shooting others with cannonballs (as in the Smiley discussion above), the Crown took on the task of preventing citizens from harming one another, and giving them a forum and legal framework for redress when

harms occurred. The paradigm case of shooting others with cannonballs demonstrates the importance of this period for the development of responsibility: In 1662 one citizen could shoot another in the face with a cannonball and get away with it by saying it was an accident, but by 1700 that position was utterly rejected so that all citizens were responsible for the outcomes of their actions unless they occurred of "unavoidable necessity."[60] And not only with cannonballs, but in all acts of life citizens became responsible for their actions in a set of ways they previously had not been. What it meant to be a citizen changed, and what it meant to be a King did as well.

I approach the development of the space and time framework in three major parts motivated by three significant factors in the upheaval of the English seventeenth century. The first is how the English Reformation changed territorial sovereignty through the abolition of sanctuary under James I and Charles I. Three trends emerge from the abolition of sanctuary. First, there are no more exceptions to the law either geographically or conceptually. The law is the same at all places and times. Second, banishment was abolished as a form of justice. The community took responsibility for all its criminals, and a universal set of judicial procedures took hold for the first time in England. Third, the concept of "peace" changed. Prior to Henry VIII, God's Peace and the King's Peace coexisted as conceptions of a peaceful world. God's Peace was composed of a nonviolent extension of grace in this world coupled with the threat of ruthless judgment and punishment in the next. The King's Peace, on the other hand, drew its lines differently. Instead of temporal/eternal, it distinguished between law

[60] *Angell v. Satterton* (1662)*; Mason v. Keeling* (1700*).*

abiding (peaceful) and criminal (not peaceful). In the King's Peace, peace was defined against criminality, which was in turn defined against the positive law. Put differently, to act peacefully was the same thing as to act in accordance with the law. Prior to Henry VII, *peace* was multiple and conflicting. After the abolition of sanctuary, God's Peace lost public relevance, leaving the King's Peace as the only relevant conception of peace for public discourse. The concept of peace went from being acknowledged as contested, conflicted, and multiple, to being a unitary and singular conception that made reference only to the positive law. Peaceful actions and peaceful people became homogenous and identifiable through the abolition of sanctuary.

The second part moves from the role of religious to economic territoriality by examining the early enclosure movement and its discontents. The transformative role of enclosure has been stressed by a diverse group of scholars including Karl Polanyi, Barrington Moore, and Christopher Hill. This section broadens the scope of the conventional economic analysis to consider what popular resistance reveals about popular understandings of the role of enclosure.

By the early seventeenth century, enclosure had been going on for at least a century, although it moved along slowly because the Crown actively sought to curtail and limit its practice. James I inherited a bad fiscal situation from Elizabeth though, and he needed to raise money. He began supporting enclosure so that the Crown could tax the nobles on the land and hoped that popular anger against enclosure would be focused on local nobility. At first he was right, but he quickly turned out to be wrong. In 1607, in the Midlands and at Newton, the peasants revolted against the local nobility by leveling

the hedges and fences they used to separate their property off from the commons. What started as rebellion against local authority that the crown might have been able to distance itself from by disavowing noble enclosures quickly morphed into a rebellion against all government when James I crushed the Newton Rebellion and left forty dead.

Charles I followed James in his support of enclosure. In 1626, he supported draining the Fenlands, a lowland area in eastern England, against the will of its inhabitants in an effort to make the land more productive and suitable for private ownership. The drainage had the opposite effect when it increased flooding, devastating the economy of an already poor region. Over the next fifty years, crowds of over a hundred people rioted on at least thirty-two separate occasions in response to drainage and enclosure attempts.[61]

These riots reveal that while enclosure was economically motivated, the economics were broadly conceived to include changing the character of the labor force. Both the Fens and commons represented a form of backward underdevelopment on the landscape that created backward and undeveloped citizens. To properly progress as a society by making citizens into a disciplined labor force, elites sought to drain the Fens and enclose the commons in part to force the people living a subsistence lifestyle off of them to work more intensely and adopt the emergent Protestant work ethic attached to a norm of masculinity. In response, the protestors not only physically tore down the enclosures, but also cross-dressed as they self-consciously resisted the new norms (economic, religious, and gendered) being thrust upon them. The process of making

[61] Keith Lindley, *Fenland Riots and the English Revolution*, (London: Heinemann, 1982), pg. 62.

people responsible included the normalization of their economic, religious, and gender practices through the enclosure of space.

While the first two sections drawn from evidence in the first half of the seventeenth century illustrate how responsibility functioned within and through space, the third part shows how changing conceptions of time led to the responsibility of to foresee likely harms, transforming responsibility by extending its domain into the future and making it legally enforceable. A couple of cases illustrate this revolution in responsibility. In *Jelley v Clark* (1607), an innkeeper was found to not have a duty of care for the goods of his guests, "when the host has no benefit from the goods that are left with him." An economic relationship implies a duty of care for another's property, but a general duty of care for goods does not exist. As of the early seventeenth century a duty of care is still largely spelled out in contracts. Yet, this begins to be challenged in coming years. A series of cases contested this thin duty of care. They argued that negligent behavior that damaged another was always trespass with force and entitled the damaged person to restitution. The defense in these cases was usually some form of, "I didn't mean it." J.H. Baker summarizes this series of cases as follows: "If a man negligently drove his horse and cart, or ship, into another man or his property, that was trespass with force. […But,] the accident might be shown to be the fault of the horse, or of the wind, and then the jury might be persuaded to find the defendant not guilty of the trespass."[62] The question then becomes one of whether it was the force of the defendant that perpetrated the trespass, or whether it was the force of the horse or wind. On its face

[62] J.H. Baker, *An Introduction to Legal History* (Oxford: Oxford University Press, 2005), pg. 410.

this seems like a reasonable defense, yet by 1700 it was replaced by a new principle that a person was, "answerable for all mischief proceeding from his neglect or his actions, unless they were of unavoidable necessity."[63] What happens here is that there is a shift from having a very thin duty of care in 1607 based on a standard of trespass with force and arms; to some duty of care in the 1660s based on a standard of trespass on the case; to an assumption that a person has control over everything that results from their actions unless they can demonstrate otherwise, a modern form of negligence.

Such a change from little responsibility, to the ability to disclaim responsibility, to the assumption of responsibility absent strong evidence to the contrary is an example of how England was working out the transition from constructing truth through testimony to constructing truth through observation. Steven Shapin has laid out this case most thoroughly, while Barbara Shapiro has shown its (in)applicability to legal concepts. Shapin argues that at the beginning of the sixteenth century truth was established through the testimony of a gentleman given in a vague way that preserved the possibility for difference without provoking disagreement.[64] This deliberate uncertainty built into a gentleman's testimony ran exactly counter to the emergent scientific revolution. Scientific knowledge demanded empirical proof, certainty, and clarity – exactly the sort of "right or wrong" situation that gentlemanly conversation was supposed to avoid.[65] In opposition to the old form of knowledge, science proposed a much less social experience in which, "if you really want to secure truth about the natural world, forget tradition,

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[63] *Mason v. Keeling* [1700]; quoted in Baker (2002), pg. 411.
[64] Steven Shapin, *A Social History of Truth: Civility and Science in Seventeenth Century England*, (Chicago: University of Chicago Press, 1994): 74.
[65] Ibid, 120.

ignore authority, be skeptical of what others say, and wander the fields alone with your eyes open."[66] Barbara Shapiro has argued that the apparent irreconcilability of imprecision and precision was overcome in legal practice by mobilizing the new concept of probability that denied both the quest of scientific certainty and the agnosticism of gentlemanly testimony. Instead, it relied on a statistical model of the world in which evidence was able to establish that events were likely to have occurred.

This evidentiary standard of "likelihood" inherited the presumption of natural regularity from science, and the courts used it to justify an enhanced duty of foresight. Citizens were responsible for foreseeing the outcome of their actions even if there was some uncertainty involved. Claiming that a bad outcome was unforeseen went from being a good excuse in 1607 to being an admittance of negligence, poor citizenship, and irresponsibility by 1700.

This narrative makes a case that the origins of our practices of responsibility reveal them as a counterrevolutionary force serving to centralize power in the hands of elites through the legal system even as participation in political institutions grew. While Walker's expressive-collaborative model is a noble aspiration for the present, the development of responsibility is somewhere between non-democratic and un-democratic. James Tully has described this form of responsibility not as liberating or participatory, but as an effort to create, "a subject who is calculating and calculable, from the perspective of the probabilistic knowledge and practices; and the sovereign bearer of

[66] Ibid, 69-71.

rights and duties, subject to and of law from the voluntaristic perspective."[67] The prospect of making ethics more participatory by opening our practices of responsibility is not just a practical innovation, but an effort to revise the ways that modern subjects have been created. A revision of Tully's articulation of modern subjectivity (which I discuss in Chapter 5) would do well to begin with an examination of that subjectivity because, as Ian Hacking has put it, "many of our perplexities arise from the ways in which a space of possible ideas has been formed," and "many of our flybottles were formed by prehistory, and only archaeology can display their shape."[68] In the coming chapters I take Hacking's advice and begin a bit of archeology on our practices of responsibility.

[67] Tully (1993), pg. 179.
[68] Ian Hacking, *Historical Ontology* (Cambridge, MA: Harvard University Press, 2002), pg. 26.

Chapter 1

Ordinary Responsibility

"The historian should not be afraid of the meanness of things, for it was out of the sequence of mean and little things that, finally, great things were formed."

- Michel Foucault, Truth and Juridical Forms[69]

At the end of his history of the medieval common law, Arthur Hogue leaves his readers on the doorstep of modernity with this cautionary note:

> Among the nations of western Europe the English alone have managed to bring essential elements of their medieval customary legal system into the modern world. This extraordinary achievement should not be taken for granted, because the common law has had powerful critics and opponents along the way…. The survival of the common law has depended in large part on the ability of its practitioners to adapt the legal system to new conditions – and adaptation has meant growth. Bold judges have created precedents adding new rules to meet new social and economic circumstances.[70]

Hogue's diagnosis is instructive and agenda setting for this chapter. He argues first that the perseverance of the medieval forms of conflict resolution is unusual and in need of explanation before pointing his readers to three important explanatory factors in early modern English law: (1) changing social circumstances, (2) changing economic circumstances, and (3) bold judges. These three forces continue to play in the next chapters, and this chapter introduces them in that order through a significant disagreement over the scope of royal prerogative between King James I and the jurist Sir Edward Coke.

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[69] Michel Foucault, Truth and Juridical Forms, in *Power*, ed. J. Faubion (New York: The New Press, 2000), pg. 7.
[70] Arthur Hogue, *Origins of the Common Law* (Indianapolis: Liberty Fund, 1986), pgs. 241; 247.

England was governed by two forms of authority, (1) the common law and (2) the natural law that authorized (a) the ecclesiastical system of courts and (b) royal prerogative.[71] The context of this contestation was what J.G.A. Pocock has described as a, "great hardening and consolidation of common-law thought," in the latter half of the seventeenth century that created the conditions for the English courts to assert the common law as supremely authoritative over and against the crown and ecclesiastical courts.[72] First Parliament and then the common law jurists sought to limit the jurisdiction of natural law (ecclesiastical and prerogative) as England distanced itself from the authority of Rome. Both efforts at creating limited government were unsuccessful, creating a situation where the ecclesiastical and prerogative techniques of administering legal responsibility continued in practice even as the natural law that had normally justified them passed away.

This chapter returns to the early modern English case as a way of understanding how responsibility donned its modern form, and in subsequent chapters how it embedded itself in the tort law that founds/underlies a great deal of modern governance. The chapter comes in two parts. The first part introduces the broad legal-political, intellectual, and economic conceptual contexts, in that order. It introduces the legal-political context through the conflict over the Ordinaries' (ecclesiastical judges') jurisdiction, a paradigm case of jurisdictional conflict between the common law and natural law forms of justification and authority. Next, it examines changes in the

[71] David Wooton, *Divine Right and Democracy* (Penguin, 1986), pgs. 22-57.
[72] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge: Cambridge University Press, [1957] 1987), pg. 31.

intellectual environment by arguing that changes in the perspective from which maps were drawn both signals an important set of metaphysical changes at work in England, as well as directs our attention to changes in the practices of politics. To round out this portrait of the seventeenth century English climate, it then addresses material and economic developments through the literature surrounding the concept of *interest*. These three snapshots – the conflict around the Ordinaries, changing perspectives in mapping, and the emergence of interest as a force of governance – serve to acquaint readers with an English political reality: the English in the early seventeenth century were living unhappily under an outmoded form of Catholic-created rule that they could not seem to shake, and that perception of mismatch between their government and their times only intensified as their perspective on the world became less local and more inclusive, while their individual economic interests were legitimated.

To give an overview of the argument to come, the first section seeks to introduce a broad social unease, and the second section addresses a very particular way that the broad unease came to a head in a conflict between two social elites, King James I and Sir Edward Coke. James argued that the natural law provided him with unlimited prerogative to decide legal cases. In contrast, Coke argued that cases originally decided according to the common law could not be appealed to/under a different standard, including the King's prerogative. In essence, Coke tried to carve out a space for the judiciary independent of the King's power, thereby creating a separation of powers.[73]

[73] This line of historical explanation was first elaborated by J.G.A. Pocock in *The Ancient Constitution and the Feudal Law* ([1957] 1987), and has since been picked up by Larry Kramer as an example of popular constitutionalism in practice. Larry Kramer, *The*

The second section is both the story of how Coke lost that fight, and also how his loss left a rickety structure of prerogative and ecclesiastical law standing upon a fractured and eroded base of natural law that could not stand under the rapidly changing pressures of emergent modern politics based on interests.

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Section 1: Context

a) Groundwork: *Hunne's Case* and *The Supplication of the Commons Against the Ordinaries*

On Monday, December 4th, 1514, a wealthy London merchant named Richard Hunne was found hanging by his neck in a cell of Lollards' Tower at St. Paul's Cathedral. While most prison deaths were inconsequential for politics, Hunne's death was important. He had been indicted on charges of heresy by an officer of the ecclesiastical courts called an Ordinary, charges that Arthur Ogle summarizes as "being a rebel."[74] Hunne was not the only one to face these charges. Heresy charges were often leveled by priests to silence a discontented person, to settle a score, or simply to extract court fees or bribes. Hunne's death appeared to be a suicide, but a formal murder investigation was launched. When no charges were ever brought, it amplified a popular feeling that something unjust was going on with the ecclesiastical courts that had

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People Themselves: Popular Constitionalism and Judicial Review (Oxford: Oxford University Press, 2004).

[74] Arthur Ogle, The *Tragedy of the Lollards' Tower* (Oxford: Pen-in-Hand, 1949), pg. 24. On this case, also see Gordon McBride, Once Again, The Case of Richard Hunne, *Albion*, Vol 1, No 1, 1969, pgs. 19-29.

imprisoned Hunne: people were being held responsible for contrived charges. Ogle argues that Hunne's case was a pivotal moment first in the Reformation and later in the unification of the legal system under common law in England.

These grievances that Hunne's case exemplified were articulated in terms of a particular legal office called the Ordinary, a local official in the Ecclesiastical courts. The Office of the Ordinary existed in the Ecclesiastical Courts and had the primary ability to legislate, adjudicate, and govern interpersonal affairs (which Catholics call the "external forum" to distinguish it from the "internal forum" which is inside an individual). This basic, low level power of governing was a court of first instance (broadly construed as both law-making, -interpreting, and -enforcing),[75] the cite of conflict resolution for everyday affairs. One might object that the Ordinary was a religious category and thinking about it as a broad, general power of governance is an overstatement of its impact. Ralph Houlbrooke stresses the importance for the Ordinary at the beginning of his book on the Ecclesiastical courts.

> Today it is unlikely that more than a tiny minority of the English people is aware of the continued existence of ecclesiastical courts. Few could describe their work. To the bulk of the sixteenth century population, however, the officers of the church courts were amongst the most familiar representatives of authority external to their own communities. The train of the archdeacon's official could be seen travelling remote lanes, in all weathers, penetrating the countryside more deeply, traversing it more frequently, than did the representatives of any other court."[76]

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[75] Maitland describes this conflation of powers as a situation where, "the function of making law was scarcely to be distinguished from that of making law." Maitland, *William Drogheda and the Universal Ordinary*, in Roman Canon Law in the Church of England [New York, Burt Franklin, 1968 (1899)].

[76] Ralph Houlbrooke, *Church Courts and the People During the English Reformation, 1520-1570*, (New York: Oxford University Press, (1979).

Houlbrooke goes on to note the personal importance of some of the matters over which it had jurisdiction: "matrimonial problems;" "irregular sexual relationships;" wills; making sure people went to church and behaved while in attendance; and helping, "to maintain harmony in the community by proceeding against those who reviled their neighbors."[77] Further, there was no clean line between common and ecclesiastical law. Helmholz reminds us that customary practice was a large part of what the ecclesiastical courts enforced.[78] There is a strong case to be made from the scope and type of ecclesiastic authority that the ecclesiastical courts surpass any modern court in the common law world as a thoroughgoing force of normalization.

In 1532, the House of Commons submitted a set of complaints about how the Ordinaries were using their power over spiritual matters to indict citizens on tenuous and even trumped up charges while assessing them heavy court fees. While the Ecclesiastical courts had once been very popular because they heard cases not entertained in feudal courts, as the common law courts grew the Ecclesiastical courts, and especially those with a financial interest in the traffic volume of the Ecclesiastical system, found themselves short of work. Ecclesiastical courts began charging higher and higher fees for legal documents and processes falling within their jurisdiction, such as probating wills and mortuaries, as well as charging exorbitant rents for church property.[79] Further,

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[77] Ibid, pg. 7-8.
[78] Richard Helmholz, *Canon Law and the Law of England* (London, The Hambledon Press, 1987).
[79] Oscar Marti quotes these fees extensively in Revolt of the Reformation Parliament against Ecclesiastical Extractions in England, 1529-36, *The Journal of Religion*, 9.2, Apr. 1929, pg. 275-276. For divergent accounts, see G. R. Elton, The Commons' Supplication of 1532: Parliamentary Manoeuvers in the Reign of Henry VIII, *The English Historical*

Ordinaries had the ability to ticket parishioners for any illegal conduct, no matter how picky, creating a clear conflict of interest in which agents of the courts were financially interested in creating as much litigation as possible. As one contemporary source put it, "There was scarcely a single person in any parish who might not receive a citation to appear before and ecclesiastical judge, if a pettifogging clerical attorney scrutinized his conduct with a malignant eye, or with a view of proffering his silence as a marketable commodity."[80] This conflict of interest created public unrest and led to Parliament filing a formal grievance with Henry VII titled *The Supplication of the Commons Against the Ordinaries* that laid out a set of requests for limitations on the Ordinary's jurisdiction and curbing of court fees and citations.[81] This document went through at least five drafts, three of which were heavily edited by Thomas Cromwell.[82] While Kelly has described the outcomes of the *Supplication* as, "a humiliating defeat for the Church in an open test of strength with the King," the root of the popular grievances remained largely unresolved.[83] Rather, the political solution to the tension/conflict between church and crown exemplified by the break with Rome did not have a legal parallel. In Richard

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Review, Vol. 66, No. 261 (Oct., 1951): 507-534, and J.P. Cooper, The Supplication against the Ordinaries Reconsidered, *The English Historical Review*, Vol. 72, No. 285 (Oct., 1957): 616-641. Although most scholars agree that a significant anti-clerical sentiment existed, for an argument that the sentiment was not as widespread as often thought see, Christopher Haigh, Anticlericalism and the English Reformation, *History*, 68.224, Oct. 1983, pgs. 391-407.

[80] Walter Hook, *Lives of the Archbishops of Canterbury*, (London: Richard Bentley, 1869), III, 31f. Cited in Marti (1929), pg. 276.

[81] The full text of the first draft of the *Supplication* can be found in R.B. Merriman, *Life and Letters of Thomas Cromwell*, Vol. 1 (Oxford: Clarendon, 1902): 104-111.

[82] Elton (1951), pgs. 508-509.

[83] Michael Kelly, The Submission of the Clergy, *Transactions of the Royal Historical Society*, vol. 15 (1965), pg. 118.

Helmholz's analysis, the ecclesiastical courts and the practitioners of ecclesiastical law were characterized by continuity rather than change throughout the Henrician Reformation and Elizabeth's reign, showing that the legal system was slow to change after the break with Rome.[84] This summation is affirmed by the continued casual overuse of excommunication through Elizabeth's reign for slight offenses, one of the *Supplication*'s original complaints.[85]

This form of the Ordinary was only one of the meanings associated with that word. The ordinary also came to have a second meaning, as the humdrum routine of everyday life. Thomas Dumm expresses this sense when he writes that, "The ordinary is what everybody knows. […] the practical form that peaceable living takes when life is good."[86] This is reflected in the concept of "ordinary time" in the Church calendar - time that does not fall under a feast season. Thus the ordinary is a lack of the extraordinary, the notable, or the remarkable. This usage to refer to what the OED calls "the usual order or course of things" came along later than the Ordinary, emerging in the latter part of the fifteenth century to refer to habits like standard royal procedure and later to servants' diets.

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[84] Richard Helmholz, Ecclesiastical Lawyers and the English Reformation, *Ecclesiastical Law Journal*, vol. 3 (1995), pgs. 366-367.
[85] F .Douglas Price, The Abuses of Excommunication and the Decline of Ecclesiastical Discipline under Queen Elizabeth, *The English Historical Review*, vol. 57, no. 225 (Jan 1942), pgs. 109-111.
[86] Thomas Dumm, *A Politics of the Ordinary*, (New York: NYU Press, 1999): 1. Here Dumm follows Stanley Cavell in equating the ordinary with the everyday. See, for example, Cavell 1986, 108. For a parallel conception of the ordinary drawn out of Strauss, see Pippin (2003).

The ordinary/Ordinary are not two entirely separate concepts, but are overlapping in the human affairs for which they could be applied. As Houlbrooke notes, the Ordinary governed sexual practices, marital relationships, wills, and maintaining common custom to promote community peace. Yet, in his Essays, Francis Bacon uses the language of ordinary, in the sense that Dumm articulates, to describe many of these same categories of human affairs, including human love, human procreation, entertainment, work and labor, banking, nature, and God's works.[87] The overlap between the spheres of the Ordinary and the ordinary is instructive: how people were thinking about the regular aspects of life was in significant flux. Whether the regular order was best described through the ecclesiastical lens of the Ordinary, or its secular counterpart the ordinary, was an open question evidenced even in language. The governing structure of the Ordinary had come to exist at something of a tangent to the everyday language of the ordinary.

b) *From Pictures to Maps: Politics and Vision*

The mismatch between the governing structures and the actually inhabited world can also be seen in depictions of physical space. Late medieval London did not have maps, at least not maps as we know them today, as depictions of physical space using a uniform scale and an objective perspective. Instead, London depicted itself in what we would call pictures or landscapes, and these pictures were usually very limited in scope. It wasn't until 1544 that a Flemish artist used Italian techniques of painting to form an imagined perspective that the first comprehensive picture of London was drawn. This

[87] Francis Bacon, *The Essays of Francis Bacon*, ed. Clark Sutherland (New York: Houghton Mifflin Company, 1908), pgs. 187; 23; 139; 12; 129; 89; 51; 85.

picture, known as the Wyngaerde panorama, is a composite of the view from several church towers on the south bank of the Thames. It is not a single perspective, but rather it is multiple perspectives stitched together so that all of London could be captured at once. This imaginative composite takes actual observations from church towers and turns them into a single picture of the city. And while it might have been possible to navigate around London based on this picture, it was not a map because it did not maintain a consistent vantage-point or scale.[88]

In fits and starts over the next hundred years, maps supplanted pictures as a mode of representing space as the perspective changed from the angle of church towers to directly above everything at once. The mapmaker no longer occupied a particular position or even multiple positions; he occupies *all* positions at once.[89] In the decade

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[88] See Wyngaerde Panorama, Appendix Figure 1, in Peter Whitfield, *London: A Life in Maps* (London: The British Library, 2006), pgs. 28-29. While there is controversy among geographers about what constitutes a map, depiction on a plane surface and consistency of scale are themes of diverse definitions. One study argues that a fundamental property of "mapness" is that "the spacial relationships among locations in/on the object correspond among those same objects in the geographical horizontal plane. Vasiliev et al, What is a Map?, *The Cartographic Journa*l, 27.2, 1990, pg 212. Functional definitions of maps are also prominent. Maps can be navigational devices for ships or cars or airplanes, and their "mapness" is then defined by their actual or perceived ability to act as navigational tools (Vasiliev et al 1990, pg. 122). More critically, maps are a nexus of knowledge and power that allow for the governance of territory and human bodies, the expansion of empires, the creation and enforcement of property rights, and a discourse of superiority and inferiority within colonialism. J. Brian Hartley, Maps, Knowledge, Power, in *Geographic Thought: A Praxis Perspective*, ed. G. Henderson and M. Waterstone (NewYork: Routledge, 2009), pgs. 129-148. Caterina Albano, Visible Bodies: Cartography and Anatomy, in *Literature, Mapping and the Politics of Space in Early Modern England*, ed. A. Gordon and B. Klein (Cambridge University Press, 2001), pgs. 89-106. Bernhard Klein, *Maps and the Writing of Space in Early Modern England and Ireland* (Basingstoke, England: Palgrave Macmillan, 2001).

[89] Even when maps/pictures are slightly in profile (not directly overhead), there are no unique vanishing points on the horizon.

after the Wyngaerde panorama was drawn, the perspective of the mapmaker moves upwards and abandons actually existing observations to be above everything at once.[90] Cartographers and map readers began to see the world without the particular perspectives (for example, the perspective from a mountaintop or church steeple), that had characterized previous attempts to depict space. It is as if they began increasingly to see the world from the perspective of the heavens. This new perspective was cutting edge in the early seventeenth century, and not all mapmakers employed it. Yet, in the first half of the seventeenth century, how Londoners normally imagined their city and depicted it transitioned from a view bound in a particular place to a view that abandoned particularity and took on what we would now call an objective viewpoint.[91] By the latter part of the seventeenth century maps had changed from being *pictures* of the world from a human perspective to being *plans* of a place from the heavens, altering not just how the world was depicted, but also how it was understood, and potentially controlled and governed.

While this change in maps and the conceptual apparatus they imply might seem like a mundane or inconsequential shift for law and politics, Sheldon Wolin has argued that there is an important relationship between politics and how people see their world. In the sixteenth and seventeenth centuries, Wolin argues, there was a shake-up in how human vision was ordered. There are two types of "vision" that humans have in this world. The first sort is a knowledge of objects that is obtained through our eyes. The

[90] See the Copperplate Map, Appendix Figure 2, in Whitfield (2006), pgs. 32-33.
[91] The modern map – characterized by an aperspectival viewpoint – became standard following the Great Fire of 1666. At that point it appears to be an industry standard, and that standardization I take to represent a public consensus.

second is an aesthetic or religious vision that allows for insight into foreign events or into the future. What happens with the scientific revolution, Wolin argues, is that these sorts of vision are neatly divided so that science strives for and claims a form of objective vision existing independently of imagination. Political philosophy, in contrast to modern science, has always been a hybrid of these two sorts of vision; it tacks back and forth between what *is* and what *might be*.[92] When the way the world *is* changes, the points of orientation from which politics disembarks also move.

Since Wolin's original publication of *Politics and Vision* in 1960, there has been an explosion of work on modern perspective and its companion concept – objectivity - that qualifies and clarifies Wolin's original argument. This literature is vast and it is outside the scope of this project to cover it all here, in part because much of it is focused on the development of science in the 18th century.[93] Parts of these historical accounts are useful for understanding the 17th century even though they are not the focus of this work because they explain how parts of 17th century conceptual change came to serve as a foundation for later scientific development, including and especially the connection between perspective and divine authority. In the present, we take the concept of objectivity to signify a perspective that is aperspectival – it is an impersonal take on the situation from nowhere in particular. Yet, historians of science argue that early modern

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[92] *Politics and Vision*, expanded edition, (Princeton, NJ: Princeton University Press, 2004), pgs. 17-20.

[93] Interested readers should consult Charles Gillespie, *The Edge of Objectivity* (1960); Karl Popper, *Objective Knowledge* (1973); Richard Rorty, *Philosophy and the Mirror of Nature* (1979); Thomas Nagel, *The View from Nowhere* (1986); R.W. Newell, *Objectivity, Empiricism, and Truth* (1986); Longino, *Science as Social Knowledge* (1990); Peter Dear, *Revolutionizing the Sciences* (2001); and Lorraine Daston and Peter Galison, *Objectivity* (2007).

Europe understood an objective perspective differently. Peter Dear has emphasized that early modern conceptions of objectivity were ancient concepts illuminated by the twilight of scholasticism. Scholasticism departed from the Latin root of objective – *objectus* – that meant something 'thrown up' for consideration by the mind. The problem that the seventeenth century inherited was a tension between conceptions in the mind and conceptions in reality: how we think about things is never all encompassing or complete. Dear argues that the most common early seventeenth century solution was to distinguish between the 'formal concept' (the thing in itself) and the 'objective concept' (our knowledge of the object). When the formal concept and the objective concept intersected, 'objective being' was achieved.[94] These neo-Platonic conceptual gymnastics were necessary given the conceptual groundwork previously laid for knowledge, and the dizzying categorical transmutation at work is evidence of a system on the edge of breakdown. As Dear writes of the Scholastic framework, "truth stood at the heart of things."[95] The seventeenth century trouble with this formulation was that "truth" was emerging as a multifaceted and perhaps even diverse concept.[96] With the new lofty perspective evidenced by the maps that replaced pictures new forms of truth came into view, and with those new sightlines new politics became possible.

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[94] Peter Dear, From Truth to Disinterestedness in the Seventeenth Century, *Social Studies of Science*, 22.4 (Nov. 1992), pg. 621.
[95] Dear (1992), pg. 620.
[96] Dear (1992), pgs. 624-625. Steven Shapin has devoted significant energy to elaborating this point as well. For example, see *A Social History of Truth* (University of Chicago Press, 1994). Barbara Shapiro argues that even as truth became an increasingly diverse concept, we also see the emergence of "fact" as a basis for claims, creating a hierarchy of truth-claims. *A Culture of Fact: England, 1550-1720* (Ithaca, NY: Cornell University Press, 2003).

Following Wolin, Mary Dietz has argued that the sort of renaissance artistic perspective that first allowed London to be mapped changed the landscape of political possibilities. Whereas the late medieval period accepted as a given that perspectives were limited and partial, the techniques of perspective practiced by landscape painters demonstrated the possibility of a "fully dimensional and complete" view on the political world.[97] The emergence of the possibility of a complete viewpoint has important political implications. While Dietz argues that it reinvigorates the possibility of political deception because those that see from that vantage point have a form of knowledge that encompasses their adversaries and allows them to manipulate those adversaries, this chapter focuses on how the changing perspectives at work in London's maps parallel and echo a set of changes in the political-economic ordering of men's lives. As men lived in a newly ordered space, a reorientation of those men to themselves as also in process.

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[97] Mary Dietz, Trapping the Prince: Machiavelli and the Politics of Deception, *American Political Science Review*, vol. 80, no. 3, (1986): 794. Although Dietz is writing here within the context of Machiavelli's Italy, the movement of Renaissance perspectives northward to England has been documented in a number of ways. Such a northward migration is evidenced by the appearance of italic script in English printing (Goldberg 1991), in Italian sources for Biblical translation (Greenblatt 2005), and in the performance of Machivelli's plays in England (Hoenselaars 1998). Anthony Ellis has argued that this Italian influence was so thoroughgoing in England that the perceived femininity of the rapidly spreading Italian culture in England resulted in English anxiety about their own masculinity, causing them to try and simultaneously disguise Italian influence in England while also appropriating it as properly English. Jonathan Goldberg, *Writing Matter: From the Hands of the English Renaissance* (Stanford University Press, 1991), pg. 1. Stephen Greenblatt, *Renaissance Self-Fashioning: From More to Shakespeare* (University of Chicago Press, [1980] 2005), pgs. 121-122. A.J. Hoenselaars, The Politics of Prose and Drama: The Case of Machiavelli's "Belfagor," in *The Italian World of English Renaissance Drama*, ed. M. Marrapodi and A. Hoenselaars (University of Delaware Press, 1998), pgs. 106-121. Anthony Ellis, The Machiavel and the Virago: The Uses of Italian Types in Webster's "The White Devil," *Journal of Dramatic Theory and Criticism*, Spring 2006, pgs. 49-74.

c) *Interest and Self-Interest*

As a tool of ordering political and economic interests, maps worked in furtherance of the developing concept of *interest*. At the beginning of *The Passions and the Interests*, A.O. Hirschman works from the basic claim that, "A feeling arose in the Renaissance and became firm conviction during the seventeenth century that moralizing philosophy and religious precept could no longer be trusted with restraining the destructive passions of men."[98] The forces of government that came to be trustworthy successors to moral philosophy and religion have been the subjects of enduring debate. For his part, Hirschman argues that capitalism emerged to fill the need to "repress and harness" human passions that would otherwise prove socially destructive and turn that energy toward the pursuit of financial "interests." Stephen Holmes has elaborated Hirschman's thesis with the key qualification that modern liberalism succeeds in going beyond particular self-interest to pursue *universal* self-interest through the mechanism of limited government authorized by popular consent and enabled by constitutional law.[99] Law, for Holmes, is not only a limitation on action, it also makes democracy possible by preserving the conditions for future action from present political circumstance.[100]

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[98] A.O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph*, 20th anniversary edition, (Princeton University Press, 1977), pg. 14-15.

[99] Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy*, (University of Chicago Press, 1995), pg. 55.

[100] Holmes (1995), pgs. 8-9. Holmes also argues for the compatibility of liberal democracy and constitutional review, summarizing and later endorsing John Hart Ely's view when he writes, "Like all rickety human creations, democratic government requires periodic repair. Its preconditions must be secured or re-secured; and this cannot always

Dean Mathiowetz has taken the concept of interest that animates Hirschman's and Holmes' works in a different direction. Instead of interpreting self-interest as "the totality of human aspirations" with Hirschman, Mathiowetz turns to the Roman understanding of interest that early modernity inherited from Scholasticism.[101] He argues that interest was not always about financial gain. Instead, for the Romans from whom the common law inherited the concept, interest was a juridical matter – it was a practice, not just a thing. For their part, the English used the concept of interest to form a national identity that underpinned a reason for and justification of state action. Interest, in this sense, was constitutional, defining the purpose of England (to further England's interests) as well as who was English (those who partook in England's interests).[102] The juridical aspect of interest was composed of a norm, a conflict over the interpretation or application of that norm, and a final decision that was a decidedly human product. By characterizing interest as a legal process of making a claim and acting on it, Mathiowetz turns interest from a rational calculation of self-interest into a process of self-

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be achieved by unmixed democratic means" (pg. 136). For Holmes who follows Hart here, it is exactly the "undemocratic" tendencies of constitutional law that enable democracy to continue functioning. It would be wrong then to characterize law only as a negative sanction. Instead, Holmes wants us to recognize that through legal prohibition – and there is no substitute – can the unnecessary practice of democracy be maintained.

[101] Hirschman also adds to his definition of "interest" that it, "denoted an element of reflection and calculation with respect to the manner in which these aspirations were to be pursued" (pg. 32).

[102] Dean Mathiowetz, *Appeals to Interest: Language, Contestation, and the Shaping of Political Agency* (Penn State University Press, 2011), pgs. 91-94. As Mathiowetz sums up this growth of interest, it "brought its constitutive power to bear not only on the persons of men and states, but now also on the body of the nation" (pg. 93).

constitution.[103] When we understand interest as a having both calculating and self-constituting aspects, a modern paradox emerges for Mathiowetz. Since we live in a volatile world (exemplified by monetary inflation during the sixteenth century) our interests are shifting and uncertain. Yet, in the modern world we also need to venture a claim to our interests, both to claim financial benefits and to constitute our place in the world.[104] Certainly the intertwining of uncertainty and identity is important for modernity here, but another important and more basic point is implicated by this construction. The government of rational self-interest is not necessarily stabilizing for society or the individual in the way that Hirschman and Holmes expect and may have in fact been destabilizing for both citizens and their societies. Appeals to interest have limited explanatory power for understanding how a society of limited government also managed to become highly regular and stable.

In contrast to Hirschman's limited focus on the power of appeals to interest, I turn here to a more nuanced diagnosis of the rupture in government that confronted the English in 1603 that implicates the Ordinary once again. In describing the preconditions for seventeenth century English political thoughts and events, Douglas Casson writes that:

> In the sixteenth and seventeenth centuries, traditional modes of ordering experience were breaking down throughout Europe. The interpretive frameworks that had once served to explain and justify theological systems, political arrangements, and ethical imperatives were appearing increasingly inadequate. In the wake of the Reformation and subsequent struggles over religious, political, and moral authority, the available languages of justification ceased to constitute a

[103] Dean Mathiowetz, The Juridical Subject of 'Interest,' *Political Theory* (Aug. 2007), pg. 470.
[104] Mathiowetz (2007), pg. 487.

> unifying authority through which norms of law and justice could be articulated. Appeals to traditional vocabularies could not be the basis for publically reliable judgments. A once common mode of discourse had fractured into mutually exclusive interpretive camps all claiming authority. Those who continued to utilize earlier languages of justification appeared increasingly untrustworthy. Their arguments smacked of partisan interest, corrupt habit, or personal passion.[105]

Here Casson points to the rupture that interest was never able to cover over: claims to administering law and doing justice based on the old order of Church and Crown were popularly suspect. The old ways of legal governance needed to be transformed, conceptual innovation needed to occur, and new technologies of governance needed to emerge so that the rule of law could take on different characteristics that would make it recognizable if not familiar to modernity. The first step in that process was a confrontation between Ordinary forms of power and popular, everyday, and ordinary forms of legitimacy derived from the life of the English people.

Section 2: The Politics of the Ordinary

Having introduced the general conditions of unease through Ordinaries, maps, and self-interest in the first section, this section turns to a concrete instantiation of this malcontentment in the conflict between James I and Coke. We approach this conflict in three parts. The first part discusses the natural and common law that governed England. Second, it looks to the offices in which these legal systems were vested. Third, it examines how these legal systems and offices came into conflict through the disagreement between James I and Coke.

[105] Douglas Casson, *Fanatics, Skeptics, and John Locke's Politics of Probability*, (Princeton University Press, 2011), pg. 23.

I. Natural Law and Common Law

Early seventeenth century England was governed by two legal systems, the natural law and the common law. This section introduces each of these systems in turn, then it turns to one prominent thinker's attempt – Grotius - to iron out the tension between their overlapping aspects.

The natural law tradition argues that "nature" has to some extent a morally and legally binding force upon humans. It has been summarized by its most prominent modern commentor, John Finnis, in three points. Finnis argues that natural law is composed by a set of universally used/employed principles that lead to human flourishing, in accordance with commonly available human reasonableness, that leads to a set of general moral standards by which we can live our lives.[106] Elsewhere, he writes that, "A natural law theory is nothing other than a theory of good reasons for choice (and action)."[107] On first blush, Finnis' definition of natural law may seem largely devoid of content, an exhortation to rigorous and honest dealing with our selves and our thoughts. Yet, the classical natural law imbued it with far more content. Brian Bix summarizes the gist of that content in three points: "(1) that moral principles can be read off of "Nature" or a normatively charged universe; (2) that moral principles are tied to human nature – and "nature" here is used to indicated either the search for basic or common human characteristics or (to the extent that this is different) some discussion of human teleology,

[106] Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), pg. 23.
[107] Finnis, *Natural Law and Legal Reasoning*, 38 Clev. St. L. Rev. (1990), pg. 1.

our purpose or objective within a larger, usually divine, plan; and (3) that there is a kind of knowledge of moral truth that we all have by our nature as human beings."[108] From Bix's summary, two characteristics of the natural law tradition are evident. First, it is universal in scope. It is based in the nature that all humans share, and consequently there are no exceptions. Second, its logic is deductive, reasoning from principles to particular cases.

In contrast, the common law diverged on both of these points. It was particular to England in two ways. First, it was formally practiced only by the King's common law courts. It was not authoritative in ecclesiastical courts or courts of any other nation, including Scotland.[109] Second, it was not authorized by an act of parliament laying out a law or principle by which cases can be deductively decided, but rather it is an amalgamation of practices and traditions that can be used inductively as precedent to substantiate or give reasons for a decision in a particular, present case.[110] In contrast to the natural law, it did not usually justify itself in terms of nature or a higher order or a teleological purpose. Instead, it was the legal instantiation of tradition and social norms. The trouble with these two systems of justice comes out of the fact that they were both

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[108] Brian Bix, The Natural Law Tradition, in *Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules L. Coleman and Scott Shapiro, (Oxford University Press, 2002), pgs. 64-65.

[109] Arthur Hogue is hesitant to even define the common law, writing that, "The greater a man's knowledge of the law, the more hesitant he will be in answering the question: What is the common law?" (1986, pg. 5). With that qualification in place, he goes on to say that at least in the early history of the common law it can be defined as "simply the body of rules prescribing social conduct and justiciable in the royal courts of England" (ibid).

[110] Blackstone famously called the common law "judge made law" to distinguish it from statutory law.

concurrent and overlapping. If the common law were to come into conflict with the natural law, what should then be done?

In 1604, Hugo Grotius[111] took up this intellectual tension in a text on the East Indies.[112] Here he laid out a theory of legal legitimacy that synthesized the forms of legitimacy that in England appeared to be in competition with one another. In England, Parliament claimed to legitimately rule through the positive law. The crown, on the other hand, staked its claim through the will of God and natural law. In the midst of this intellectual grudge match, Grotius argued that we should take as a "primary principle" that, "What God has shown to be his Will, that is the law."[113] On its face this might be an endorsement for monarchical power, but Grotius is doing more here than picking sides. The key to Grotius' innovation for the problem of domestic politics is the idea of demonstration, that the will of God is evident and observable in the natural order of the world that also contains and entails human judgment.

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[111] Here I am inserting a Dutch thinker into an English context and it might appear that I am portraying him as if he were writing explicitly and only about English domestic politics. Grotius is not addressing the English context directly. On the contrary, Richard Tuck calls this work, "a major apology for the whole Dutch commercial expansion in the Indies" Tuck, R. (1999). *The Rights of War and Peace, Political Thought and the International Order from Grotius to Kant*. New York, Oxford University Press. 79. Grotius's solution, though, deals with a set of common troubles with authority at the time, both in colonies and domestically in Europe. Elsewhere Tuck notes that one of Grotius's central tasks in De Indis is to found a theory of ethical conduct and a theory of justice, see Tuck, R. (1993). *Philosophy and Government, 1572-1651*. New York, Cambridge University Press., 173.

[112] We now know this text as the *Commentary on the Law of Prize and Booty*. Grotius's title was *De rebus Indicis* (*On the Affairs of the Indies*). For more on the story of how this change came about, as well as the implications of that change, see Wilson 2006.

[113] Hugo Grotius, *Commentary on the Law of Prize and Booty* (Liberty Fund, [1603] 2006), pg. 8.

> The will of all, when applied to all, is called *lex* [statutory law]. This law proceeds from God, wherefore it is proclaimed to be 'the invention and gift of God.'[114] It is approved by the common consent of mankind … In short, *lex* rests upon the mutual agreement and will of individuals.[115]

This dense passage performs an important set of conceptual innovations. First, it asserts that lex/law is authorized by collective will. The law "proceeds" from God and is "approved" by the will of the collective. Finally, God's role as lawgiver is contained and expressed – but never replaced - by collective agreement.

This uneasy alliance is made possible by the substantially identical relationship between human and divine reason that Grotius takes on when he quotes Epicharmus: "Man's reason from God's reason takes its being."[116] They are substantially identical for two reasons. First, we are part of the creation, so we are born with knowledge of the natural law. Grotius quotes Lucan here to argue that, "*the Creator* revealed to us once and for all, *at our birth*, whatever we are permitted to know."[117] Secondly, while living in the world we are continually surrounded by and participating in the natural order. This immersion continues to educate us in the natural law.[118] Through the mechanisms of birth and life humans are endowed with and continually taught God's reason so that if people use reason at all they are channeling God's reason. Any difference is illusory. This move turns political questions into questions of knowledge, of thinking correctly. Here Grotius makes politics go away by creating an ionic bond – one that holds two

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[114] This quotation is not attributed to an author in the text. It is also preceded by the original Greek, which I have omitted here.
[115] Grotius (2006), pg. 23.
[116] Grotius (2006), pg. 12.
[117] Ibid, pg. 9, *italics original*.
[118] Ibid.

oppositely charged atoms together – between positive and natural law by arguing that, contrary to appearances, they are actually the same thing.

Annabel Brett has called attention to the historical significance of Grotius' admixture of God's will, natural law, and positive law. She reminds us that modernity has a significant focus on accommodating and managing nature.[119] In this form of modernity, Brett argues, the goal of government is to harness nature as much as possible and work around the parts that cannot be tamed. In contrast, what Grotius aims at is, "constructing the city from a nature which is then left behind. The question, therefore, is how to establish some sort of disjunction between nature and the city but at the same time to establish some sort of continuity: how to combine civic integrity with a foundation in nature."[120]

Knud Haakonssen has picked up on the uncomfortable role played by natural law in Grotius' schema. If the natural law does not conflict with proper positive law, then it seems that the case of an actually existing conflict means that humans have either misunderstood the natural law, or they have made an (invalid) positive law that conflicts with the natural law. The idea that we would know the natural law and still choose to break it is not possible for Grotius.[121] Haakonssen argues that for Grotius, "it is inherent

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[119] In addition to Brett's focus on the management of nature, I would add, through the lens of Machiavelli, God/gods, and the parallel concepts of Fortune/Fortuna. See *Masters, R. (1999). Fortune Is a River : Leonardo Da Vinci and Niccolo Machiavelli's Magnificent Dream to Change the Course of Florentine History*. New York, Plume.

[120] Annabel Brett, *Liberty, Right, and Nature: Individual Rights in Later Scholastic Thought*, (Cambridge: Cambridge University Press, 1997), pg. 33.

[121] Grotius explains that positive law can vary between societies without necessarily violating natural law when he argues that we should not think "it strange that laws [about economic relations] should change with their cause – that is to say, in accordance with

in the concept of a human being that once it applies its rationality to the content of natural law, it will follow this law.[122] By making legal consensus appear necessary or inevitable, Grotius leaves politics with little room to maneuver. Natural law and its authorized interpreters seem to hold a cudgel for holding change at bay. As the seventeenth century opens, Grotius provides an outline of an overdetermined world that forecloses rational politics that would reconsider the assumptions of order. Reflecting on the political role of Grotius' innovations for future politics Haakonssen writes, "The key question in my opinion is that of the knowledge of natural law, partly because this makes the question of obligation acute."[123] In practice, English citizens in 1603 found themselves obligated in a number of ways through various institutions that were not easily harmonized. Grotius' redoubling of legal doctrine that aimed for uniformity rather than accommodating difference only increased the internal contradictions of the English legal system's

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the human will – while natural precepts, based as they are upon a constant cause, remain constant in themselves; or that the former should vary in different localities, since the various communities differ, of course, in their conception of what is good" (Prolegomena, 23).

[122] Knud Haakonssen, Hugo Grotius and the History of Political Thought, *Political Theory*, 13.2, (May 1985), pg. 252. Grotius famously extends the reach of natural law beyond Christendom later in his life, arguing in 1625 that God is not necessary for natural law to be both apparent and binding: "though we should even grant, what without the greatest wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs" natural law would not change in the least. Grotius expands this famous statement in a footnote: "This assertion is to be admitted only in the following Sense: That the Maxims of the Law of nature are not merely arbitrary Rules, but are founded on the Nature of Things; on the very Constitution of Man, from which certain relations result, between such and such Actions, and the State of a reasonable and sociable Creature. But to speak exactly, the Duty and Obligation, or the indispensible Necessity of conforming to these Ideas, and Maxims, necessarily supposes a superior Power, a supreme Master of Mankind, who can be none other than the Creator, or the supreme Divinity" Grotius, H. (2005). *De Iure Belli ac Pacis, Book 1*. Indianapolis, Indiana, Liberty Fund., 89.

[123] Haakonssen (1985), pg. 248.

reliance on multiple forms of authority. The next section explains those structures and why their plurality tended to promote uneven forms of obligation that led to political unrest.

II. Institutions

This section will then aim to outline the institutions and why they tended toward conflict with one another. This section is not a comprehensive summary of the English legal system which is a subject unto itself and has been addressed elsewhere.[124] Instead, this section aims to orient a reader so that he or she can follow the later political plot. This outline will necessarily be partial. In the *Fourth Part* of his *Institutes*, by my count Coke refers to at least 102 distinct courts either common or ecclesiastical. This brief overview will not cover them all, but will instead try to give the reader a concise summary sufficient for the purposes of following this project.

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[124] J.H. Baker's *An Introduction to English Legal History* (Butterworth's, 2002) is the definitive introduction to the subject today. F.W. Maitland's *A Sketch of English Legal History* (1915) is more thematic and less case-driven. Theodore Plucknett's *A Concise History of the Common Law* (1929) remains a good supplement for the institutional development of the courts. W.S. Holdsworth's comprehensive, seven volume work *A History of English Law* (1922) is very thorough. Roscoe Pound's lectures published as *Interpretations of Legal History* (1923) address historical, ethical, religious, economic, and "great-lawyer" interpretations of English legal history. Contemporary overviews beyond Baker include: Arthur Hogue, *Origins of the Common Law* (Liberty Fund, 1986); Harry Potter, *Law, Liberty, and the Constitution: A Brief History of the Common Law* (Boydell Press, 2015); John Langbein, Rennee Lerner, and Bruce Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions,* (Aspen Publishers, 2009). Classic treatments include Mathew Hale's *The History of the Common Law of England* (1713) and William Blackstone's *Commentaries on the Laws of England* (1753).

a) Outline of the English Legal System

It is important at the outset to note that the England of 1603 was not a state in a Weberian sense: it actually had a "monopoly" (in Weber's words) on very little and its eventual emergence was not preordained. Hendrik Spruyt has argued that the modern nation-state – what he calls, "a final locus of authority" – was not a necessary outcome of the collapse of feudalism, but rather the victor in a competition between several other modes of organizing and governing communities.[125] In Spruyt's analysis, the Roman Empire left Europe with two systems of consolidated authority that did not recognize geographic boundaries: empire and theocracy.[126] Prior to Henry VIII's break with Rome in the 1530s these two universal claims to authority coexisted in tension in England. Later, under the Church of England, these tensions came to the fore as practices of sovereignty by the church no longer were protected by the authority of Rome.

One of the reasons for this tension was that much of what the church (theocracy) had authority over was shared with the crown (empire). Frederic Maitland goes so far as to say that, "the medieval church was a state," because "we could frame no acceptable definition of a state which would not comprehend the church."[127] Because Maitland is writing two decades before Weber delivered *Politics as a Vocation*, his description of a state's functions is not perhaps what we would expect. He argues that the church had a legal apparatus composed of laws, courts, and lawyers; prisons for punishment including

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[125] Spruyt, *The Sovereign State and Its Competitors* (Princeton University Press, 1994), pg. 153
[126] Ibid, pg. 42; 153.
[127] Frederic Maitland, *Roman Canon Law in the Church of England: Six Essays* (New York: Burt Franklin, 1968 [1898]), pg. 100.

death; it could tax; and membership was involuntary.[128] While a post-Weberian perspective might not call the church a state because it lacks a monopoly on force, it is worth noting that the church played many of the same functions that we expect from a modern state. And yet, so did the King: the King also had laws, courts, and prisons; he also taxed; he also imposed harsh penalties for disobedience. What we confront then is a competing and overlapping set of jurisdictions that is not necessarily hierarchical or open to neat appeal. The English legal system was more a matter of layers than hierarchy – it was not the sort of institution that could be drawn in a single flow chart.[129]

For its part, the ecclesiastical system was very Catholic in that it was hierarchical, or as R.B. Outhwaite puts it, "a graded hierarchy with overlapping functions."[130] At the base were two parallel courts, one which dealt with the clergy and parishioner complaints and another collection of "peculiar" courts that were outside of the local bishop's authority and fulfilled diverse tasks. On the second layer, there was a set of superior diocesan courts that were in some cases called commissary courts. On the third layer,

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[128] Ibid.

[129] In describing the ways that the King's law impacted colonial legal systems, Julius Goebel works to disabuse his twentieth century audience of the notion that the King's law was necessarily the leading or only form of legal authority in seventeenth century England when he writes that, "No one who ventures into the forbidding welter of contemporary charters can fail to be appalled by the multitude and extent of franchises, the tenacity with which they were clung to, and the astounding picture of jurisdictional diversities they disclose. This then is the fact to which we must cleave, that the law of England was something greater and more multiform than that of the courts at Westminster" (1931, 417). Here Goebel signals the multiple overlapping interests that we confront in seventeenth century England as a form of governance approaching a modern nation-state emerges at the expense of those who previously held a fraction of England's governance.

[130] Outhwaite, *The Rise and Fall of the English Eccesiastical Courts, 1500-1860* (Cambridge University Press, 2006), pg. 2.

there was a consistory court. Appeals usually proceeded up the courts in this order.[131] There were a significant number of ecclesiastical courts, somewhere between two hundred and fifty and three hundred and seventy two. About three quarters of them were likely peculiars.[132]

The jurisdiction of the ecclesiastical courts was defined by their goal, as Colin Chapman puts it, "to promote faith in Jesus Christ and improve the moral standards of the Angles, the Saxons and the pagan Britons."[133] Given this broad mandate to promote faith and improve morality, it is not surprising that the church courts had broad jurisdiction. Any issue pertaining to the family - including wills, marriage, divorce, and paternity - were under the church's legal authority. The courts could compel church attendance (an effort that met with mixed success), and they could exact tithes. They also handled a great deal of licensing, and this sort of non-contentious administrative work probably took up more than half of the court scribes' time.[134] Chapman argues that between 1300 and 1800 the ecclesiastical courts heard up to nine million cases involving ten percent of the adult population, and half of that litigation occurred between 1450 and 1640.[135] It is also worth noting that the church courts' power was not only broad, but also extensive and deep. They were not only preserving order, they were looking after the souls of men. As a consequence of that outlook, they dealt with issues that today we

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[131] Outhwaite (2006), pgs. 1-4.
[132] Outhwaite (2006), pg. 1.
[133] Colin Chapman, *Ecclesiastical Courts: Their Officials and Their Records* (Dursley, England: Lochin Publishing Company, 1992): 5.
[134] Houlbrooke, *Church Courts and the People during the English Reformation, 1520-1570* (Oxford University Press, 1979), pg. 8.
[135] Chapman (1992), pg. 7.

would consider private. They adjudicated marriage disputes. They punished heterodoxy and blasphemy. They went after people they suspected were engaged in "irregular sexual relationships."[136] And this governance was more than pro forma, it was a very real practice. Houlbrooke writes that, "The train of the archdeacon's official could be seen travelling remote lanes in all weathers, penetrating the countryside more deeply, traversing it more frequently, than did the representatives of any other comparable court."[137]

Alongside the ecclesiastical courts were the various and diverse common law courts.

At the local level, two powers were important, the sheriff and the feudal manor. We will start with the sheriff, which was a very powerful office, at least at times.[138] The sheriff oversaw the prisons and two communal courts, the county and hundred courts. By 1600, these once powerful courts were sparsely attended because litigants had begun taking their business to the king's justices of the peace because the county courts were viewed as corrupt in a number of ways.[139] In spite (or perhaps in part because) of the appointment of four coroners per county to represent the King's interest locally and strict

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[136] Houlbrooke (1979), pg. 7.
[137] Ibid.
[138] Maitland has argued that, "The whole history of English justice and the police might be brought under this rubric, 'The Decline and Fall of the Sheriff.'" (quoted in Holdsworth [1903], pg. 66). The Sheriff was the King's county agent and at times held responsibilities from chief tax collector to head of law enforcement. What Maitland means by connecting the development of justice and the police with the decline of the sheriff is that gradually and in a piecemeal fashion the functions of the sheriff were replaced with the apparatus of a modern state (i.e. a professional police force). (See Holdswoth [1903], pgs. 66-69.)
[139] William Searle Holdsworth, *A History of English Law, Volume 1* (London: Methuen & Co., 1903), pg. 74.

annual accounting by the exchequer, sheriffs abused their taxing power.[140] Alongside the sheriff's courts were the courts of the manor, which were called "courts leet" when they were held under their own authority rather than the authority of the sheriff. Jurisdiction over the hundred courts could be transferred from county to manor.[141] In Theodore Plucknett's analysis, the trend in local jurisdiction during the middle ages was away from the county courts and toward the hundred courts increasingly held as leet courts.[142] On the local level, in both county and manor courts, ancient standards of community justice were long maintained and only slowly reconciled with the common law of the king's courts.[143]

The main mechanism of that reconciliation was the justices of the peace and of assize that judged cases according to the common law on a local level. The justices of the peace were originally knights charged with local peacekeeping, and their role eventually came to include presiding over common law courts between assizes.[144] The

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[140] Plucknett argues that it was precisely because of the strictness with which the Crown accounted with sheriffs that sheriffs were corrupt. He writes that, "Such ruthlessness left the sheriff no alternative to amassing as big a surplus as possible in order to meet these contingencies" (pg. 102). Royal accounting may have been so strict as to put sheriffs in a precarious position where prudence demanded that they use their taxing power to horde money in case the Crown demanded more money than they could provide legally.

Also, Holdsworth emphasizes the independent power of the coroners to hold their own courts beyond most other authors. See Holdsworth (1903), pgs. 82-87.

[141] Baker (2002), pg. 24.

[142] Theodore Plucknett, *A Concise History of the Common Law*, 5th ed. (Union, NJ: The Lawbook Exchange, [1956] 2001), pgs. 97-98. Holdsworth is noncommittal on this point, simply arguing that both county and manor courts declined as the King's courts rose to prominence.

Also, note here that "leet" is an adjective: it describes or indicates that a court is not under a sheriff's authority. See Baker (2002), pg. 24.

[143] Baker (2002), pg. 22.

[144] Baker (2002), pg. 25-26.

justices of assize traveled in circuit and held jury trials in local jurisdictions.[145] There were also other travelling justices that had limited or occasional commissions.[146] The growth of the power of the king's justices was not signaled with a particular law or attached to a given year. It was likely an unintentional, ad hoc solution to the problem of maintaining royal power in a large country connected by muddy roads and horses. J.H. Baker describes the situation early in the history of these courts as one in which, "The king's law was not yet universal; but the king's judgments could not be questioned or ignored."[147] That tension between the king's absolute power and yet limited ability to implement it is evident even in the seventeenth century, as evidenced later in this chapter.

If there was one place the king's ability to carry out his will was not in question, it was at Westminster Hall. Between 1099 and 1882, four superior courts sat there with very limited exception: the Court of the King's Bench, the Court of Chancery, the Court of the Exchequer, and the Court of Common Pleas. Remarkably, these four courts were held in the same room together for six centuries. They survived two civil wars, and even in times of rebellion they held court with the justices occasionally wearing armor under their robes. In Baker's estimation, the situation had "the appearance of complete immunity to change."[148] Despite appearances, there were changes and there were struggles. On a number of matters, the King's Bench, Chancery, and Common Pleas all potentially had jurisdiction (either as courts of first instance or as appellate bodies), and they all wanted that jurisdiction because hearing cases was profitable. According to

[145] Plucknett (2001), pg. 112.
[146] Plucknett (2001), pg. 104.
[147] Baker (2002), pg. 15.
[148] Baker (2001), pg. 37.

Baker, wrangling and procedural maneuvering in "the later sixteenth century took on the appearance of an internecine struggle for business between the common-law courts themselves."[149] At the highest levels, the common law courts had concurrent jurisdiction that led to struggles over money and power. It is under these conditions that the common and ecclesiastical courts come into conflict over a set of scarce resources.

Given that common and canon courts had concurrent jurisdiction in many matters, two questions present themselves. First, were they entirely separate institutions or did they cross-pollinate with one another? And second, how were these concurrent jurisdictions impacted by the Reformation? The answer to the first question is that the canon and common law courts did interact, and what remains in question is the degree of their interaction. Richard Helmholz has spent much of his career arguing by enumeration that these two formally separate courts were in practice influenced by one another.[150] Other evidence might contradict Helmholz's strong argument for mutual influence. Houlbrooke notes that in 1536 Ordinaries had been given the option to augment their enforcement powers in cases of contempt of court by obtaining assistance from justices of the peace. Yet, this formal option was not developed in spite of "unprecedented" flaunting of the canon courts.[151] Although the church needed the executive power of the state to augment its own and such a relationship was provided for in statute, no such partnership developed. An exact explanation remains elusive, but fact that the church

[149] Baker (2001), pg. 40.
[150] For a straight forward statement of this position, see his 1983 Seldon Society Lecture published as *Canon Law and English Common Law*.
[151] Houlbrooke (1979), pg. 15.

needed help and either did not seek it or did seek it and was denied suggests a limited relationship between the two courts.

To the second question regarding concurrent jurisdictions, the counterintuitive consensus appears to be that the Reformation did not change much. Given that the Reformation is so often portrayed as a sharp rupture, we might expect to find a clean break with the canon courts. Yet, the history up until 1603 is more continuity than change. In Houlbrooke's estimation, there were some reforms, but "No thorough revision of the ecclesiastical laws inherited from the middle ages was achieved during the Reformation."[152] Helmholz largely agrees, writing that "For the historian of the ecclesiastical courts [...] The enormous changes in religious doctrine and worship that were occurring made much less impact on court practice than he might initially suppose."[153] Elsewhere Helmholz argues that the break with Rome was of "no consequence" for the careers of English ecclesiastical lawyers.[154]

The legal system of 1603 England had built in structural tensions left unresolved by the Reformation. With the rise of James I in 1603, those tensions were personified by James on the side of kingly power and later Sir Edward Coke as an advocate of administering the common law through the lens of tradition. The next section takes the Ordinary as an exemplar of that conflict.

b) *Two Concepts of the Ordinary*

[152] Houlbrooke (1979), pg. 18.
[153] Helmholz (1990), pg. 36.
[154] Helmholz, (1995), pg. 367.

The development of tort law is tied up with the conceptual cultivation of responsibility during the decline of the Ordinary as a legal category, a process that gave us our present sense of the ordinary as a non-legal concept. To put it as a question (or two): how did the Ordinary (as a legal office) become the ordinary (as the commonplace or everyday), and what became of the legal functions and authority entailed in the former but not practiced by the latter?

Here I want to visit some historic political events to understand how the ordinary came from representing both events and nonevents to signifying only nonevents. Prior to Henry VIII's break with Rome, when England was Catholic, there was no word for responsibility in England because the practices of what we now know as responsibility were located in the ordinary. The ordinary had two senses and two referents. The first was how we use it, as a denotation of the regular humdrum routine of everyday life. This is reflected in the concept of "ordinary time" in the Church calendar - time that does not fall under a feast season. Thus the ordinary is a lack of the extraordinary, the notable, or the remarkable. The second, and perhaps more common, use was as a legal term, and this was the location of what we now think of as responsibility. The ordinary was an office with the primary ability to legislate, adjudicate, and govern interpersonal affairs (which Catholics call the "external forum" to distinguish it from the "internal forum" which is inside an individual). This basic, low level power of governing was a court of first instance (broadly construed as both law-making, -interpreting, and -enforcing),[155] the cite

[155] Maitland describes this conflation of powers as a situation where, "the function of making law was scarcely to be distinguished from that of making law" (Maitland, F.

of conflict resolution for everyday affairs.[156]

The practices of regulation and accountability that we now know as responsibility were located in this second sense of the ordinary and only emerged as an independent concept after the monasteries had been closed and the ecclesiastical courts had undergone some key changes. Foremost among these key changes was the abolition of the right to appeal to Rome as a court of first instance. This right is more important for the practice of law than it might first appear. The pope exercised the power of "universal ordinary," meaning that he had the power to decide any case he wished and that all cases could be heard directly before him or, more commonly, before his delegate judges.[157] This ability

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(1968 [1898]). William of Drogheda and the Universal Ordinary, in Roman Canon Law in the Church of England, Six Essays. New York, Burt Franklin**:** 100-131.).

[156] One might object that the ordinary was a religious category and thinking about it as a broad, general power of governance is an overstatement of its impact. Ralph Houlbrooke characterizes this view as a modern misunderstanding when he writes at the beginning of his book on the ecclesiastical courts that, "Today it is unlikely that more than a tiny minority of the English people is aware of the continued existence of ecclesiastical courts. Few could describe their work. To the bulk of the sixteenth century population, however, the officers of the church courts were amongst the most familiar representatives of authority external to their own communities. The train of the archdeacon's official could be seen travelling remote lanes, in all weathers, penetrating the countryside more deeply, traversing it more frequently, than did the representatives of any other court" Houlbrooke, R. (1979). Church Courts and the People During the English Reformation, 1520-1570. New York, Oxford University Press. Houlbrooke goes on to note the personal importance of some of the matters over which it had jurisdiction: "matrimonial problems;" "irregular sexual relationships;" wills; making sure people went to church and behaved while in attendance; and helping "to maintain harmony in the community by proceeding against those who reviled their neighbors" (ibid, 7-8). Further, there was no clean line between common and ecclesiastical law. Helmholz reminds us that customary practice was a large part of what the ecclesiastical courts enforced Helmholz, R. (1987). Canon Law and the Law of England. London, The Hambledon Press. There is a strong case to be made from the scope and type of ecclesiastic authority that the ecclesiastical courts surpass any modern court in the common law world as a thoroughgoing force of normalization.

[157] Maitland (1968), pg. 104.

to be the court of both first instance and last appeal was strategically advantageous for the pope because he was able to dictate the outcome of cases while minimizing sites of controversy. Maitland argues that litigants liked this system for three reasons. First, appeals were encouraged, so going to the pope directly was a short cut to the eventual conclusion. Second, papal courts allowed suits to occur across jurisdictional lines - i.e. a party in Canterbury could not sue a party from York within the normal legal channels because they were in different bishoprics. The pope was the only common judge. Third, parties granted a trial by Rome were often able to select their own judges.[158] The court at Canterbury was exercising a similar ordinary jurisdiction for all of England.[159] What existed under the canon law was the real ability of Rome to act as the first and final court in any case that plausibly fell under canon law, thereby enabling it to enforce an orthodox uniformity throughout Christendom.

With Henry VIII's break from Rome, the king became the head of the church and thereby the court of final appeal. In practice, though, it was not until Elizabeth's reign that a high court of appeal was established. Elizabeth established the Court of Delegates to be the final court of appeal in spiritual matters, and the Court of High Commission to serve as an extraordinary court charged with supporting the ordinary courts. The Court of High Commission was the more powerful of the two, possessing the power to imprison and fine, which ordinary ecclesiastical courts lacked. This Court was not a single point

[158] Maitland (1968), pgs. 113-114.
[159] Maitland (1968), pg. 117. Maitland characterizes this situation of courts overreaching to hear cases as, "Usurpation we see wherever we turn" (120).

of appeal as Rome had been, but was rather likely composed of a court in each diocese.[160] Furthering this diversity of legal decision-makers was a trend under both Elizabeth and James I to grant common law courts jurisdiction to hear cases that had previously been the exclusive jurisdiction of the ecclesiastic courts.[161] The unsettled climate of legal authority is evidenced by a series of treatises that attempt to define and defend jurisdictional boundaries.[162] At the beginning of the seventeenth century legal adjudication had become less uniform than it was before the break with Rome because the Crown had not erected a legal structure that laid claim to the universal ordinary. Rather, the ordinary was always at least as local as the bishopric.

The next forty years were the site of significant innovations in the way that low-level justice was administered. The ecclesiastical courts went into decline and by 1640 had experienced what R.B. Outhwaite called a "sudden death."[163] Absent the peeping and prying power of the ordinary ecclesiastic courts, common lawyers and secular public figures started reaching for the language of *responsibility* to describe a standard of behavior that the ordinary courts used to by-and-large enforce. One primary meaning of this new word that emerged in the 1640s was the ability to pay back debts: a responsible person would pay what he owed. One of the ordinary courts' primary responsibilities had been the enforcement of habitual and regular tithing, making sure people paid their debts

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[160] Helmholz (1990), pg. 47.
[161] Ibid, 53.
[162] Houlbrooke (1979), pg. 20; Helmholz (1990), pg. 50.
[163] Outhwaite (2006), pg. 22. That is not to say that the ecclesiastical courts ceased to exist. They continued to be a point of public controversy until the mid-nineteenth century when reforms seriously reduced their power. What I understand Outhwaite to be saying here is that by 1640 the ecclesiastic courts had ceased to be a serious rival power to the common law courts.

to the church. As the payment of debts became episodic (as in a loan of money or goods) rather than habitual (as in tithing), responsibility captured this new unevenness of obligation. A second important meaning that emerged in the 1640s was that a person was responsible if he could be called to account for his actions by another, whether that be God, the King, or a neighbor. This unitary concept of accountability – to God, King, and neighbor – had been the sole domain of the ecclesiastic courts because the common law courts had only temporal authority. By 1640, though, James Howell was writing about being responsible to the high majesty of Heaven, and in 1662 John Davies was using the same language of responsibility to describe a subject's relationship to the King. Variations on these meanings flourished and were notably used by Locke in a political letter of 1691, by Alexander Hamilton in *Federalist 63* (1788), and by Edmund Burke in *Reflections on the Revolution in France* (1790) and twice in his *3rd Letter to the Present Parliament* (1797).[164] These waypoints in the linguistic development of responsibility show a rough, tripartite chronology: (1) the decline of ordinary power immediately preceded the development of responsibility in such a way that there appears a possible relationship; (2) the behaviors to which responsibility was applied were previously regulated by ordinary power; and (3) responsibility had a conceptual impact on early modern political thinkers.

This long aside into the relationship between the ordinary and responsibility was necessary to highlight the limitations that responsibility might have as a political concept. As the concept and practices of responsibility emerged out of the ordinary's decline, they

[164] All sources and citations in this sentence located using the OED.

continued to operate on the same terrain. That terrain was local communities that were homogenous by today's standards: they had low levels of in- and out-migration that led to intergenerational relationships, and a universally recognized legal system possessing authority to adjudicate disputes. None of the early uses of responsibility that I have found use the term to describe the relation of two lay people unknown to one another, of a different race than one another, or citizens of different countries. Rather, responsibility emerges between related individuals: debtor to creditor, landlord to tenant, subject to king, man to God, official to constituents. Responsibility was a very interpersonal concept deeply rooted in a context that is not our own.

III) *Whose Ordinary?: James and Coke in Conflict*

a) Conceptual origins of the problem

The ascension of James I after Elizabeth I's death in 1603 presented a problem. Elizabeth was widely viewed as a weak monarch that allowed Parliament to expand its power at the expense of the Crown, a move that was popular with both elected officials because it increased their power and with citizens because it tended to hold their taxation rates down. Taxation fell into two types: (1) taxes the Crown collected by royal prerogative, and (2) taxes voted by Parliament. Through Elizabeth's reign the ratio of prerogative taxation to Parliamentary taxation decreased, putting Parliament in a stronger position. Part of the reason for this shift is that Elizabeth did not consistently leverage

her claim to Divine Right against Parliament.[165] As a claim to Divine sanction receded, the positive legislation of Parliament grew into its place. Thus, during Elizabeth's reign positive law was on the upswing while the natural law's authorization of Divine Right faltered, leading commenters to call the sixteenth century, "the golden age of parliament."[166]

Elizabeth's failure to articulate and act upon a theory of royal power was of particular importance because the traditional justificatory mythology that the papacy imparted to the throne passed away with Henry VIII's break from Rome, and her sister and predecessor on the throne, Mary I, waffled semi-publically between Protestantism and Catholicism. Elizabeth bequeathed to James a throne unsanctioned by Roman Ordinary authority, yet shakily founded in both the theory and practice of its own

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[165] An important exception is her speech after the Northern Rising of 1569, but there the audience was rural laymen, not elected officials, see Lockyer, R. (1998). James VI and I. New York, Longman., 35-36.

[166] Lockyer, *Tudor and Stuart Britain* (New York: Routledge, 2005), pg. 91. It is also worth noting that a strong theory and practice of unqualified divine right is emerges in the late medieval and early periods only as the authority of Rome is called into question. The power vacuum of the Reformation meant that thrones were no longer legitimated by Catholic authority, and kings were pushed into a spot where they had to justify their own power on other terms than force and violence.

In his political history of *The Book of Common Prayer*, Timothy Rosendale neatly captures the origin of this political problem when he noted that the English split turned "the Church *in* England" into "the Church *of* England." That shift meant that the English church was no longer authorized by the papacy and the mechanisms and modes of legitimacy it had buttressed itself with over the preceding millennium. Instead, if the church was to be "*of* England" and headed by the English monarch, a new set of justificatory reasons, rationales, and structures had to emerge to replace the Catholic forms that were able to make claims in terms of St. Peter. I read James I's theories of kingly authority as a political action aimed at articulating a set of reasons why the crown is legitimate, and also why the crown's authority ought to be modeled on the Pope's power of universal ordinary. Timothy Rosendale, *Liturgy and Literature in the Making of Protestant England* (Cambridge: Cambridge University Press, 2007).

authority. Given this weakness, the nobility and parliament asserted themselves through their ordinary practices.

James I was keen to reverse this trend. Prior to becoming King of England, James ruled Scotland as James VI, where he presented a much stronger theory of Divine Right and monarchical supremacy.[167] In 1598, James published a theory of the divine right of kings called *The True Law of Free Monarchies*. Here he argues that, "Kings are called Gods … because they sit upon his thrown on the earth,"[168] and their authority then transcends earthly law because, "kings were the authors and makers of the Lawes, and not the Lawes of the kings."[169] Further, because kings make laws and not the other way around, "a good king will frame all his actions to be according to the Law; yet is hee not bound thereto but of his good will… ."[170] In 1599, James published another theory of kingship ostensibly written to his son under the title *Basilikon Doron*. Here he moves from a theoretical register to a policy one, advising his son to, "hold no parliments, but for necessitie of new Lawes, which would be but seldom: for few Lawes and well put in execution, are best in a well ruled common-weale."[171] This work was republished in

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[167] John Cramsie has argued that what James was articulating was not just a strong theory of divine right, but a theory of "imperial" kingship (*imperium*) that, "posited the unchallenged authority of rulers in temporal and spiritual matters within their realms." In my reading of Cramsie, what makes James I's vision different than what came before was that "their territorial *imperium* might be augmented by conquest and colonization," rather than granted in a fixed manner. John Cramsie, The Philosophy of Imperial Kingship and the Interpretation of James VI and I, in *James VI and I: Ideas, Authority, and Government*, ed. Ralph Houlbrooke, (Burlington, VT: Ashgate, 2006), pg. 43.
[168] James I, *King James VI and I: Political Writings*, ed. Sommerville (Cambridge: Cambridge University Press, 1994), pg. 64.
[169] Ibid, 73.
[170] Ibid, 75.
[171] ibid, 22.

London in 1603 and became a best seller. Thus, James I arrived on the scene in 1603 London as a very public advocate of a strong monarch based on the Divine Right of Kings and natural law against the authority of Parliament and its positive law.

The arrival of James I opened a political question and possibility: Who was going to be in charge of English taxation? And, by extension, would Parliament continue to expand its sphere of sovereignty, or would the Crown successfully assert its authority absent Roman sanction? One prominent answer to this question came from the jurist Edward Coke. In contradistinction to James I's argument that the King made the laws and therefore was not subject to them, Coke claimed that the common law was not made by a sovereign at any prior identifiable point in time, but rather existed since "time out of mind."[172] To get a sense for this dating, consider this passage from *Le Tierce Part des Reportes* (1602):

> First, they say that Brutus, the first king of this land, as soon as he had settled himself in his kingdom, for the safe and peaceable government of his people, wrote a book in the Greek tongue, calling it the Laws of the Britons, and he collected the same out of the laws of the Trojans. This king, they say, died after the creation of the world 2860 years, and before the Incarnation of Christ 1103 years, Samuel then being judge of Israel.[173]

The point that Coke is making here is not really that the English legal system is 2605 years old. Rather, it is a listing of why the law predates kingly authority. The only event it follows is *the creation of the world*. Starting from that reference point, Coke tells us that it was not authorized by Christ or any of his disciples because it predates the

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[172] Here Coke is in agreement with Davies, who writes, "Long experience, and many trials of what was best for the common good, did make the common law" (cited in Pocock 1987, 41). It was not a single legislator that produced the common law, but rather the collected experience of the English people.

[173] Quoted in Wooton (1986), pg. 144.

Incarnation by 1103 years. Further, it was created during the days of Samuel, the last of the judges to govern Israel who crowned the first two kings.[174] Put differently, kings had not yet been Divinely authorized to make law yet so the law clearly predates kings. Brutus' lawbook was not a creation, but a collection of Trojan laws. This identification of the British common law with the Trojans places it outside of the historical world and instead locates it in the world of myth. By denying an identity to the common law's authority Coke denies James's claim that Kings were not subject to the law. What Coke sets up here is a counterargument to any strong theory of the divine right of kings.

Thus James I took the English throne in 1603 in a crisis of authority. He had laid out a very strong case that his power as king was not limited by the law. Moreover, being a Scot, he represented the Roman law of his homeland that emphasized the authority of the ruler against the common law that the English believed contained protections against the King's authority.[175] Against James, Coke made the argument that even the king was subject to legal limitation. He argued that some rights – to a trial, to speak freely in Parliament, against self-incrimination – were, as Pocock puts it, "in some way immune

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[174] James also styled himself alternately a modern Solomon who was a fount of wisdom and peace for his people, as well as a modern King David whose Psalms impart practical advice and royal counsel. John King has argued that David took primacy over Solomon in both his influence over James as well as his enduring legacy (James I and King David: Jacobean Iconography and Its Legacy, in *Royal Subjects: Essays on the Writings of James VI and I*, ed. Daniel Fischlin and Mark Fortier (Detroit: Wayne State University Press, 2002): 421-423.) If King is right about James's affinity for David as a model, there may be another layer of meaning to Coke's argument. The story of King David is told in the Biblical *Book of Samuel*, whose authorship is traditionally attributed in part to Samuel. Coke's appeal to the figure of Samuel here might then not only be an argument that the common law predates kingly authority, but that it came from the age in which David was anointed King of Israel. Using Samuel as a marker for the common law then draws attention to its seniority over the House of David that James wished to emulate.

[175] Lockyer (2005), pg. 253.

from the king's prerogative action."[176] This was, in the first instance, a conflict over whether or not the English people were going to live under a sovereign monarch or an ostensibly representative parliament; it was a conflict over who was going to be in charge. Yet, it was also a conflict over how authority could be publically legitimated. James looked to supernatural authorization to legitimate his office.[177] Coke looked to English tradition and practice.[178]

b) The Tension, Unresolved

The conceptual tension between James and Coke outlived them both, and it animated the tumult and aftermath/reconstruction of the Civil War. As discussed above, both James and Coke staked out their respective positions early in their relationship, and the years that followed were characterized by a set of sharp disagreements that further elaborated their points of disagreement. Two particular cases illustrate how Coke continued to articulate a theory of procedurally limited government, while James worked

[176] Pocock (1987), pg. 46.

[177] As time went on James ratcheted up his claims. In 1610 he claimed in a speech to parliament that, "kings are not only God's lieutenants upon the earth, and sit upon God's throne, but even by God himself they are called gods. […] Kings are justly called gods for that they exercise a manner or resemblance of divine power upon earth. For if you will consider the attributes to God, you shall see how they agree in the person of a king. God has the power to create, or destroy, make, or unmake at his pleasure, to give life, or send death, to judge all, and to be judged nor accountable to none; to raise low things, and to make high things low at his pleasure, and to God are both soul and body due. And the like power have kings: they make and unmake their subjects; they have the power of raising and casting down, of life and of death; judges over all their subjects, and in all cases, and yet accountable to none but God only" (in Wooton 1986, 107).

[178] Interestingly, although Parliament was an elected body, I do not find them making claims to legitimacy through their role as representatives of the people or from the procedure of elections.

to recapture the scope of papal authority by acting as universal Ordinary as the Pope once had in England. Mark Kelman, a founder of the Critical Legal Studies movement, has noted of the conflict between James I and Coke that, "early seventeenth-century common law is the source of the deepest principles to which we return in politically healthy times."[179] Political health here is not indicative of things running smoothly or conflicts being resolved efficiently, but rather the mobilization of legal principle against prerogative power.

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The office, figure, and practices of the Ordinary across time form not only a paradigm case for understanding the political terrain into which this particular account of responsibility begins, but conceptually foreshadow the chapters to come. The Ordinary was a form of canonical or church power that existed in tension with the state. Chapter Two takes up this tension by examining the territorial for of this conflict through the example of sanctuary to examine changes in the forms of political authority led to the unification of legal jurisdiction. The Ordinary governed people's lives in an everyday way: where they went, who they had romantic relationships with, and what parish they both occupied and attended. Chapter Three takes on the Ordinary's everyday concern for governance, production, and reproduction by examining how the governance of everyday

[179] Mark Kelman, *A Guide to Critical Legal Studies*, (Cambridge, MA: Harvard University Press, 1987), pg. 339. The quotation parenthetically follows his citation of Pocock.

behavior was translated through the medium of space during the draining of the Fens and the initial enclosures. The Ordinary was concerned with the maintainance, transmission, and enforcement of common expectations for behavior. Chapter Four addresses the development of new expectations for, and enforcements of, behavioral norms. The vacuum left by the decline of the Ordinary makes the particular form of the coming emergence of new practices of responsibility possible.

Chapter 2

Sacred Irresponsibility: Sanctuary and its Abolition

There were places in the geography of England where the King's law did not apply, and in 1636 Samuel Yarworth was headed toward one of them. Yarworth had convinced a man to leave his wife and child, and now he was being pursued by a group intent on making him pay up for that crime. English tradition held that if Yarworth made it to a designated church or any number of crosses around the countryside, confessed his crime to a priest, handed over his weapons, and repented, he would be safe for a time while he figured out what to do. Yarworth headed for the sanctuary at Hindon, but he was caught before he quite made it. He "recussed" himself by force, and ran to the sanctuary while his pursuers stopped at the gate.[180]

Sanctuary in England was an interesting and peculiar method of accommodating deviance. It was a practice whereby the usual mechanisms of responsibility within the community were suspended in order for the accused to have time to make things right, for tempers to cool, and for the peace to be maintained. In general, people like Yarworth who feared punishment could flee to designated churches where, for a period of time, they could take refuge while working out a settlement with their accusers. Those who could not work out a settlement were offered safe passage to the sea and the opportunity to go into exile. The outcome of Yarworth's story is lost, but it is very likely that he

[180] Charles Cox, *The Sanctuaries and Sanctuary Seekers of Medieval England* (London: G. Allen & Sons, 1911), pgs. 329-330.

either made a monetary settlement with his pursuers, or he left England for the Continent. His ability to make it to a sanctuary likely changed everything for his fate since it shielded him from both the justice of the mob and the justice of the King.

The mechanics of sanctuary demonstrate remarkable continuity across time, both in practice and justification. Karl Shoemaker has traced the first legal articulation of sanctuary to Book 16 of the Theodosian Code and the Codex Justinianus 1.12.2, both of 409. The Codex orders that, "no one be permitted to drag away those who have fled to sacrosanct churches," and in 419 later the geographic space was extended to fifty paces beyond the doors of the church.[181] Imperial edicts of 431 and 432 spelled out the provisions of sanctuary further, and they included a minimal but new protection of slaves from their masters. Violation of sanctuary was also categorized with the most serious offenses, punishable by death.[182]

The Roman justifications for sanctuary were rooted in conceptions of benign sovereignty and *humanitas* in a chaotic and cruel world. The law of 419 described sanctuary seekers as those who, "flee from the violence of cruel fortune and choose the protection of the defense of the churches."[183] Sanctuary is a protection against "fortune," a category that connotes both a lack of human intention and agency as well as supernatural intervention. Under such conditions, *humanitas*, or civilized kindness, was the appropriate response. This civilized kindness was sanctioned by the benign sovereign and carried out by priests. For example, the edict of 432 required that priests act as

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[181] Quoted in Karl Shoemaker, *Sanctuary and Crime in the Middle Ages* (New York: Fordham University Press, 2011), pgs. 39-40.
[182] Ibid, pgs. 41-42.
[183] Ibid, pg. 40.

intermediaries between masters and slaves seeking sanctuary to insure that slaves who left sanctuary were returned to their masters, "without any lingering spirit of ire."[184] In a world characterized by fortune rather than agency and intention, sanctuary provided a space of protection sanctioned by benign sovereignty and a spirit of *humanitas*.[185]

The English sanctuary Yarworth fled to twelve hundred years after the Roman codification of the practice bore startling resemblance to its ancient predecessor: sanctuary was a spatially defined practice of exemption from punishment for a limited duration, characterized by priests acting as intermediaries between the accused and their accusers. Yet, for the external similarities, the justifications for sanctuary were eroding as "fortune" was replaced by agency as an explanation for events in the human world. In the next section we turn to different ways people have understood sanctuary's justification and demise, and I will elaborate the relationship between the decline of fortune and the abolition of sanctuary.

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[184] Ibid, pg. 42.

[185] Even though the right of sanctuary was promulgated as Rome was leaving England, it is not surprising that English practice developed along the Roman model since the laws and edicts were likely an expression of existing practice aimed at standardization rather than innovation. It is also likely that there were formal legal statements of sanctuary rights going at least as far back as the 390s, although those sources no longer survive (See Shoemaker, pgs. 38-39). For example, Norman Trenholme traces sanctuary in Christian churches to Constantine's Edict of Toleration of 313, and Charles Cox cites a 392 law from Theodosius the Great (Trenholme, pg. 304; Cox, pg. 3). Further, many of these principles found their way into canon law governing England until the Reformation, and which remained influential significantly later. See Richard Helmholz, Canon Law in Post-Reformation England, in Canon Law in Protestant Lands, ed. Helmholz (Berlin: Duncker and Humblot, 1992), pgs. 203-221. In statute, sanctuary was protected in England by statute from 597, meriting a place in Ethelbert's first code of Anglo-Saxon laws (Cox, pg. 6).

I. Sanctuary Narratives

The explanation of sanctuary's collapse tends to be intertwined with narratives of its existence, of which there are three. The first tells a story of nature and human nature. The second focuses on the process of developing legal processes and technologies. The third is a narrative of church, the modern state, and secularization. I set out each below, and explain why I find the first and third compatible and compelling, but the second lacking.

The traditional sanctuary narrative is that it arose from a medieval understanding of nature, human nature, and the human place within the natural order, an understanding that changed in early modernity and removed the theoretical justification for a sanctuary right. Thomas John de' Mazzinghi laid out this narrative in *Sanctuaries* (1887), where he argued that religious sanctuary is one type of sanctuary among others that provide a common general purpose of sheltering humans against happenstance harm. He notes that in the alpine regions of Switzerland there are shelters for travelers to protect them from storms and avalanches, and in Italy there are enclosures that provide humans with protection from wild animals or driven herds. The goal of such shelters, he argues, is to shelter humans from natural threats that they are unable to control or avoid due to their unpredictability. The relations among humans, he further argues, occasionally take on the character of an avalanche, a wild beast, or a driven herd, and sanctuary in churches – like an avalanche shelter – can protect human life until the storm has passed. He writes that,

> It is not only in the physical world that storms, hurricanes, and whirlwinds exist and during which shelter is sought: there are phenomena in the nature of man

> more fearful, more appalling: there is the storm of headstrong anger uncontrolled until it becomes uncontrollable: there is the hurricane of revenge, the whirlwind of sensual passion, and the avalanche of ambition. What is our safeguard against these?[186]

Mazzinghi argues that when the relations between humans begin to resemble the human relation to a natural disaster, sanctuary within a church is the last and most effective resort.

The second explanation is not incompatible with the first, but its focus is on the social function of sanctuary rather than its justification. Sanctuary, this position holds, preserved the peace by forestalling the dispensation of private justice and provided the space for negotiating a peaceful settlement to a crime, offense, or harm. Norman Trenholme argues that, "to the Church and religion alone could men look for protection from murder and violence disguised under the name of private justice."[187] Charles Cox echoes this position, noting that sanctuary originated in societies where private vengeance was common practice.[188] Underlying this position is the idea that the existing legal system was inadequate and needed to be augmented by sanctuary privileges in order to preserve the possibility of justice and minimize violence insofar as possible. To put it differently, legal institutions are an inadequate defense against the natural human tendency to act violently and unjustly in moments of passion.

A particular variety of this explanation has been staked out by Richard Helmholz and is worth special note. Helmholz argues that sanctuary often served the purpose of

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[186] Thomas John de' Mazzinghi, *Sanctuaries* (Stafford, England: Halden & Sone, 1887), pg. 5.
[187] Norman Trenholme, *The Right of Sanctuary in England* (University of Missouri, 1903), pg. 1.
[188] Cox (1911), pgs. 1-2.

stabilizing the developing public monopoly on justice by providing political asylum and forestalling the royal ability to take private vengeance outside of the legal system, thereby undermining the legal system's claim to the monopoly on doing justice in a way that would have trickledown effects. He writes that, "even the greatest of the late medieval kings did not always resist the temptation to take private vengeance upon their enemies. Lesser men sometimes followed royal bad examples. When this happened, sanctuary offered the chance for tempers to cool and mediation to be attempted."[189] In Helmholz's view, sanctuary prevented the king from indulging in private vengeance that would set a bad precedent, and such prevention of the privatization of violence served to reinforce the courts as the exclusive forum for justice.[190] From this interpretation, we can understand sanctuary playing a role in sheltering the weak from the furry of the powerful, and in protecting "lesser men" (as Helmholz puts it) from their own inclinations toward vengeance.

One explanation for the abolition of sanctuary that is compatible with these first two explanations for its existence (uncertainty and social ordering) is that human relations came to be understood in less chaotic terms – social disagreements were interpreted less like natural disasters that came suddenly upon the innocent – and the legal processes for dealing with harms were improved, asserted, and respected in a way

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[189] Helmholz, *The Ius Commune in England* (New York: Oxford University Press, 2001), pg. 40.

[190] It strikes me as a bit counterintuitive that removing cases from common law jurisdiction through the invocation of sanctuary would actually legitimize the common law courts as the exclusive legal forum. This tension presupposes that common and canon law forms of authority are necessarily in conflict with one another, and later in this chapter I address the possibility that conflict may not have been a driving narrative in their relationship.

that headed off the vigilante justice that pursued people to sanctuary. Once a context of rationalized human behavior and legal processes had been established, sanctuary's social respect declined as it sheltered only the most blatant and egregious criminals and debtors who were clearly on the wrong side of the law. This explanation of the abolition of sanctuary will be defended later in this paper, but before turning to that explanation I want to contrast this explanation with a common explanation that I think is inadequate, namely secularization.

II. The Conflict-Secularization Thesis

One explanation for the abolition of sanctuary is that sanctuary was indicative of the Church as a rival legal institution to the State, and that as the State gained power it successfully abolished the Church's claim to legal exceptionalism. Cox points us in this direction when he writes that, "In considering the question of sanctuary right through these pages, it must always be borne in mind that the whole matter involved a perpetual conflict between the State and the Church."[191] The idea that sanctuary was a point of perpetual conflict between Church and State because it represented a geographic space where Church authority trumped State authority has been adapted and often taken as a given by contemporary scholars studying modern sanctuary and seeking to connect it with medieval sanctuary in order to mobilize the past as precedent for the present. In this section I lay out why sanctuary did not represent a perpetual conflict between Church and State, how sanctuary's abolition is an inexact fit with the secularization narrative, and

[191] Cox (1911), 17.

instead how the post-Reformation continuance of sanctuary served the interests of both Church and State (both of which were headed by the Crown).

Hendrik Spruyt has argued that the "sovereign state" emerged out of a conflict – militarily, intellectually, and economically – between a variety of alternate modes of organization that included theocratic empire, the city-state model, the city-league model, and feudalism. Theocratic empire was overtly incompatible with the concept of a sovereign state, because it did not recognize clear limits to its power. "The empire was not," according to Spruyt, "simply a secular political authority that controlled a certain area. It claimed jurisdiction over the Christian community as the secular arm of God."[192] The consolidation of the state through warfare and further institutional mimicry, exit, and learning had as a part the denial of the Church's jurisdiction and the claim to sole and exclusive jurisdiction within its borders.[193] The conflict-secularization thesis is here exemplified by Spruyt's argument that the church and the secular government were in conflict at the beginning of modernity in Europe, and the secular government emerged from that conflict victorious in the form of the sovereign state that denied the church's jurisdiction.

John Sommerville extends the conflict-secularization thesis to the early modern English case in a particularly nuanced and thoughtful manner, and his work will reappear later in this chapter. He argues that the secularization process began with spaces like monasteries and sanctuaries; manifested itself in the ordinary aspects of everyday life like time, play, and language; overcame technology and work; and ultimately became the

[192] Spruyt (1994), 53.
[193] Spruyt (1994), 154; 171-177; see Chapter 8 generally.

presumed basis of art, politics, power, personhood, and science. This process of removing the church from visible life had a material basis and took a century and a half to fully overtake the ideational realm.[194] For Sommerville, the church was indeed in conflict with the state, but the state's victory was slow. "Sanctuary for crime or debt," he notes, "was a special provocation to the state," and at rough points its assertion was "a notable triumph" for the church.[195] The abolition of sanctuary is the first major step in the process of English secularization for Sommerville.

III. Divergent Understandings of Secularization

What Sommerville describes as early modern English secularization should be differentiated from contemporary understandings of secularization. Sommerville's narrative focuses on secularization as an outcome of conflict between church and state and serves primarily as an historical description of a single case. In contrast, many contemporary theories of secularization are comparative and focus on the social dynamics of secularization. In the next few paragraphs I describe modern theories of secularization, before turning back to Sommerville to understand what his focus on conflict in secularization reveals about early modern England.

The English sociologist Steve Bruce summarizes what he sees falling under the banner of secularization in three points:

> (a) the declining importance of religion for the operation of non-religious roles and institutions such as those of the state and the economy; (b) a decline in the

[194] C. John Sommerville, *The Secularization of Early Modern England: From Religious Culture to Religious Faith* (Oxford University Press, 1992), pg. 144.
[195] Sommerville (1992), pg. 30.

> social standing of religious roles and institutions; and (c) a decline in the extent to which people engage in religious practices, display beliefs of a religious kind, and conduct other aspects of their lives in a manner informed by such beliefs.[196]

Bruce's categorization is perhaps familiar – state, society, individuals – and it is shared by most of the participants in the debate.[197] Each of these divisions is intelligible to a modern reader, and it seems plausible that each category can have a different inclination toward religiosity than the other two.

A significant conceptual division exists, though, over whether these categories have a necessary relationship with each other, or whether they can fluctuate independently. Bruce falls on the side of those who argue that, "there is a very clear implication that three things are causally related: the social importance of religion, the number of people who take it seriously, and how seriously anyone takes it."[198] He paints a picture in which the Protestant Reformation began the process of secularization that influenced society through the three strands of individualism, the capitalist economic order, and the rationality of the scientific worldview.[199] For Bruce, religosity has individualistic, capitalistic, and scientific strands, as he illustrates using the English case. While it is possible to conceptually distinguish between secularization on state, societal, and individual levels, Bruce argues that they are positively correlated in practice.

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[196] Steve Bruce, *God is Dead: Secularization in the West*, (Malden, MA: Blackwell, 2002), pg. 3.
[197] John Sommerville devoted an article to clarifying dimensions and definitions of secularization, and he argues that secularization can be thought of in terms of structures, institutions, activities, and mentalities. See Sommerville, Secular Society/Religious Population: Our Tacit Rules for Using the Term 'Secularization,' *Journal for the Scientific Study of Religion*, June 1998, pgs. 249-253.
[198] Ibid.
[199] Ibid, pg. 4.

Rodney Stark has been the standard bearer for an argument that accepts the correlation of state, social, and individual religiosity, but the argument rejects the notion that secularization is happening in any orderly or linear fashion. These two points need a bit of elaboration. For Stark, the "issue is not a narrow prediction concerning a growing separation of church and state." Asking a question about church and state without addressing questions of personal belief is flawed because religiosity at all levels is linked in a codependent and mutually reinforcing set of power dynamics: "if the churches lose power, personal piety will fade; if personal piety fades, the churches will lose power."[200] For this argument, personal piety is the appropriate measure of secularization, a theory that predicts a "marked decline in the religiosity of the individual."[201] The other half to this argument is that there has been no consistent decline of religiosity of individuals since the Reformation; that pre-Reformation Englishmen in particular were far less religious than conventionally thought; and that contrary to the secularization thesis trend lines in religious participation have either held steady or even increased in Europe since the middle ages.[202] Thus, the decline of individual piety taken as a necessary part of secularization has not occurred and therefore the secularization thesis is false.

While Bruce and Stark disagree about whether or not secularization is occurring, they agree in their rejection of the liberal notion that the practices of religion on state, social, and individual levels are separable. In that sense they are both non-liberal or anti-liberal since their arguments are premised on rejecting Locke's argument in the Letter

[200] Stark, Secularization, RIP, *Sociology of Religion*, 60.3 (1999), pg. 252.
[201] Ibid, 253.
[202] Ibid, 254-255.

Concerning Toleration that magistrates are extremely ineffective enforcers of religious orthodoxy because the best the magistrate can do is enforce behavior, he cannot change belief. A century later Thomas Jefferson famously quipped in his *Notes on Virginia* that there was no reason for the state to get involved the enforcement of religious conformity because, "it does me no injury for my neighbor to say there are twenty gods or no gods. It neither picks my pocket nor breaks my leg." The two strands of the secularization debate that I have discussed above reject the notion that state, social, and individual religiosity are cleanly separable.

Another strand of the secularization debate accepts the severability of state, social, and individual religiosity from one another, and reveals a more nuanced and useful conceptualization of religious transformation in seventeenth century England. Philip Gorski argues that the traditional understanding of secularization, in contrast to the theory of general and unified decline described above, held that religious and non-religious institutions have become increasingly differentiated over time so that trends in one area of religiosity (state, society, or individual) have less and less of an effect on the other areas. He writes that, "Although there are minor differences in emphasis and detail, most other theories of secularization tell an essentially similar story: The original unity between church and state in classical societies gives rise to a loose symbiosis during the Middle Ages and then to separation and subjugation of the church in the modern era."[203] Secularization has not always occurred evenly across state, society, and individuals, and

[203] Gorski, Historicizing the Secularization Debate: Church, State, and Society in Late Medieval and Early Modern Europe, ca. 1300 to 1700, *American Sociological Review*, 65.1 (2000), pg. 140.

there is for him – and the conventional/mainstream position he is summarizing - no logical or practical necessity linking a decline in one area to a decline in the others. They can and do in practice fluctuate with some degree of independence.

Peter Laslett and John Sommerville have both argued in this vein that practices of religion, individual religious piety, and the religious environment were uneven and shifting in late medieval and early modern England, and it is precisely this dynamic and shifting set of relationships that can explain some important aspects of sanctuary. Sommerville argues that we can think of the medieval period as an "Age of Religious Culture," by which he means that religion was a total paradigm through which people understood the world. There was no alternative to religion, only a variety of types or conceptions. "It was the situation," he writes, "of people who literally could not think or express themselves outside of a religious idiom. There was plenty of heresy, but it took religious forms. For even resistance to religion could only take religious forms [... since...] one could counter religion only with alternative religion."[204] Sommerville argues that there was no conceptual language for a secular discourse at all.

Laslett's work should act as a caution, though, against equating a religious worldview with what moderns might think of as Puritan piety, because the religiosity of the medieval period looked very different. In what might appear to be contradictory behavior, English church membership was universal, but attendance was low. There was a church court charged with prosecuting adultery, but the same church routinely blessed the marriages involving a prenuptial pregnancy. In contrast to a strict religious code of

[204] Sommerville (1992), 102-103; Sommerville (2002), 362.

sexual conduct, Laslett estimates that during the seventeenth century in England 16-29% of all marriages involved a prenuptial pregnancy.[205] What was formally forbidden was quickly forgiven and forgotten: Laslett tells the story of a young man who's fiancé was pregnant at their marriage, but within two years of their marriage he had been appointed churchwarden where he was responsible for reporting on others' sexual lives.[206] Further, it would be incorrect to assume that such laxity of practice in the face of expressed belief was limited to particular areas or low rungs on the social ladder. "The living representatives of law and order, of high social life as well as the ideals of religion," Laslett writes, were full of "fornicating, adulterous, whore-mongering males," and he provides prominent examples to illustrate his point.[207] Yet, for all of these impious behaviors, England was far from an irreligious place. People generally paid their tithes (with some grumbling) even if they didn't attend church, they made religious vows, they made confessions, they went on pilgrimages, and they "charmed" their fields.[208] It was, Sommerville writes, "a time in which religion consisted in assumptions, habits, customs."[209] "Religious culture," in this sense, was "too big to see."[210]

The coexistence of religion and irreligion along side one another described in Sommerville and Laslett's work demonstrates how in late medieval England the different manifestations of religiosity were uneven, in tension with one another, and yet religion was still a total paradigm. In this context, secularization was a process of beginning to

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[205] Laslett, *The World We Have Lost* (New York: Scribner, 1965), pg. 161.
[206] Ibid, 104.
[207] Ibid, 166-167.
[208] Sommerville (2002), pg. 363.
[209] Ibid, pg. 362.
[210] Ibid, pg. 368

think outside of a religious paradigm, of taking previously religious things and treating them as nonreligious. I reject the notion that secularization must occur in any unified manner across society, and instead focus this chapter on a particular temporal laggard – sanctuary – whose persistence and capacity to irritate both stand in need of explanation.

IV. Abolishing Sanctuary

If the conflict-secularization thesis is accurate, then what explains the maintenance of sanctuary between 1532 and 1624? And especially from 1603 to 1624 under James I? And why, even after James I's formal abolition in 1624, was sanctuary allowed to continue for decades? We might put the question somewhat differently. If indeed the state was aiming to minimize church power and sanctuary was indeed an especially prominent form of that power, why was it sanctioned by the crown for decades? The conflict-secularization thesis does not provide a clear answer to this question. In this section I question the characterization of sanctuary as a "perpetual conflict" between church and state, instead arguing that institutional momentum and internal state politics led to alliances for which sanctuary was useful. The partial breakdown of those alliances under James I reduced sanctuary's political usefulness, allowing jurisdictional conflicts to come to the fore. A colorful characterization of sanctuary from T.M. Lambert will help us to think of the question another way:

> Sanctuary, to take a zoological analogy, is rather like the kiwi (a small flightless bird native to New Zealand): it evolved in a particular environment, but that environment then changed dramatically, threatening it with extinction and prompting its careful preservation.

If sanctuary developed naturally during the medieval period only to find itself unsuited to the environment of modernity, who was it that preserved it and why? The answer is that James I preserved it because it served his political purposes. Not only did he preserve it until 1624, his successor, Charles I, tacitly consented to its observance in a number of places and for certain offenses right up until his death in 1649. In fact, sanctuary for debt was observed in some places until official abolition in 1697.[211] When looking for an explanation for sanctuary's post-Reformation longevity, conflict between church and state provides less of an explanation than alignment of those supposedly conflicting interests. When we talk about the secularization of sanctuary in England, it is helpful then to think about it as a mobilization of the previously sacred for the purposes of the state.

Recall from the last chapter that James found himself in conflict with the English bench, and particularly with Sir Edward Coke, over the extent of royal prerogative and the scope of legislative authority. Even before assuming the throne in 1603, James I had publically articulated a nearly unlimited theory of Divine Right while Coke had argued that there was an ancient constitution predating any Divine Right whose principles were not subject to the king's prerogative.[212] Coke's position was originally the minority view, both in circles of power and among legal practitioners.[213] The prevailing school of thought at Oxford and Cambridge was a particular form of natural law theory that

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[211] James Hertzler, The Abuse and Outlawing of Sanctuary for Debt in Seventeenth Century England, *The Historical Journal*, Sept. 1971, pg. 467.
[212] See Pocock (1987), pgs.45-47.
[213] Harold Berman, The Origins of Historical Jurisprudence: Coke, Selden, Hale, *The Yale Law Journal*, May 1994, pg. 1670.

understood the sovereign power to be in harmony with the natural order that revealed its unlimited nature in which the sovereign was accountable only to God.[214] Not only was this the educational tradition producing legal professionals, it was the school of thought from which King James drew important representatives. Most prominent among these representatives was the Attorney General, Francis Bacon, who was a strong supporter of unlimited monarchy.[215]

In 1608, the disagreement between James and Coke almost descended into personal violence. James desired to hear a case about tithes himself, while Coke argued that the King could not act as judge because he did not know the Common Law. James's reaction was not warm. According to Sir Julius Caesar's notes of the meeting, James responded to Coke that, "the King maketh Judges and Bishops," elevating himself above both the bench and the church.[216] Coke appears to have been taking a position against Ecclesiastical jurisdiction, which moved the King to great anger. In a letter from Sir Rafe Boswell to Dr. Milbourne about the incident, Boswell writes that Coke, "prayed his Majesty to consider the Eccesiasticall Iurisdiction was forren. After which his Majestie fell into that high indignation as the like was neuer knowne in him, looking and speaking fiercely with bended fist, offering to strike him etc."[217] Coke had made direct challenges to the King's authority for years, and yet it was Coke's presentation of Ecclesiastical jurisdiction as a foreign influence on the English legal system that most moved the

[214] Berman (1994), pgs. 1670-1671.
[215] Ibid, 1670.
[216] Quoted in Usher (1903), pg. 669.
[217] Ibid, 669-670.

James's emotions. Clearly, James was attached to the remnants of the Ecclesiastical legal system.

By 1610, the dispute between James and Coke had escalated in the public view. In a speech on March 21st before parliament, James called himself *lex loquens*, a "speaking law."[218] He claimed directly to the elected assembly that his word was law, and that he thought it was "sedition in subjects to dispute what a king may do in the height of his power."[219] Coke responded strongly later that fall in two famous instances. The first came on September 20th, when Coke and a number of other judges were summoned to a conference of the Privy Council to issue an opinion about whether the King had the authority to restrict building in London and also whether he could regulate the trade in starch used in ruffled collars. To which Coke eventually replied, "that the King cannot change any part of the Common Law, nor create an Offence by his Proclamation, which was not an Offence before, without Parliament," and further that, "the King by his Proclamation, or other waies, cannot change any part of the Common Law, or Statute Law, or Customs of the Realm."[220] Coke's justification for this limited understanding of royal power is historical, arguing that indictments are always framed in terms of a violation of law, statute, or custom, but never ever in terms of the violation of a royal proclamation.[221] Here Coke turns attention away from principles of Divine Right

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[218] James VI and I, A Speech to the Lords and Commons (1610), in *Divine Right and Democracy*, ed. D. Wooton (New York: Penguin, 1986), pg 108.
[219] Ibid, 109.
[220] Coke, *The Selected Writings of Sir Edward Coke, Volume 1* (Indianapolis: Liberty Fund, 2003), pgs. 487-488.
[221] Ibid, 488. Here Coke writes that the King, "by Proclamation cannot make a thing unlawful, which was permitted by the Law before: And this was well proved by the

to historical precedent in order to present a strictly limited view of the King's prerogative. Steven Sheppard concludes that this simple move "was one of Coke's most significant attacks on royal prerogative."[222]

Also in the fall of 1610, Coke took a seemingly everyday case about medical licensure and used it as a platform to announce a doctrine of judicial review over Acts of Parliament. In making his decision he writes that, "the Common Law doth controll Acts of Parliament, and sometimes shall adjudge them to be void; for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be preformed, the Common Law will controll it, and adjudge such Act to be void."[223] Thus, in the fall of 1610 Coke inverted the structure of authority James assumed to exist by Divine Right. Instead of a hierarchy of the King delegating his unquestionable power to the subordinate Parliament and Judiciary, Coke argued that the ultimate check on all of government – including the King – was the Common Law as it was interpreted by the judiciary.

To a king who had recently survived an assassination plot and was in the midst of dealing with an uncooperative Parliament, Coke's theory of Common Law supremacy likely appeared a threat, and he confronted it on interpretive, administrative, and jurisdictional fronts. First, in response to Coke's historical theory of legitimacy, James

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ancient and continuall forms of Indictments, for all Indictments conclude, *Contra legem & consuetudinem Angliae* [Against the law and custom of England], or *Contra leges & statua, &c.* [Against the laws and Statutes, etc.] but never was seen any Indictment to conclude *Contra Regiam proclamationem* [Against the royal proclamation].

[222] Ibid, pg. 486.

[223] Ibid, 275. For the development of this concept in English jurisprudence, see Allen Dillard Boyer, Understanding Authority, and Will: Sir Edward Coke and the Elizabethan Origins of Judicial Review, *Boston College Law Review*, 1998, pgs. 76-82.

furthered his interpretation of Biblically ordained Divine Right. In 1611, he authorized the release of the King James Version of the Bible which, as explained in the last chapter, presents a very strong interpretation of kingly authority. Of course, making himself the authorizer of the Bible in English also underpinned his religious authority since every English subject who opened a Bible would see the name of King James before getting to God.

Second, in 1613 James (acting on advice from Bacon) gave Coke a "promotion" that actually reduced his income and power. On paper, Coke went from being Chief Justice of the Court of Common Pleas to Chief Justice of the King's Bench. Although this move appears to be a promotion, it was actually a demotion made, as Steve Sheppard puts it, "in an effort to silence him."[224] As we will later see, it did not work.

Third, James maintained sanctuary rights, which had the effect of weakening the judiciary. Daniel Klerman has argued that courts were in competition with one another to hear cases because a regular caseload provided prestige and court fees paid a large portion of the judges' incomes.[225] Different jurisdictions were in competition with one another to hear cases, and tended to be pro-plaintiff since the plaintiff chose the venue.[226] Sanctuary rights reduced the number of cases heard by the common law courts, starving them both of authority and financial resources. The intergovernmental political role of sanctuary should be emphasized and likely contributed to James's strong attachment to Ecclesiastical jurisdiction.

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[224] Coke (2003), pg. lii.
[225] Daniel Klerman, Jurisdictional Competition and the Evolution of the Common Law: A Hypothesis, *Australian Journal of Legal History* (2004), pg. 2.
[226] Ibid, pgs. 6-7.

In the summer of 1616, the issue came to a head. James ordered Coke to forego his usual circuit on the assize courts and instead spend his time reforming his *Reports* that contained his legal doctrines. At the same time, James took to Parliament to continue asserting that his authority was superior to the bench. In doing so, he returned directly to the Old Testament, and likened himself to Moses:

> Kings are properly Iudges, and Iudgement properly belongs to them from God: for Kings sit on the Throne of God, and thence all Iudgement is deriued. In all well setled Monarchies, where Law is established formerly and orderly, there Iudgement is deferred from the King to his subordinate Magistrates; not that the King takes it from himself, but gives it vnto them. [...] after Moses had gouerned a long time, in his owne person, the burthen grew so great, hauing none to helpe him, as his father in law comming to visite him, found him so cumbered with ministring of Iustice, that neither the people were satisfied, nor he well able to preforme it; Therefore by his aduice, Iudges were deputed for easier questions, and the greater and more profound were left to Moses: And according to this establishment, all Kings that haue had a formall gouernement, especially Christian Kings in all aages haue gouerned their people, though after a diuers manner.[227]

James argues that there is a Biblical precedent going back to Moses that Kings delegated the power of judging "easier questions" to judges, while retaining the ability to intervene in hard cases and judge himself.[228] This understanding of royal authority denies that the judiciary is the final word on legal interpretation as Coke had argued, and instead asserts that the king's word is always the final one. Meanwhile, Coke came back with five small

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[227] King James VI and I, *Political Writings*, ed. J. Sommerville (Cambridge University Press, 1994), pg. 205.

[228] The question of judges and kings is a perennial problem for James, and as I noted in the last chapter he and Coke spared over Old Testament interpretation regularly. The problem for James in this instance is that, chronologically, the Israelites were ruled by judges prior to the anointing of King David. On its face, it would appear that the rule of judges predated the rule of kings. James's move is to take Moses as a king-figure, thus setting the precedent of royal delegation prior to the rule of judges. This is a creative and twisted interpretation since Moses is never referred to as a "king," and David is presented as the (later) first king.

revisions, and refused to alter his assertion of judicial review in any way. As Roger Lockyer has put it, Coke "had claimed an authority co-equal and in some respects superior to the King's. It was a claim that James could never accept."[229] On November 14, 1616, James removed Coke from office.

After Coke's removal, James had asserted his authority to hear cases in person and rule according to his own reason. Under these new conditions, we might expect James to further consolidate his jurisdiction by abolishing all sanctuary rights, but he did not. Why? Sanctuary fulfilled two functions for James. First, its maintenance gave the appearance of respecting a Catholic tradition during the Spanish Match. Second, it allowed James to avoid responsibility for judging cases of debt and capital offences, both of which were deeply unpopular. These advantages offered James more in potential political gain than consolidation of his power over the church could potentially provide.

The Spanish Match can be thought of as an on again, off again period of English-Roman reapproachment. The process began in 1614, when the Spanish proposed marriage between their child-princess Maria Anna and James's son Charles. Given that both were young children at the time of the proposal, negotiations between England and Spain were very slow moving at first. In 1618 though, the match took on new urgency as the Thirty Years War broke out and pitted Protestants against Catholics. James had family and national interests directly involved on the Protestant side, and the heavily Protestant Parliament pushed hard for England to get involved in the war. James, aware that England could not afford a war and naturally inclined toward negotiation rather than

[229] Roger Lockyer, *James VI and I*, (New York: Longman, 1998), pg. 48.

bloodshed, chose instead to pursue the Spanish Match as a way to create a Protestant-Catholic alliance that would bring peace to Europe.[230]

Much of the negotiation over the Spanish Match had to do with the place of Catholic practices and traditions in England, of which sanctuary was a remaining part.[231] The Spanish had laid out a set of demands that included that applied to English Catholics generally and the Spanish queen in particular. They demanded that the English not enforce their laws against Catholicism and that they eventually permit the public practice of Catholicism again in England. The Spanish queen in particular would live publically as a Catholic, the royal children would have Catholic baptisms, that the children be free to choose whether they would be Protestant or Catholic, and that if the heir chose to be catholic that would not bar him from the throne.[232] The place of Catholicism in England

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[230] James stands out as an English monarch widely characterized by historians as peace loving. Lockyer writes of James that, "Because he was a peace-lover by nature, and was appalled at the idea of Christians fighting each other, he longed to preserve the uneasy equilibrium between protestants and Catholics that had been established on the continent in the opening years of the seventeenth century" (Lockyer [2005], pg. 268). Irene Carrier focuses on his track record and writes that, "James persistently opted for diplomatic solutions to international crises; dynastic marriages were a method of promoting harmony. *James VI and I: King of Great Britain*, (New York: Cambridge University Press, 1998), pg. 129. For an extended review of James's reception, see Ralph Houlbrooke, James's Reputation, 1625-2005, in *James VI and I: Ideas, Authority, and Government*, ed. R. Houlbrooke, (Burlington, VT: Ashgate, 2006), pgs. 169-190.

[231] Richard Helmholz notes that although debt sanctuary had a very long and established tradition in medieval Europe, its observance was not clearly commanded by the canon law. Rather, it is entirely possible to read the canon law as forbidding sanctuary for debt since sanctuary seekers were required to make recompense to victims (Helmholz [2001], pgs. 71-72). T.B. Lambert concludes that, "there was no ecclesiastical reason why English sanctuary should have taken the form that it did" (Lambert [2012], pg. 119). Calling debt sanctuary a catholic tradition is correct in reference to its practice, but that should not be confused with the letter of canon law.

[232] Alan Stewart, *The Cradle King: The Life of James VI & I, the First Monarch of a United Great Britain*, (New York: St. Martin's Press, 2003), pg. 295.

became a key bargaining chip, and when the negotiations were going well James relaxed enforcement of legislation against Catholicism.[233] James also reached out to Pope Gregory XV with a letter stressing their common faith and urging the Pope to use his position and authority to reestablish "a firm and unchangeable friendship" between Catholics and Protestants.[234] Under these conditions where the place of Catholic traditions in England played such a prominent role and James so strongly desired to negotiate a peace on the Continent, James chose not to attack sanctuary rights.

The second reason to continue sanctuary was to insure the resolution of felony cases where an incentive to prosecute was lacking, and avoid involvement with unpopular collection proceedings in debt cases. I will explain the felony cases first and then turn to debt cases. Early seventeenth century did not have a modern police and penal system, so the options for resolving serious cases were limited and the incentive for actors to pursue cases also circumscribed. Criminal cases were prosecuted privately, resembling what today we would think of as a civil proceeding. The prosecution of crimes therefore required a motivated prosecutor. The incentives to prosecute, though, were small since financial compensation was usually off the table. Lacking a police force and an extensive prison system, David Friedman has observed, "English courts imposed only two sentences on convicted felons; either they turned them loose or they hanged them."[235] Incarceration was primarily a short-term hold before trial that today we would

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[233] Lockyer (2005), pgs. 272-273.
[234] Letter 187, in *Letters of King James VI & I*, ed. G. Akrigg, (Berkeley: University of California Press, 1984), pgs. 384-385.
[235] David Friedman, Making Sense of English Law Enforcement in the Eighteenth Century, 2 *University of Chicago Law School Roundtable* 475 (1995), pg. 475.

think of as jailing, and occasional long term imprisonment in places like the Tower of London was limited and primarily applied to political prisoners. The only real motivation to pursue a felony case was blood vengeance, and that often was not enough reason to bring a case to court.[236]

Bringing a case to trial had significant costs. The financial costs were expected, but felony prosecution was often publically unpopular and risky. Felony offenses pursued in the common law courts were by jury, and juries were very reticent to convict of crimes punishable by death. Often juries would commit "pious perjury" by leaving out some facts, changing the facts, or even changing the charge to avoid convicting for a crime where the only punishment open to the judge was death.[237] Yet, it was not just the citizenry composing juries that was hesitant about the death penalty. J.M. Beattie has argued that there was also, "an apparent reluctance in the courts and the government to hang large numbers of offenders."[238] Between popular, legal, and political aversions to the death penalty, it appears to have been little used. Friedman has extrapolated from Beattie's records to estimate that only about 40% of those convicted of capital offenses were actually hanged, and of those initially charged only 16% were executed. Even for an aggrieved relative with a strong desire for violent retribution, the odds of pursuing prosecution that would end in an actual hanging were very low.

When juries did return a guilty verdict and the death penalty was imposed, pressure was often on the king to pardon the convict. If Friedman's conclusions are

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[236] Friedman (1995), pg. 476-477.
[237] Friedman (1995), pgs. 480-481.
[238] J.M. Beattie, *Crime and Courts in England, 1660-1800* (Princeton University Press, 1986), pg. 12.

correct, 60% of death sentences did not actually result in a hanging, and one of the primary means that capital punishments were avoided was a royal pardon. "The King had the power to extend mercy to those who had been convicted," Beattie writes, and how he used that power was critical to the English legal system.

> The discretion that that power gave to the king enabled him to determine whether convicted offenders would be punished, and the punishments that would be imposed. It was in that form that the royal pardon came to play a central, indeed a crucial, role in the administration of the law. It was used not simply to correct an occasional miscarriage of justice or to respond to new information when a trial was concluded – as clemency might in the modern world – but as an ordinary and established aspect of the way the law was administered.[239]

When a death sentence was ordered, the king was expected to get involved. Yet, his options were limited. On the one hand, if he commuted the sentence, he risked offending the party that had pursued prosecution against the odds and prevailed. If he pardoned the criminal altogether, he risked putting a murderer, burglar, or rapist back in a community where a he might reoffend, thus reflecting poorly on the king. On the other hand, if he allowed the execution to go forward, he risked offending popular sensibilities and appearing unmerciful. The king had very little to gain from dealing with a pardon appeal, and sanctuary reduced the number of appeals upon which he had to decide. Sanctuary averted the legal process and any attendant controversy, permitted the accused to abjure the realm, and thereby insured that there would be no re-offense for which the king's pardon could be blamed. Sanctuary followed by abjurement had all of the benefits of a death sentence – the criminal was gone and could not reoffend – with none of the drawbacks of offending Christian expectations of mercy and peace. Karl Shoemaker

[239] Beattie (1986), pg. 11.

argues that this was a good situation for the king since, "sanctuary allowed medieval English late to publicize and excluded a large number of felons, while maintaining effective royal jurisdiction over a wide range of disputes."[240] Given that sanctuary resolved many conflicts that James would not benefit from involving himself in, James had an incentive to retain sanctuary privileges.

Debt litigation was another category of touchy conflicts that sanctuary helped to reduce. The extension of credit had greatly expanded in the latter half of the sixteenth century, and with it had also grown disputes over unpaid debt. By the seventeenth century debt claims constituted the bulk of common law courts' work, perhaps 80-90%.[241] The quantity of litigation did not mean it was popular, though. This sort of open conflict between citizens violated principles of seeking and maintaining peace, reconciling with one another, and being a good neighbor, and the growth in litigation was decried in both sermons and government proclamations.[242] Sanctuary for debt was also politically charged since the Puritan reformers tended to concern themselves with the situation of the debtor rather than the creditor.[243] Given that James was in a difficult financial position and was seeking new funding from Parliament continually after 1616,

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[240] Shoemaker (2011), pg. 124. See also T.B. Lambert, The Evolution of Sanctuary in Medieval England, in *Legalism: Anthropology and History*, ed. P. Dresch and H. Skoda (Oxford University Press, 2012), pg. 121.
[241] Craig Muldrew, Credit and the Courts: Debt Litigation in a Seventeenth-Century Urban Community, *The Economic History Review*, 46.1, (Feb. 1993), pg. 24 [cited as Muldrew 1993a]; Muldrew, The Culture of Reconciliation: Community and the Settlement of Economic Disputes in Early Modern England, *The Historical Journal*, 39.4 (Dec. 1996), pgs. 921-922.
[242] Muldrew (1996), pgs. 919-920.
[243] James Hertzler, The Abuse and Outlawing of Sanctuary for Debt in Seventeenth-Century England, *The Historical Journal*, 14.3 (Sept. 1971), pg. 470.

he chose not to alienate the Puritan faction through abolishing sanctuary for debt and appearing to side with creditors.

James had several reasons to continue to allow sanctuary after 1616. His desire to appear open to catholic traditions during the Spanish Match, the incentive to avoid involvement in the decision of felony cases, and the Puritan concern for debtors all are reasons for sanctuary's endurance. Its eventual destruction, then, stands in need of explanation, and it is to sanctuary's abolition that we now turn.

V. Killing off Sanctuary

The conventional story of sanctuary's demise says that it underwent "moral decay" or became prone to "abuse," and therefore it needed to be shut down in order to insure that sinful behavior was not condoned and that law and order prevailed. Often this explanation is attached to a narrative of secularization whereby sacred spaces and sacred practices were supplanted by secular spaces and secular practices. This section argues, in contrast to the conventional story, that three primary factors motivated the closure of sanctuary. First, the politics surrounding sanctuary changed, and with that political change the incentives also shifted so they no longer favored sanctuary's maintenance. Second, as capitalistic values of personal property gained currency among the general public, sympathy for debtors declined. Third, the category of accidental harm that justified sanctuary for so long narrowed both legally and in popular perception, undercutting the conceptual justification for a space of legal suspension and exception.

The conventional story about sanctuary's abolition is that it fell into disrepute. Mezzinghi, Trenholme, and Cox all mourn in their own way the abolition of sanctuary, but each also argue that abuse and "decay" motivated its demise.[244] Isobel Thornley argued that the Reformation was an opportunity where, "the widespread and acknowledged abuses of sanctuary could be brought under due control."[245] Contemporary historians have largely followed this reasoning. John Sommerville notes that, "St. Martin le Grand in London had become a refuge for unrepentant debtors and swindlers, so that any association with penance or mercy seemed strained."[246] Karl Shoemaker characterizes the privilege in the seventeenth century as, "the promiscuous availability of sanctuary for murder and theft," while Hertzler argues that sanctuary was a "burning political question" in the seventeenth century because, "to the dishonest debtor it provided the opportunity to evade arrest and judgment for flagrant abuses of credit."[247] "No longer understood as an appropriate response to a serious crime," Shoemaker writes, "sanctuary had come to be seen as a nuisance."[248] The conventional view argues that something changed in the practice and/or perception of sanctuary that made it fall out of favor.

In the past ten years there has been some effort to think beyond the conventional explanation of sanctuary's demise. One noteworthy effort to understand the process by which sanctuary fell out of favor and explain it is Trisha Olson's secularization narrative.

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[244] Mazzinghi (1887), pg. 104; Trenholme (1903), pg. 96; Cox (1911), pgs. 319-336.
[245] Isobel Thornley, *The Destruction of Sanctuary*, Tudor Studies (1924), pg. 182.
[246] Sommerville (1992), pg. 31.
[247] Shoemaker (2011), pg. 170; Hertzler (1973), pg. 469.
[248] Shoemaker (2011), pg. 25.

Olson argues that during the late medieval period the practice of sanctuary was increasingly removed from its theological justifications and/or foundations until, eventually, it lacked a coherent explanation and appeared unreasonable.[249] The theological component fell away, and what was left was what Lambert has called an, "anachronistic oddity."[250] Both Olson and Lambert treat sanctuary as a medieval institution and end their analyses with the Reformation, an endpoint that facilitates a secularization explanation. Lambert ends his article with a note of recognition that his work is incomplete and ends its analysis to early when he writes that, "In focusing almost exclusively on late medieval sanctuary's contemporary functions the current literature fails to explain its most arresting characteristics. More seriously, it obscures the fact that there are important questions yet to be asked – not just why English sanctuary, uniquely in Europe, assumed the form that it did, but also the problem of its longevity."[251] The secularization narrative does not account for the post-Reformation afterlife of sanctuary very well, and further explanation is needed.

The conventional explanation and the parallel story of secularization is not wrong so much as it is underspecified: it does not tell us what changed and for whom that made sanctuary fall out of favor in seventeenth century England. Below I argue that the political incentives around sanctuary changed for King James; that capitalistic norms and values about debt took hold both among the general population and the legal

[249] Trisha Olson, *Of the Worshipful Warrior: Sanctuary and Punishment in the Middle Ages*, 16 St. Thomas L. Rev. 473 2003-2004.
[250] Lambert (2012), pg. 143.
[251] Lambert (2012), pg. 144.

establishment; and finally that accidental harm – an ancient justification for sanctuary – declined in the scope of human events to which it could be persuasively applied.

First, the politics changed. Recall that in pursuing the Spanish Match James reached out toward Catholic figures and promised respect for catholic traditions in England, and respecting sanctuary privileges fit with that narrative. Yet, in late 1623 the Spanish Match fell apart.[252] On August 10th James wrote to Charles to command him, "either to bring quickly home your mistress," or "come without her."[253] Charles arrived back in England on the 5th of October to celebration and, as Akrigg puts it, "the acclaim of a nation that rejoiced to have King James's heir restored to them safe, single, and Protestant."[254] Charles was extremely unhappy and returned bent on war with Spain. Parliament was summoned to raise the money for war in 1624, which they did.[255] They also urged James to promise that he would enforce the laws against Catholicism in England. James, as if to show his good faith commitment, also signed an Act declaring that, "no sanctuary or privilege of sanctuary shall be allowed hereafter in any case."[256] Absent the incentive of the Spanish Match, under pressure from his son, and dealing with an anti-catholic Parliament, James quickly abolished sanctuary.

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[252] James held out hope for a successful marriage until the end of his life in 1625, and wrote directly to Princess Henrietta Maria as late as December of 1624. Charles had given up on the marriage when he left Spain.
[253] Letter 213, in Letters of King James VI & I, ed. Akrigg (University of California Press, 1984), pg. 424.
[254] Akrigg (1984), pg. 426.
[255] See Lockyer (2005), pg. 272.
[256] *Select Statutes and other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I*, ed. G. Prothero, 2nd ed. (Oxford: Oxford University Press, 1898), pg. 278.

Yet, to note that James confronted an anti-catholic Parliament anxious to see sanctuary abolished is perhaps to beg the question of the social context producing that Parliament which was unsympathetic to the plight of debtors and felons. One reason for decreasing sympathy for debtors was a growth of capitalism and its supporting norms. Credit had become a normal and vital part of the English economy, and most citizens would have played multiple roles and had multiple investments in the lending economy.[257] Many lending relations were unwritten and instead sworn in front of community witnesses with the consequence that credit and its regulation had become a community affair.[258] To default on a debt was not just a betrayal of personal obligation but also of community trust and security. One default could set off a domino effect of defaults, endangering the financial security and reputation of an entire community.[259] In contrast to thinking about the debt sanctuary seeker as someone "believed to have suffered unjustly, either because of the vicissitudes of an unpredictable market or at the hands of unsympathetic creditors,"[260] Ignatius Bau writes that:

> One common scheme was for debtors to assign all their property to friends and then flee to a sanctuary. The creditors were then forced to settle their claims at a much reduced value or lose them altogether (if the debtor was in a secular or chartered sanctuary, he could often stay indefinitely while the creditor could not afford to wait). Once the debtors were free of the claims of their creditors, they left the sanctuary and then retrieved their property.[261]

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[257] Working from a variety of court records, Craig Muldrew has argued that litigation over credit was pervasive throughout the social hierarchy, and was not just a matter of the wealthy elite. See Mulrew (1993a).
[258] Muldrew Interpreting the Market: The Ethics of Credit and Community Relations in Early Modern England, *Social History*, 18.2 (1993), pg. 173. Cited as Muldrew (1993b).
[259] Muldrew (1993b), pg. 178.
[260] Stirk (2001), pg. 184.
[261] Ignatius Bau, *This Ground is Holy: Church Sanctuary and Central American Refugees* (Manwah, NJ: Paulist Press, 1985), pg. 150.

Bau argues that there was a growing feeling that those in debt were not victims, but rather perpetrators of a fraud. The community had become invested in an extensive network of reciprocal and interdependent lending, and those whose behavior threatened it were characterized as deviant swindlers. Debt sanctuary thus came to be understood to some degree by the community as a threat to their ability to obtain credit, make good on their debts, and participate in the growing capitalist system.

Also, the deference once given to the possibility that harm had occurred accidentally was in serious decline among decision-makers. In 1620, Francis Bacon, then Lord Chancellor of England, published his *Novum Organum* where he argued that, "nothing exists in nature except individual bodies, exhibiting clear individual effects according to particular laws."[262] Bacon sent a copy to James, and James replied that he would, "read it through with care and attention."[263] Given that Bacon saw no distinction between scientific and legal methodologies, he quickly applied his understanding of a law-governed universe to the common law.[264] In his reexamination of the common law intended to replace Coke's *Reports*, Bacon argues that the law is not concerned with unknown causes, but rather, "it contenteth it selfe with the imediate cause, and judgeth of acts by that, without looking to any further degree."[265] The extended context and reasons

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[262] Francis Bacon, *Novum Organum*, ed. J. Devey, (New York: American Home Library Company, 1902), pg. 109.
[263] Letter 181.
[264] Barbara Shapiro, Law and Science in Seventeenth-Century England, 21 *Stanford Law Review* 4 (Apr. 1969), pgs. 736-737.
[265] Francis Bacon, *The Elements of the Common Lawes of England*, (Union, NJ: The Lawbook Exchange, 2003), pg. 1.

for an action were no longer central, but rather what was now becoming important and decisive was the immediate cause of the action.

In contrast to the conventional story that sanctuary was abolished because of institutional decline that was part of a broader secularization narrative, I have argued above that sanctuary was abolished because of the changing political context arising from the Spanish Match, increasing community investment in credit relations, and a declining allowance for accident as an excuse for causing harm. By tracing these shifting reasons, I have been elaborating Christopher Hill's point that, "reason, reasonableness, is a social concept."[266] It is a social concept in the sense that it is produced by actors and events, and it varies across time and space. In the next two chapters I think further about how reasonable behavior is developed along with a legal technology of holding citizens responsible for their unreasonable actions. Sanctuary – the legal alternative to common law responsibility – ceased to be officially recognized in 1624, putting the burden on the common law courts. In the chapters to come we will see how, now that the vestiges of medieval legal exception were cleared away, the state learned to hold people responsible.

VI. Sanctuary's Afterlife

What I have done in this chapter is shine a light on a particularly tumultuous but short period in sanctuary's long existence. I have given special attention to the forces driving its change – the Spanish Match, community debt obligations, and the decline of accident as an excuse – but it would be incorrect to infer from that narrative that all

[266] Christopher Hill, *Change and Continuity in Seventeenth-Century England*, (New Haven: Yale University Press, 1991), pg. 120.

political and social forces were against sanctuary because they were not. Rather, there were significant reasons for maintaining sanctuary, and those reasons became especially visible after its official abolition in 1624. Although James sought to abolish sanctuary, he only partly succeeded. "Even this," Thornley writes, "did not prevent the tough old privilege from dragging out an existence in various places until 1727," even though by 1624, "legally its career was closed."[267] Why did the practice of sanctuary eek out another century of practice even after its legal sanction was revoked?

Certainly the illegal afterlife of sanctuary is a topic in its own right, and I just want to point to two of the reasons that sustained its legal exceptionality. Both have to do with sanctuary's financial benefits. First, in a context of common law courts that did not produce financial settlements in felony cases, sanctuary had the effect of turning a blood debt into a financial debt for the victim. Richard Helmholz writes that once he had sought sanctuary,

> the criminal could be required to make monetary amends to those he had injured. If he had caused injury to another, he owed compensation to his victim. If he had killed someone, he must make monetary restitution to the family. A sanctuary seeker could therefore be required in most instances to come to an agreement with his accusers in order to satisfy their legitimate claims.[268]

In felony cases, sanctuary provided an opportunity for victims to monetize their harm that the common law courts did not facilitate. It also translated the impulse for revenge on the perpetrator's body into revenge on his pocketbook, thereby keeping the peace.

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[267] Thornley (1924), pg. 207.
[268] Richard Helmholz, *The Ius Commune in England: Four Studies* (New York: Oxford University Press, 2001), pgs. 30-31.

Second, in cases of debt or outstanding settlement obligations, sanctuary provided a place for the indebted to work off their obligations. In prison, people were idle and unproductive. Sanctuary provided artisans with a space where they could continue to work, be productive, and eventually pay off their debts.[269] In this sense, sanctuary was more efficient than imprisonment. Sanctuary was recast as a sort of purgatory rather than an escape, "a way of deferring obligations without cancelling them."[270] Further, creditors who imprisoned their debtors were usually required to pay for the creditor's subsistence, which was not the case in sanctuary. Thus debt sanctuary was cheaper than debt prison for creditors.[271] Debt sanctuary increased the odds of creditors being paid back because the debtor was working rather than idle, and it was also cheaper for creditors since they did not have to pay for the debtor's subsistence.

As Stirk has put it, "Sanctuary was a medieval tradition, but one which proved difficult to uproot when a modern function could be found for it."[272] Modern uses were indeed found for it, and so it was illegally resurrected for a century or more.[273] Those uses were partly products of royal politics, but they were also produced by the lack of a clear legal process for holding citizens responsible for debts and damages. As Paul Hyams has argued, sanctuary makes no sense in the modern context of a developed

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[269] Hertzler (1973), pg. 474.
[270] Nigel Stirk, Fugitive Meanings: The Literary Construction of a London Debtors' Sanctuary in the Eighteenth Century, *Journal for Eighteenth-Century Studies*, 24.2 (Sept. 2001), pg. 185.
[271] Jay Cohen, The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy, *The Journal of Legal Studies*, 3.2 (1982), pg. 158.
[272] Nigel Stirk, Arresting Ambiguity: The Shifting Geographis of a London Debtors' Sanctuary in the Eighteenth Century, *Social History*, 25.3 (Oct. 2000), pg. 316.
[273] Stirk argues that the Mint served as a sanctuary until at least 1723. See Stirk (2000).

system law aimed at holding people responsible for torts and, I would add, debts.[274] Yet, in a world without responsibility law, sanctuary was a useful space of exception that served to help hold people responsible that gave way only when the common law was ready to take its place.

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The abolition of sanctuary was one way that responsibility came to have a uniform standard in different spaces, but it was not the only one. In the next chapter, we continue the theme of responsibility's relationship with space, but instead of the sacred/secular distinction explored in this chapter, we turn to the way that the public/private distinction both served and frustrated the extension of responsibility across land.

[274] Hyams, Feud and the State in Late Anglo-Saxon England, *The Journal of British Studies*, 40.1 (Jan. 2001), pg. 27.

Chapter 3

Forces of (Ir)Regularity: Draining, Demarcation, Privatization

"Custom could be a double-edged weapon, used by lords bent on exploiting every profitable loophole as well as by tenants defending ancient rights."

- David Undertown[275]

In the previous chapter we encountered how the abolition of sanctuary within the space of the church served to bring all territory under the authority of the crown, getting rid of the space of exception from punishment and regularizing the terrain of legal pursuit and enforcement. The last chapter explained how and why a space of sacred exception existed for so long, and why it died out. This chapter moves beyond the last while maintaining its concern for territory, moving beyond the way that church territory was regularized to analyze how the efforts at producing a regular landscape outside of the church context functioned to physical territory but actually produced irregular political reactions from the citizens. Its central theoretical concern, then, is how efforts at producing a regular landscape and regular, responsible citizens provoked irregular resistance from the citizenry and alternative conceptions of responsibility based in local knowledge, norms, and fundamental law rather than statute.

This chapter begins with elite efforts at promoting citizen regularity through drainage and the intertwined process of enclosure. Although, as Roger Kain, John

[275] David Undertown, *Revel, Riot, and Rebellion: Popular Politics and Culture in England, 1603-1660* (Oxford: OUP, 1985), pg. 15.

Chapman, and Richard Oliver have argued, the process of reclaiming land through drainage and reorganizing fields through enclosure were not identical processes, this chapter finds significant commonalities and overlap in their processes, consequences, and proponents.[276] It then moves on to examine the conceptual and legal resistances employed by the fenmen as they sought to undermine the regularity of both landscape and behavior being imposed on them from above. Throughout this chapter, I argue that the effort to make the landscape regular was an effort to make people regular, orderly, and predictable. The old order – the *responsibility* based on the office of the Ordinary, which we saw in Chapter 2 – had been explicitly rejected. In its place emerged a new order of responsibility based on regular territory, regular people, and the expectation that citizens living in a regular world can and ought to foresee the consequences of their actions. This chapter covers the regularization of people and place; the next chapter addresses foresight within a now-ordered geography.

These changes are illustrative of the seventeenth century discourse surrounding responsibility, and what I do with them is a species of what Terence Ball calls a "critical conceptual history," although I give less weight to words than Ball and relatively more to practices.[277] I give more weight to practices because they often predate the development

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[276] Roger Kain, John Chapman, and Richard Oliver, *The Enclosure Maps of England and Wales 1595-1918* (Cambridge: Cambridge University Press, 2004), pg. 3.

[277] Terence Ball, *Transforming Political Discourse*, (New York: Basil Blackwell, 1988), pg. 15. For Ball, the relationship between language and actions is complex as they are parts of political discourses:

> Political discourses, and the concepts that constitute them, have histories that can be narratively reconstructed in any number of ways. Such histories would show where these discourses functioned and how they changed. These changes may, moreover, be traced to the problems perceived by particular (classes of) historical

of the language that describes them, so as I aim to describe change a focus on language would be late. While Quentin Skinner argues that, "the surest sign that a group or society has entered into the self-conscious possession of a new concept is that a corresponding vocabulary has developed," a focus on practices allows me to give and account of responsibility as it became self-conscious, rather than waiting for the language to catch up.[278] Causation in critical conceptual history should not be overemphasized, and I agree with Tracy Strong's summary that discourses are only "loosely causal" in the sense of placing boundaries on future developments.[279] Although this sort of following political events shares much in common with David Collier's description of process tracing as a focus, "on the unfolding of events or situations *over time*," it does not aim for

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> agents in particular political situations. Conceptual changes are brought about by political agents occupying specific sites and working under the identifiable linguistic constraints of a particular tradition as it exists at a particular time. [….] The history of *political* concepts (or more precisely, concepts used in political discourse) cannot, however, be narrated apart from the political conflicts in which they figure. What distinguishes critical conceptual history from philology or etymology is its attention to the *arguments* in which concepts appear and are used to perform particular kinds of actions at particular times and at particular political sites. Histories of political concepts are, in short, histories of political arguments and the conceptual contests and disputes to which they give rise (pgs. 15-16, emphases and parantheticals original).

For Ball, critical conceptual history is not a recounting of words, but rather an understanding of political struggle using words, including the interplay between contests and words and the contests over concepts represented by words.

[278] Quentin Skinner, Language and Political Change, in *Political Innovation and Conceptual Change*, ed. T. Ball and J. Farr, (Cambridge University Press, 1989), pg. 8.

[279] Tracy Strong, Review: Transforming Political Discourse, *American Political Science Review*, 85.4 (Dec. 1991), pg. 1498.

generalizability across time or space.[280] Rather, it aims at uncovering the role of past political actors, such as the fenmen, in our conceptual present.

I. Draining the Fens: Abolishing the Lifestyle of "Subsistence Luxury"

The fenmen were not like the rest of the English, or at least they were not the sort of Englishmen that the English wanted to be. They were commonly seen as a "wild bunch," possessed of fierce individuality and independence that set them apart from the rest of society and caused them to be ill-fit for integration into the productive mechanisms and values of society. They lived a lifestyle of what Christopher Evans calls "subsistence luxury": hunting, fishing, and gathering - notably of crops they did not sow or tend. They have lived, "an internal exile in relationship to the development of 'mainland' Britain," living in the category of, "poor whites [...] who have more in common with the nation's colonised populations than their country proper."[281] The fenlanders were the quintessential irregular Englishmen, as much or more outsiders to their country than insiders.

This subsistence luxury was religiously, socially, and intellectually problematic for the English. First, a subsistence hunting and gathering lifestyle went against the emerging Protestant work ethic, especially its emphasis on disciplined productivity.[282]

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[280] David Collier, Understanding Process Tracing, *PS: Political Science and Politics*, 44.4 (Oct. 2011), pgs. 824.
[281] Christopher Evans, Sentimental Prehistories: Construction of the Fenland Past, *European Journal of Archaeology*, 5.2 (Sept. 1997), pg. 115
[282] Most are familiar with the Protestant Ethic through Weber. In the particular context of England, Christopher Hill summarizes it as, "an emphasis on the religious duty of working hard in one's calling, of avoiding the sins of idleness, waste of time, over-

Evans writes that, "This subsistence luxury clearly conflicts with a Protestant work ethic and the Christian value of 'honest' labour; non-agrarian communities were frequently denounced for their laziness and predatory existence."[283] Part of being an English Protestant was working in a regular manner to produce goods or crops for consumption and market at the maximum rate possible.[284]

This refusal by the fenmen to adopt the Protestant Ethic reveals an internal contradiction in the distinction in England between *needs* and *luxuries*. England had long had sumptuary laws that banned certain forms of consumption (often through regulating imports that were categorized as luxurious rather than needed) on the grounds of promoting the virtues of austerity and practicality while discouraging the vices of vanity and the pursuit of social status.[285] This equation of virtue with needs and vices with luxury depends on a clear and intelligible distinction between needs and luxuries that

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indulgence in the pleasures of the flesh." *The World Turned Upside Down*, pg. 324. I take Hill's account to be generally compatible with Weber's, although Hill places less emphasis on the appearance of election.

[283] Evans (1997), 115.

[284] It is worth noting that the relationship between agrarian lifestyles in England and Protestantism was reciprocal. Not only were rural protestants expected to live agrarian lifestyles, those who lived agrarian lifestyles were far more receptive to Protestantism. See Rosemary Hopcroft, Rural Organization and Receptivity to Protestantism in Sixteenth-Century Europe, *Journal for the Scientific Study of Religion*, (June 1997), pgs. 158-181.

[285] The explicit religious justifications were, of course, only part of the reason for implementing sumptuary laws. According to Dean Mathiowetz, the primary reasons for these laws were controlling the balance of trade, and making class hierarchy visibly manifest. When these reasons were not enough, "condemnations of luxury offered a moralistic means of justifying a role for the state in directing patterns of change in an emerging commercial society." A religious vocabulary was often employed to express anxiety about social change and a desire for control and traditional order. Dean Mathiowetz, Feeling Luxury: Invidious Political Pleasures and the Sense of Touch, *Theory and Event,* (Winter 2010), pgs. 16-17.

needed to be maintained, and the fenmen undermined this distinction. On the one hand, they were poor as a group: Evans compares them to the Irish or "American Appalachian Hillbillies."[286] Yet, they chose to have the luxury of extra time to be idle, recreate, and socialize. The choice to enjoy few material resources while luxuriating in the opportunities of extra time revealed how the line between needs and luxuries was neither natural nor clear: the fenmen chose what others understood to be a luxurious amount of time over the material security that the Protestant Ethic categorized as a need. By redefining the categories of need and luxury according to their own values, the fenmen put their fellow citizens in the uncomfortable, modern position, as Dean Mathiowetz puts it, of "acknowledging that needs and luxuries are analytically indistinct."[287] The lifestyle of the fenmen demonstrated by example that the Protestant Ethic's foundational distinction between need and luxury was not as clear and consistent as its proponents wished to present.[288]

Subsistence luxury was also socially problematic in the sense that it disrupted expected roles and identities. Christopher Hill has argued that the attachment to regular employment and a particular place were essential parts of British citizenship whose disruption created "considerable panic" among the ruling class.[289] The elite envisioned

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[286] Evans (1997), pg. 115.
[287] Mathiowetz (2010), pg. 18.
[288] The logic of luxury was also employed by the fenmen to argue against drainage. The *Anti-Projector* argued that the drained ground was not being used to produce necessities like corn, but rather "Dutch commodities" which are "but trash and trumpery" in comparison to the needs of the English. *The Anti-Projector: or, The History of the Fen Project* (1648), pg. 8.
[289] Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (New York: Penguin, 1972), pg. 40. See also Hill, *Liberty Against the Law*

the detachment from arable land as a cause of vagrancy, lawlessness, and poverty. In particular, subsisting on game – especially deer - necessitated a form of lawlessness - poaching - that inverted important social roles. From William the Conqueror, all forests had been proclaimed royal property, reserved for the king's hunting. The actual enforcement across both time and space was uneven, reaching a particular low-point after the reign of Elizabeth, who was uninterested in it.[290]

There are two primary interpretations for why poaching was a serious crime, sometimes a capital offense. First, Christopher Hill argues that as uncultivated land started to become scarce in the sixteenth century, the forests gained economic value, both as a source for naval timber and as a hunting lease for nobility. For Hill, the prohibition against poaching was primarily a matter of economic self-preservation on the part of the crown.[291] Second, and in contrast, Daniel Beaver argues that the highly ritualized violence of the hunt was closely linked to the identity of the nobility. Beaver understands hunting as an exercise in noble honor, a school for noble virtue, and a sign of noble status. Hunting was not primarily about the procurement of meat (although it was eaten), but about the process, skills, and knowledges that it required. Beaver writes that, "The ceremony of the hunt unfolded as a dramatic self-sacrifice, a display of the gentility of the sacrificer and an initiation into the circle of nobility. During this ceremony, the deer became the surrogate for the sacrificer and its blood expressed both *honos* as an

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(New York: Penguin, 1996), pgs. 47-56. Hill makes his case using the example of vegabonds.
[290] Hill (1996), pgs. 91-92.
[291] Ibid.

abstract principle and the ethos of the nobility as a service class."[292] According to Beaver, hunting was a sacrificial ceremony reserved only to the nobility that re-enforced their class identity as honorable and self-sacrificing. Poaching was then an inversion of class identity where commoners took part in the rites of nobility.

Hill's economic interpretation and Beaver's class-identity interpretation need not be exclusive, but are rather complementary because each focuses on the interests of different actors. For his part, Hill takes the interests of the crown as his focal point, arguing that their financial interests drive the condemnation of poaching. Given that the crown had some (varying) ability to exclude the nobility from hunting, the crown's financial interests in leasing are likely a significant part of the explanation. Yet, Beaver's focus on the nobility is almost certainly valid as well since the local nobility were the enforcement mechanism for the crown's leases as well as their primary holders. Roger Manning concludes that, "large-scale, sustained poaching flourished only where corrupt magistrates protected poachers or at least looked the other way," which was a tendency that varied by time and circumstance.[293] Both the crown (as owner) and the nobility (as users) had an interest in protecting their exclusive right to hunting. Those living a life of subsistence luxury, in part through poaching, disrupted and inverted the established

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[292] Daniel Beaver, *Hunting and the Politics of Violence Before the English Civil War*, Cambridge Univ. Press, 2008, pg. 21. In a similar vein, Roger Manning argues that hunting was a symbolic substitute for warfare among the nobility. See *Hunters and Poachers: A Cultural and Social History of Unlawful Hunting in England, 1485-1640* (New York: Oxford, 1993).

[293] Roger Manning, Unlawful Hunting in England, 1500-1640, *Forest & Conservation History* (Jan 1994), pg. 18.

economy of violence, both by siphoning off resources and by seizing roles above one's station.

Subsistence luxury on marginal land also conflicts with intellectual understandings of progress through mastery and improvement of the landscape. The Great Draining Act of 1600 (whose ambition exceeded its execution) ordered that, "the wastes, commons, marshes, and fenny grounds" should be, "recovered by skillful and able undertakers" so that they could be made, "dry and profitable."[294] By 1620, the progress in this "recovery" was moving at a slower pace than James I wanted, and he declared that he would fund a major drainage project because, "the Honour of this kingdome would not suffer any longer, the said Land to bee abandoned to the will of the Waters, nor to let it lye wast and unprofitable."[295] For James, there was something dishonorable about the continued existence of the fens in the English landscape.

James's angst over the English wetlands was part of a broader English and European discourse of improvement and modernization, in part through drainage. Roger Masters has argued that the ability of humans to control the flux of water is an important foundation of modernity, indicating a mastery and rationalization of the natural world through human endeavors.[296] That control of water led to greater and more consistent arable land, allowing not only for more crops that could be sold (and taxed), but also for more farmers. The two – arable land and farming lifestyle – are linked in a narrative of

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[294] *The Great Draining Act of 1600*. Quoted in H.C. Darby, *The Draining of the Fens* (Cambridge University Press [1940] 2011), pg. 29.
[295] Quoted in Darby (2011), pg. 38.
[296] See Roger Masters, *Fortune is a River: Leonardo Da Vinci and Niccolo Machiavell's Magnificent Dream to Change the Course of Florentine History* (New York: Penguin, 1999).

progress. Evans writes that, "the development of mankind was essentially envisioned as a progression from forest to field," where the state of being "irrational and untaught" common in the woods and marshes was left behind for the "civil and rational" virtues associated with cities and development.[297] Keith Thomas frames the matter as a question that would have appeared rhetorical to a seventeenth century Englishman: "For how had civilization progressed, if not by the clearance of the forests, the cultivation of the soil and the conversion of wild landscape into human settlement?"[298]

The undrained fens were a symbol that England was not developed and civilized, that parts of it remained uncultured, and that underdevelopment reflected poorly on both the king and the citizens. "Man's task," Keith Thomas writes, "was to 'replenish the earth and subdue it': to level the woods, till the soil, drive off the predators, kill the vermin, plough up the bracken, drain the fens. Agriculture stood to land as did cooking to raw meat. It converted nature into culture. Uncultivated land meant uncultivated men."[299] Thomas's allusion to Claude Levi-Strauss's raw/cooked distinction is instructive here: In the same way that food is transformed from something found in nature into a product of culture through the process of cooking, land is transformed from the natural state of a swamp or fen to the cultural product of arable land. Yet, the issue is only partly about land; it is also about humans. Uncultivated land produced uncultivated men, with all of the irrationality, chaos, and danger associated with the wild. By draining

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[297] Evans (1997), pg. 119.
[298] Keith Thomas, *Man and the Natural World: Changing Attitudes in England, 1500-1800* (New York: Penguin, 1983), pgs. 14-15.
[299] Ibid. Internal quotation is to Genesis 1:28.

the fens and cultivating the previously wild land, the men would follow in that cultivation and rationalization.

The order of the landscape was a mirror of human order. If men were to behave rationally, the landscape would also be rational: the relationship was symbiotic and mutually re-enforcing. Robert Harrison elaborates on the irrationality of undeveloped land and the irrational behaviors it inspired: "the law of identity and the principle of non-contradiction go astray in the forests [...] The profane suddenly becomes sacred. The outlaw becomes the guardian of higher justice. A virtuous knight turns into a wild man. The straight line becomes a circle. Or the law of gender is confused."[300] Undeveloped land was a space of inversion and unpredictability, for logic, religion, gender, and social roles. Development was a project, in part, of changing the landscape to stabilize the order of these concepts and human roles. As the keeper of English order, it was James I's responsibility to facilitate that natural and human ordering. Although he did not take it to the French extreme of *outlawing* swamps, he was a steadfast supporter of the draining that made both the landscape and his citizens rational and regular.[301]

II. Marking Boundaries

The rationalization and regularization of both citizens and landscape required the marking of boundaries and the mapping of property lines. Surveyors found themselves on the front lines of this process, and were often met with local hostility. One such

[300] Robert Harrison, *Forests: The Shadow of Civilization* (University of Chicago Press, 1992). pg. 63.
[301] On the outlawing of swamps in France, see Evans (1997), pg. 120

surveyor, John Norden, took it upon himself to write a set of dialogues that both captured the situation descriptively and offered advice for those surveying land. *The Surveyor's Dialogue* (1618) captures the power dynamics at work in describing the "manner Tennants ought to behave themselves towards their Lords," "how the Lord of a Mannor ought to deale with his Tennants," and how to use the survey as a legal document.[302] It is not a work in the technique of plotting land, but rather in the management of diverse and competing interests in the land. Throughout, the surveyor becomes not only the surveyor of land, but also an outside voice guiding them toward the conclusion that having the land surveyed and improved is in their interest. Although A.W. Pollard has called *The Surveyor's Dialogue* one of Nordon's "strictly professional works," it contains very little technical information and a great deal of practical advice for dealing with people and examples of effective persuasion.[303] Through the voices of the surveyor, farmer, and Lord, Norden articulates a case for how the rationalization of land would be of universal benefit.

The *Dialogue* can be read as a process of overcoming suspicion of rationalized knowledge. The tenant farmer is suspicious of the surveyor on the grounds of past experience or rumor. He argues that the surveyor is a disturber of the peace who makes life worse rather than better for "many millions" by his,

> measuring the quantity, observing the quality, recounting the value, and acquainting the Lords with the estates of all mens livings whose ancestors did live better with little, then we can doe now with much more, because by your meanes

[302] John Norden, *The Surveyor's Dialogue* (1618), table of contents, unnumbered.
[303] Alfred W. Pollard, The Unity of John Norden: Surveyor and Religious Writer, *The Library*, December 1926, pg. 250.

> rents are raysed, the Lands knowne to the uttermost Acre, Fines inhaunced farre higher then ever before measuring of Land and surveying came in[304]

For the tenant farmer, the knowledge of surveyed land is used by the Lords to raise rents equal to and exceeding productivity gains in agriculture, leading to a decreased standard of living. For the farmer, surveyors are "the cords whereby poore men are drawne into servitude and slavery," and their employment is "a pittie."[305] The forms of rationalized knowledge that their profession produces lead to greater productivity of the land but impoverishment of the workers. The words that Norden puts in the mouth of the farmer give voice to Christopher Hill's assessment that, "Agricultural prosperity was accompanied by poverty for the producers."[306] The farmer traces this poverty in the midst of prosperity to the abstraction of knowledge exemplified by the drawing of maps, arguing that the concrete experience of viewing the field is far better than any map can represent. The desire to create abstractions of the landscape is, for the farmer, a thinly veiled effort to exploit the population further.

Against the farmer's argument that the practice of surveying is for deceitful purposes, the surveyor argues that his work pursues truth of universal benefit. The primary benefit of greater knowledge of the land is greater efficiency in its use and greater care of it. By clearly distinguishing pasture from arable land from meadow, land will be used more efficiently. Fences, gates, hedges, and ditches will be easier to maintain. And livestock will be better accounted for and taken care of.[307] What the

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[304] Norden (1618), pg. 6.
[305] Norden (1618), pg. 8.
[306] Hill (1996), pg. 23.
[307] Norden (1618), pgs. 47-48.

surveyor does not do is distinguish between gains that accrue to the farmer and gains that accrue to the Lord, thereby ignoring the farmer's previous distinction between productivity and quality of life.

Further, the surveyor turns the farmer's own concern for honesty against him, arguing that abstract knowledge promotes truthful practices while concrete, local forms of knowledge facilitate lying and cheating. With a clearly drawn map property rights are fixed, maintained, public, and legally enforcable. Without a map, there is no consistency and the door is opened to cheating. Especially among idlers who, "having time enough to alter names and properties, to remove meers, and to cast down ditches, to stocke up hedges, and smother up truth and falsehood under such a cloacke of conveniency as before it be suspected or found out by view, it will be cleane forgotten, & none shall be able to say, This is the land."[308] Traditional methods of maintaining boundaries, the surveyor argues, are ambiguous, changeable, and prone to abuse. In contrast, a map is stable and honest.

The task of surveying was not just descriptive, but a basis for changing human habits of land use, and the link between productivity and behavior is especially evident in the work of Cressey Dymock from the 1650s. Dymock was a member of the Hartlib Circle, a group of Protestant reformers who concerned themselves with both the improvement of land, the improvement of society, and the improvement of souls.[309] The drained fens gave Dymock a fresh landscape upon which he was free to imagine the ideal

[308] Ibid, pg. 28.
[309] *Samuel Hartlib and the Advancement of Learning*, ed. Webster (Cambridge University Press, 1970), pgs. 3-5.

organization of farms, both with one another and internally. In 1652, Dymock circulated a set of plans for a new organizational structure to the Hartlib Circle.[310]

His goals in this reordering were to increase outputs by increasing product transportation efficiency, minimizing crop loss, reducing unnecessary human travel, and focusing production efforts on necessities rather than luxuries. The method for effecting these changes was the restructuring of the landscape. "Land," he wrote, is not set out in any good form; too much of England being left as waste ground in commons, moors, heaths, fens, marshes and the like, which are all waste ground ... but all very capable of improvement."[311] Dymock takes for granted that waste ground ought to be brought into production; the question is how to do it in the most efficient manner possible.

At the level of the individual farm, Dymock identifies a number of organizational inefficiencies. First, while many people order their farms with the pastures close to the house and the fields further away, it would be "fitter to send such cattle further off and have your corn and hay (and wood too if need be) nearer home."[312] He argues that it makes more sense to have the pastures far away and the fields closer for a number of reasons. First, cattle can transport themselves by walking, while grain has to be carried; keeping the grain close decreases the need to carry crops. Second, keeping the livestock out away from the crops prevents them from eating or trampling them, thereby reducing

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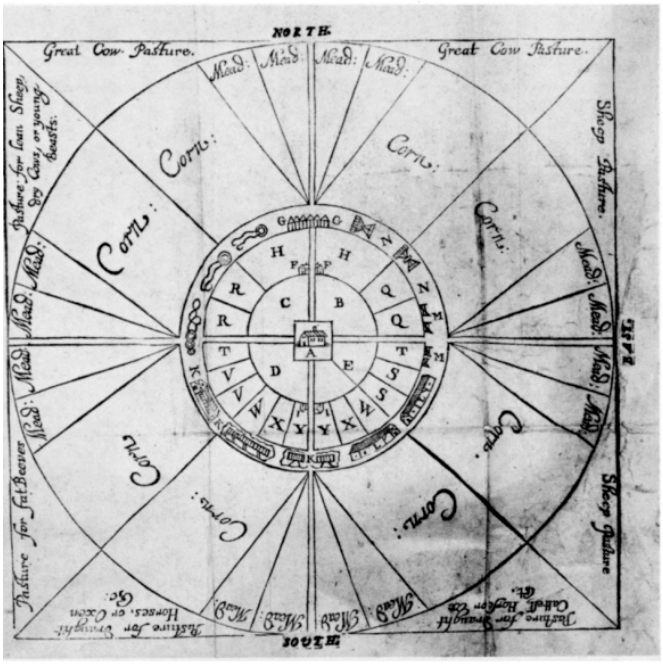
[310] These plans were published by Samuel Hartlib as *A discoverie for division or setting out of land* (London: Richard Wodenothe, 1653).
[311] Quoted in Richard Grove, Cressey Dymock and the Draining of the Fens: An Early Agricultural Model, *The Geographical Journal*, 147.1 (Mar.1981), pg. 27.
[312] Grove (1981), pg. 28

waste. The first phase of his plan relies on the idea that keeping the crops close to the house and the livestock further away will increase efficiency and decrease waste.

The second part relies on the idea that by moving the house to the center of the property and reordering the fields in a concentric fashion around the central farmhouse, human movement could be economized. Here is the diagram of what Dymock envisioned:[313]

(Figure 1)



The idea is that no field has to be crossed to get to another field at the beginning and end of a day or when harvesting, thereby reducing human travel. The corn fields are kept square for planting even rows, and the hay meadows where rows are not planted account for the curve of the circle.

[313] Reprinted from Grove (1981), pg. 31.

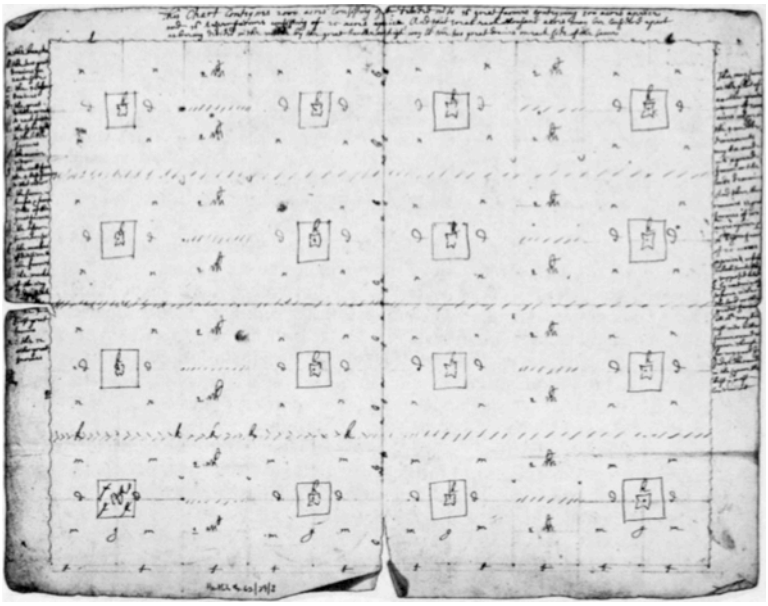
The concentric organization also had the advantage that all fields could be seen at once from the farmstead, and problems readily identified and fixed. Dymock writes that, "In this contrivance you may at all times with ease view and take account of your business," and this central location allowed the easy dispatch of workers to fix problems, and advantage that, "is not easily valued."[314] The organization of property in a way that could be easily surveilled from a central point was critical to the solution of unexpected problems. Here he inverts the traditional agricultural practice of keeping a close eye on livestock to keep them safe from predators, theft, accident, or simply wandering astray while assuming crops grow on their own, to a model where cash crops and the laborers tending them deserve the most attention and access, while livestock is expected to be more self-sustaining. Dymock estimates that the reorganization of farms on his model could increase the productivity of farms by 50%.[315] Although this may seem optimistic, one 1653 pamphlet did indeed make reference to production on the Bedford being "more than doubled" through drainage and conversion to row crop production.[316] Yet another writer argued in 1665 that, "His Majesties Subjects in this [Bedford] Level, who were formerly very poor, [...] will grow rich and prosperous, to the strengthening of the King

[314] Grove (1981), pg. 30.
[315] Grove (1981), 30; 33.
[316] Richard Baddeley, *An Answer (To a printed Paper dispersed by Sir John Maynard entituled The humble Petition of the Owners and Commoners of the Towne of Isleham in the County of Cambridge, and to the Exceptions thereto annexed against the Act for the dreyning of the great Level of the Fennes)*, (1653), pg. 5.

and Kingdom."[317] The promise of wealth was a very explicit justification for this drainage regime.

At the community level, Dymock envisioned the perfectly square farms fitting neatly together in a way that minimized the distance from farmhouse to property line, but maximized the distance between farmhouses. Here is one such sketch from 1651 where the small boxes are the farmhouses:

(Figure 2)



Two points are especially noteworthy here. First, there is no concern for topography at all. The broad, flat expanse of the drained fens made this sort of arrangement practical in a way that it had not been before. Dymock compared it to Holland, favorably.[318] Secondly, the concern for the human element of the landscape is for its productive capacity as labor and farm management, not for the human community. The farms are as

[317] William Dodson, *The design for the perfect draining of the great level of the fins, called Bedford level* (London: R. Wood, 1665), pg. 20.
[318] See Grove (1981), pg. 30.

far from one another as possible, functioning as outposts of agricultural production rather than human communities.

This isolated model stands in stark contrast to public promises that agricultural reorganization would lead to better transportation and access to services both material and religious. William Dugdale's 1662 world history of embanking and draining argues that the Fens isolated their residents, especially when the water was half-frozen, so that they could, "have no help of food, nor comfort for body or soul; no woman aid in her travail, no means to baptize a Child, or partake of the Communion, nor supply of any necessity, saving what those poor desolate places afford."[319] The promise of agricultural reorganization and drainage for fenland communities was not proximity to neighbors, but rather access to occasional services. The model of community is thus transactional, rather than relational.

Dymock's farm models represent a significant departure from the outlook of his predecessors. For example, John Norden's 1595 map of Sussex shows no roads, but is extensively illustrated with ships on the sea and mountains from three quarter perspective.[320] Similarly, John Speed's 1610 map of Surrey, based on John Norden's

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[319] William Dugdale, *The history of imbanking and drayning of divers fenns and marshes*, (London: Alice Warren, 1662), unnumbered pages. A very nearly identical claim is included in a 1629 text that reads: "when the ice is strong enough to hinder the passage of Boates, and yet not able to beare a man, the Inhabitants vpon the Hards, and the Bankes within the Fennes, can haue no helpe of Food, no comfort for Body or Soule, no Woman ayd in her Trauell, no meanes to baptize a Child or administer the Communion, no supply of any necessitie, sauing what those poore desolate places can afford." H.C., *A discourse concerning the drayning of the fennes and surrounded grounds* (London: T. Coates, 1629). Unnumbered pages.

[320] For a reproduction of this map, see *Two Hundred and Fifty Years of Map-Making in the County of Sussex*, plate 3b.

description, is elaborately illustrated with castles and coats of arms, and only shows rough property divisions at the level of the hundred.[321] With Dymock's models we move away from the consideration of existing topography, the concern for waterways, and the illustration of human activities. Instead, the landscape is entirely flat, the view entirely objective, and the concern what can be grown in the land rather than what human activities or offices pertain to that parcel. The land becomes in Dymock's drawings a generic space for the production of commodities and citizens.

Marking the boundaries of the land was a process of rationalizing it for the purposes of maximizing production by minimizing crop and labor inefficiencies. It functioned in part through reshaping the farm so that its products and laborers could be effectively surveilled from the central farmstead. This new, efficient grid of production existed not only to produce goods, but also to produce good Englishmen. And so, this new land needed owners.

III. Arguing for Privatization

One prominent method of privatizing the previously-common was enclosure by drainage, but the meaning of enclosure was unclear to its contemporaries and continues to be unsettled in modern scholarship. In her study of Tudor enclosures Joan Thrisk gives two definitions of enclosure. First, she says it was, "a method of increasing the

[321] Speed's 1610 maps of England's counties have been widely reproduced by Kelly's Directories in four volumes. The Surrey map is inscribed in the lower, left corner: "Described by the travills of John Norden Augmented and performed by John Speede." See also, John Snyder, *Flattening the Earth: Two Thousand Years of Map Projections* (Chicago: University of Chicago Press, 1997).

productivity or profitability of land."[322] Second, it was "the process by which the open field system gave way to consolidated farms in separate ownership."[323] The first account is one of economic progress in which privatization increases productivity. Classic accounts of the enclosure movement like Karl Polonyi's and Barrington Moore's follow this track when they characterize enclosure as an enabling force for the industrial revolution.[324] In this first view enclosure is, broadly construed, a force for economic ordering and improvement. The second definition that Thrisk offers (the process definition) is seemingly put forward as a rephrasing of the first definition, or perhaps a more general definition that is less committed to results than the first. As an historian, Thrisk leaves the potential tensions between these two definitions alone as she turns to a narrative of Tudor enclosures. Yet, her omission can be taken as a question or even an invitation: What part of the enclosure process falls outside of the economic ordering and progress definition?

The narrative that enclosure is a force of economic ordering was not universally shared by its contemporaries. One of the first critics was Thomas More wrote that grazing sheep on enclosed pastures impoverished peasants, dislocated people and community structures, and led to begging, gambling, and theft in this vivid selection from his dialogue *Utopia*:

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[322] Joan Thrisk, *Tudor Enclosures* (London: The Historical Association, [1958] 1989), pg. 4.
[323] Ibid.
[324] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2nd ed (Beacon Press, 2001 [1944]) and Barrington Moore, *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World* (Beacon Press, 1993 [1966]).

> Normally sheep are placid and eat very little, but now I hear reports that they have become so voracious and fierce that they have even started eating men. They are laying waste and depopulating fields, houses, towns. […] In order that one insatiable glutton, a menace to society, can enclose thousands of acres into one vast field, the peasants are ejected. Some are tricked out of possession of their lands; others are driven out by force; yet others, worn down by harassment, are reduced to selling their rights. One way or another, these poor people are driven out.[325]

More goes on to detail the consequences of this dislocation:

> The consequence of the reduction of arable land is that in many places bread has become much more expensive. But the price of wool has also shot up, so that the common people, who used to buy wool in order to make cloth for resale, can no longer afford it, with the result that many of them have become unemployed. […][326] And what, tell me, can they turn to except to begging, or – and this seems less humiliating if you have any pride – to theft?[327]

Here we see a counter-narrative to the idea that enclosure furthered economic order. To call it a "process" as Thrisk does covers over the distributional consequences of the changes. More argued that greed was leading to unemployment, the dis-integration of communities, and crime.

The arguments for enclosure were framed in appeals to public standards of morality and order often forgotten in efforts to place the enclosures within a grand narrative of English progress and development. For example, the note to the reader at the beginning of Adam Moore's 1653 pamphlet *Bread for the Poor and the Advancement of the English Nation Promised by the Enclosure of the Wastes and Common Grounds of England* contains two primary arguments that both appeal to public morality. First,

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[325] Thomas More, *Utopia*, ed. Wooton (Hackett, 1999 [1516]), pg. 66
[326] In this omitted section More attributes the rise in wool prices to price fixing on the part of a few large landowners. He writes that, "Virtually all the sheep are now owned by a few wealthy landlords. They will never be forced to sell unless they feel like it, and they won't feel like it unless they can get a price that suits them" (1999, 67).
[327] Ibid.

Moore argues not only that private property is more efficient than common fields, but that such efficiency will relieve hunger and provide some leeway in years of bad harvest. Given that enclosure can stop hunger, its implementation takes on a moral tone for Moore in which exclusive fidelity to land is comparable to familial and marital fidelity: "Doth not every man covet to have his own alone? Would any man admit of a partaker in his house, his horse, his oxe, or his wife, if he could shun it? And why is it otherwise in land?"[328] The common system is not only a contradiction to the general rule that "every man covet to have his alone," it is also a source of loss to the local community. Moore argues that there is significant loss from the common to outsiders that is similar to free sexual relationships: "why are you," he asks, "so cuckolded by Forreigners and strangers, and your Common used before your face, even as commonly as by yourselves? or indeed, (while you make it a common prostitute for every lust) how can you help it?"[329]

Moore's use of sexual analogy here can be understood in two ways. First, we should note that the project of enclosure utilized existing discourses of fidelity and decency in the service of privatization, freely transposing moral language onto economic questions. Second, in the same way that an exclusive sexual relationship is disciplining for the members, so also the exclusive relationship with a plot of land is disciplining for the farmer toward greater productivity. Poverty, Moore argues, is greatest near common lands, and this condition is caused both by their idleness and by God's further judgment

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[328] Adam Moore, *Bread for the Poor and the Advancement of the English Nation Promised by the Enclosure of the Wastes and Common Grounds of England* (London: R.&W. Laybourn, 1653), forward. No page numbers in the forward. Wilson Library Rare Books Y942.063 M781.
[329] Ibid.

for that idleness. Further, commons and wastes are "Nurseries of Thieves and Horse-stealers," places that encourage lawlessness.[330] In contrast, enclosure can "remove the curse of sin in their dwellings," and add work ethic to those living on privatized property who by "admirable industry and cheerful labours" might create "wealth unspeakable."[331]

Moore also argues that national food security and self-sufficiency are facilitated by enclosure, a goal that particular serves the interests of the poor who are hardest hit by food shortages. The abundant possibilities of enclosure save the poor from becoming "prey to the sharking engrosser, and mercilesse hoarder," or having to set out for "the Maritine parts for forreign musty corn."[332] Moore's distrust of the commodities trade is transparent, and he makes the case to the poor that their interest in a steady supply of food is best served by enclosure. Enclosure is a humanitarian act that stabilizes food supply and prices while increasing English security and independence.

Arguments for enclosure draw upon, blend, and bridge older arguments (rooted in theology and feudal practice) that a connection to a particular piece of land produces better citizens, with/to an emergent language of economy and efficiency more characteristic of modernity and nascent capitalism. Writing in 1649, Walter Blith exemplifies the merging of these languages when he lays out three reasons why he thinks people are against enclosure. First, he appeals to the economic argument that they live in "Ignorance," whereby they, "suffocate their own unspeakable advantage," and fail to

[330] Ibid, pg. 21.
[331] Ibid, pg. 5; forward.
[332] Ibid, forward.

discover "the publique good."[333] Secondly, he merges the argument for material advancement with an older language of virtue and vice, claiming that, "Idleness, Improvidence, and a slavish Custome of some old form," contribute significantly to the opposition to enclosure. And third, he thinks that this whole state of affairs represents a failing on the part of the state to enforce public morality. In order to rehabilitate both production and citizens, England needs not only enclosure but, "severe punishment of Idleness, the Mother, and Drunkenness, the Daughter," in order to rehabilitate and re-habituate England to manly, virtuous labor and production.[334]

IV. Sluiced: Draining water, draining blood

Many of the drainage projects in the fens employed a sluice, a gated drainage ditch that often looked a bit like a guillotine with a rope allowing authorities to control the gate's opening and thereby the water levels. This very basic piece of technology was central to the project of draining the fens and managing them. Yet, *sluice* also had a parallel meaning that referred not to the draining of water, but the draining of blood: one could sluice a chicken or a king by cutting off its head. In 1630, the "water poet" John Taylor wrote of how at the crucifixion, "the vnpolluted blood from him [Christ] was sluc'de."[335] Later, with the benefit of historical distance, Tobias Smollett wrote a play about James I in which a character vents his frustration:

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[333] Walter Blith, *The English Improver Improved* (1649), pgs. 6-7. Available through Early English Books Online.
[334] Ibid, pg. 7.
[335] John Taylor, *Taylor's Verania*, Stanza 9, in The Works of John Taylor, Folio Edition (1630), pg. 12.

> O Wond'rous Plan / Of unrefrai'd Barbarity! – It suits / The Horrors of my Bosom! – All! – What all? / To slaughter'd Heaps. – The Progeny and Sire! – To sluice them in th' unguarded Hour of Rest! / Infernal Sacrifice! – dire – ev'n too dire / For my Despair! – To me what have they done to merit such Returns? – No, my Revenge / Demands the Blood of one, and he shall fall. -[336]

This dramatic illustration indicates that to an English citizen, draining through a sluice also had connotations of killing those in power. This double meaning manifested itself in the drainage of the Fenlands and their redistribution as private property, where first water and then blood were drained.

The fighting over and around drainage is well documented. Keith Lindley's maps of the riots around The Wash are densely filled with the locations of conflict.[337] Yet, for all of this bloodshed, it was a regular form of resistance the King and nobility were prepared to meet and to quash. It can be straightforwardly understood as a dispute over property whose motives were material. Yet, to think about resistance to drainage and enclosure only as a matter of irreconcilable interests coming into open, armed conflict misses a great deal. In the remainder of this chapter, I will show how the irregular forms of resistance that occurred alongside the regular revolts show that the resistance was not just a competition over resources. Rather, the diverse forms of resistance express efforts to unsettle the very conceptual categories and authoritative structures of interpretation that reforming the landscape was supposed to help regularize.

V. Irregular resistance

[336] Tobias Smollet, *The Regicide: Or, James the First of Scotland* (London, 1749), pg. 49.
[337] Keith Lindley, *The Fenland Riots and the English Revolution* (Ashgate, 1982), pgs. 260-262.

Insofar as drainage and enclosure were an effort to make citizens regular, resistance to those efforts express an effort to keep alive possibilities of irregularity. Resistance takes two unconventional forms. First, through an elaborate ritual of cross-dressing, males sought to contest the relationship between their gender and their work. While the drainers and enclosures tried to connect disciplined, productive labor with masculinity, citizens resisted this connection by treating gender identity playfully. Second, resistors used the legal principle of statutory promulgation to undermine grants of prerogative given to drainage companies. In arguing that statutory ambiguity cannot rightfully be interpreted by an interested party, resistors articulated a core principle of the rule of law about the necessary neutrality of legal judgments. The Crown and nobility were not prepared to meet these conceptual resistances.

One irregular method of resisting regularization was the playful rendering of gender identity in public, and this method proved remarkably effective in mobilizing mass protest. On March 25th, 1631, 500 people led by men dressed in women's clothing rioted and destroyed the enclosures of the Forest of Dean. Less than two weeks later, on April 5th, 3,000 people gathered to destroy the enclosures, fill ore pits, and damage houses in the enclosure. By the end of April, all of the enclosures there were destroyed. A similar mass mobilization of 1,000 protesters led by men dressed as women occurred in May and June in the Braydon Forest. In July, protests moved to the Chippenham

Forest, where common rights and use were restored. The Star Chamber watched concerned, issuing a "commission of rebellion" against the cross-dressing leaders.[338]

During the Western Rising, a protest leader named John Williams cross-dressed to take on the role of Lady Skimmington and became, "a symbol of disorder to the state and a symbol of justice to members of rural communities affected by enclosure."[339] By taking on the name "Skimmington," Williams mobilized a whole set of associations for English citizens, especially in the western counties. Traditionally, a skimmington was a public ritual whereby those who had violated gender norms of the community were humiliated. They were often forced to cross-dress and be paraded through town, serenaded by the banging of pots and pans, and generally mocked.[340] Taking on the identity of Skimmington was, according to Christina Bosco Langert, a form of trespassing. She argues that, "Trespassing is the crux of cross-dressing as a form of protest. Cross-dressing involves trespassing outside one's assigned social identity," and "threatened the immutability of social station."[341] Skimmington was not an attempt by

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[338] Christina Bosco Langert, Hedgerows and Petticoats: Sartorial Subversion and Anti-enclosure Protest in Seventeenth-century England, *Early Theater* 12.1 (2009), pgs. 126-127.

[339] Ibid, pg. 119.

[340] The exact relationship of skimmington to gender roles is debated. Langert argues that it was a general practice for punishing violators of gender norms, as well as some larger community norms like infidelity. Anthony Fletcher shares Langert's broad view, arguing that it was applied broadly to cases of relational irregularity. In contrast, M.J. George makes the case that it was primarily applied to men who were victims of domestic violence at the hands of their wives. The skimmington was then a method of punishment for allowing gender roles in their house to be reversed, since the man should enact domestic violence, not receive it. See Fletcher, *Gender, Sex, and Subordination in England, 1500-1800*, (New Haven: Yale, 1995), pgs. 270-272; George, Skimmington Revisited, *The Journal of Men's Studies*, Winter 2002, pgs. 111-127.

[341] Langert (2009), pg. 122.

men to behave as women; they continued to behave as men while looking like women. This mixing of identities is key to the impact of skimmington as a form of protest. While the state sought to stabilize and naturalize identity through drainage and enclosure, cross-dressing unsettled that stability and mobilized protestors with the possibility of doing things differently.

Cross-dressing was not widespread, but its impact was significant and the state pursued Lady Skimmington and her imitators aggressively. Although no more than seven men likely cross-dressed during protests out of the thousands who turned out, the state's greatest concern was for the capture and punishment of Lady Skimmingon.[342] When Lady Skimmington was eventually captured – by a small army of 120 men – she was sent to Newgate Prison and punished with a fine and put on display in women's clothes. The stakes of the conflict were about far more than property, as the punishment suggests. Langert argues that by imposing this punishment, "the state re-appropriated the representation of skimmington as a form of humiliation to reassert its power and authority as master, father, and husband of the people."[343] By taking the on himself the authority to become Lady Skimmington, Williams threatened the given gender roles and wider social roles, and the state's punishment of him focused on taking back that conceptual ground.

Popular reaction to Lady Skimmington seems to treat her more as a hero and protector than a villainous force of disorder. The man who captured Skimmington was attacked by villagers, and the privy council provided him with a guard any time he

[342] Ibid, pg. 128.
[343] Ibid, pg. 127.

entered the forest.[344] One tract from 1629 describes a fictional blacksmith who is generally tough and carefree, but when Skimmington takes a vacation the smith starts carrying an old sword for protection.[345] Although this description of the smith is intended humorously, it reveals that Lady Skimmington took on a role as social protector, even if only farcically. The ability to mobilize thousands, become endeared to the people, and to even become a subject of social satire indicates that the unsettling of the gender categories closely tied to the sort of people drainage and enclosure worked to create was a vibrant form of resistance. It met attempts to remake identity through re-creating the physical world on their own terms, remaking identity in order to protest the remaking of the physical world. As David Undertown has put it, "The customary world has been turned upside down by enclosures; the protesters symbolically turn it upside-down again (dressing as women, parodying the titles and offices of their social superiors) in order to turn it right-side-up again."[346]

Even as citizens recognized and fought the settling of property and gender boundaries, they also recognized that the law might be a tool for maintaining traditional rights. Although the assertion of legal principle from below against a variety of traditional elite privileges grew rapidly during the seventeenth century, by looking closely at the case of Sir William Killigrew in Lincolnshire we can see the particular language and modes of mobilizing the law as a limit on elite privilege. Namely, against the drainage regime with which Killigrew was associated, commoners argued that the law

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[344] Ibid.
[345] R.M., *Micrologica. Characters, or essayes, of persons, trades, and places, offered to the city and country*, (London: T.C., 1629). Unnumbered pages.
[346] Undertown (1985), pg. 111.

prohibited his actions in five ways: (1) his use of private force was illegal; (2) the lack of a royal writ meant that he lacked authority for his actions; (3) he packed fact-finding juries with interested parties; (4) his actions violated property and liberty guarantees found in Magna Carta; and (5) the grant by the king to pursue the common good was overbroad and constituted an invalid/impossible transfer of royal prerogative. These accusations reveal how the commoners used a concept of law as a stable limit on elite behavior to advance their case against draining.

As I have mentioned in the Introduction, commoners in England were rapidly developing a legal consciousness and access to the legal system throughout the seventeenth century. Wilfrid Prest has argued that legal action became a form of "conspicuous consumption" for commoners during the Tudor and early Stuart period.[347] Christopher Brooks has found that as much as 71% of all litigation was initiated by non-gentlemen, and they were significantly more likely to sue their social superiors than be sued by them.[348] James Hart Jr. calls this expansion "the popularization of the law," while Richard Ross has memorably called it "the commoning of the common law."[349] As citizens sought to protest the remaking of their common landscape, the turn to legal channels was part of a larger thematic of legalizing conflict, especially conflict with those

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[347] Wilfred Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (Oxford University Press, 1986), pg. 49.
[348] Christopher Brooks, *Pettyfoggers and Vipers of the Commonwealth: The 'Lower Branch' of the Legal Profession in Early Modern England* (Cambridge University Press, 1986), pg. 61.
[349] James Hart Jr., *The Rule of Law, 1603-1600: Crowns, Courts, Judges* (Edinburgh: Pearson, 2003), pg. 14; Richard Ross, The Commoning of the Common Law: The Renaissance Debate Over Printing English Law, 1520-1640, *University of Pennsylvania Law Review* (Jan. 1998), pg. 323.

occupying a higher social rank. While responsibility had always had a legal manifestation, the area of human activity covered by legal process in practice expanded, as the law served to cut across class divides.

The conflict at Lindsey Level in Lincolnshire began in 1631 when Sir Robert Killigrew was granted a patent for the right of improvement over approximately 45,000 acres. The deal was that within four years the 45,000 acres were to be drained so that no more than 3,000 acres remained flooded. In return, he and his associates received and enclosed 28,000 acres, or 62.2% of the previously common land. With this project complete, Killigrew and his partners began looking for more land to drain and enclose in the East Fen, an effort that met with common resistance since local residents maintained that the land was not flooded and did not need to be drained. Acting on royal instructions, the Commission of Sewers appointed a jury of forty-nine people to determine whether the land was flooded and ought to be drained; they found that it was not flooded and did not need to be drained. Killigrew protested and managed to have another jury formed with a composition more favorable to his cause, including several shareholders in his project. Unsurprisingly, this new jury decided that the land did need to be drained. Throughout Lindsey Level, Killigrew and his associates repeated versions of this rouse to privatize the best common property.[350] In 1639, as drainage was just being completed, common resistance come into open conflict with Killigrew as cattle were removed from the enclosed former-common and commoners continued to exercise

[350] See Lindley (1982), pgs. 46-56.

their traditional rights.[351] With the outbreak of war in 1642, the commoners took possession of nearly all the enclosed grounds and the conflict was put off until the end of the war when it made its way into the court.[352]

In a series of arguments from 1649-1651, commoners attempted to use their understanding of the rule of law to maintain the practice of their common rights and invalidate Killigrew's enclosure agreements. First, the commoners successfully argued that the necessity of force was suspicious to the point of indicating that Killigrew knew he was acting outside of the law because drainage and the use of force to accomplish drainage were two different forms of delegated authority. Even after all of the other shareholders in the project had sold their shares, Killigrew doubled down on the project. John Maynard writes that Killigrew, "built a faire House on another folks Lands, and fortified it, and furnished it with men, Ammunition, and Artillery. Muskets, Horsemen, and Pistols, in a Warlike manner, and entertained French and Dutch." Further, some who opposed Killigrew, "were wounded and affrighted with Mastiffe dogs."[353] Revealingly, Killigrew felt the need to formally reply to this charge, arguing that during the unrest, "there were neither Troops, or Guns used, or any man slain."[354] Instead, Killigrew paints himself as the victim of unjust force, thus agreeing with Maynard and the commoners neither his position nor his commission to drain authorized the use of force. Here the commoners successfully argue that the legitimate use of force must be expressly granted and is not implied in the authority to accomplish a task.

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[351] Ibid, 106-107.
[352] Ibid, 164.
[353] Maynard, *The Picklock of the Old Fenne Project* (1650), EEBO pg. 2.
[354] Killigrew, *Answer to the Fenne Mens Objections* (1649), EEBO pg. 11.

Further, they argued the appearance of illegality given off by the private use of force was in fact confirmed as the drainage scheme violated procedural law, principles of valid contract, and process guarantees of the Magna Carta. Procedurally, the king never issued a writ for the drainage, but agreed to it informally outside of the standard procedural channels. Maynard describes this subversion of the royal writ system as an "evil bargain" because the king "ought by Law to speak only by his Writs."[355] The drainage violated not only the writ system, but also guarantees to process found in Magna Carta. In particular, Maynard argues that the corruption of juries during the drainage determinations by packing them with interested parties constituted a violation of process and property guarantees. The jury, he argued, was composed of both "Judges and Parties" who "could not contract with themselves."[356] One earlier tract, The Anti-Projector, argued that in rigging juries, "they have destroyed the chief branch of the Common Law, in depriving the people of their Juries of the neighborhood."[357] Maynard cites the 29th Chapter of Magna Carta which guarantees both property rights and due process to make the strong claim that in corrupting the jury determination process Killigrew, "put out the two eyes of the Law, Liberty, and Property."[358] This dual appeal to procedure and fundamental law rather than statute is demonstrative of the seventeenth

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[355] Maynard (1650), pg. 5.
[356] Ibid, pg. 4.
[357] Anti-Projector (1646), pg. 5.
[358] Maynard (1650), pg. 3. The 29th Chapter of Magna Carta reads: "No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land. To no-one will we sell or deny or delay right or justice."

century understanding that above and beyond statutory law, elite behavior is bound by fundamental law and by procedural norms.[359]

Finally, Maynard argued that the grant of authority from the king to the Undertakers was overbroad to the point of constituting a transfer of unalienable royal prerogative due to the inherent uncertainty involved in the project. While Meynard grants that the Commissioners of Sewers have the power to drain in ways that are "good for the Common-wealth," he argues that such judgment cannot be reliably exercised because working with water is inherently uncertain. "The Undertaker," he writes, "is like the Tinker, he stops one hole, and makes two; he draynes one Acre for himself, and drownes two of his neighbors; nay sometimes twenty: certainly this is bad for the Commonwealth."[360] The drainers do not, according to Meynard, possess the foresight and judgment to be able to drain in a way that is consistently good for the commonwealth. The pursuit of the "good of the Common-wealth" is not the sort of royal order that can be reliably executed: actions that appear to be for the common good actually turn out to be bad. The drainers simply could not reliably foresee the consequences of their actions. The question of the authority to drain in the public interest is not one of using better or more precise language, but rather about acknowledging the uncertainty and imprecision inherent in the process.

The voices against drainage made the case that the inherent uncertainty involved in draining made a grant to drain in actual practice a grant to tyrannical action. The *Anti-Projector* argues that there is no inherent limit to the lands that can be drained and

[359] This concept has been elaborated by Pocock (1957).
[360] Maynard (1650), pg. 10.

thereby enclosed because the Commissioners would take anything left, "by their Perrogative."[361] Maynard echoes these sentiments, concluding that the drainers could and would conclude eventually that all of England was somehow flooded so that it could be drained, enclosed, and privatized.[362] Maynard argues that by exercising this limitless prerogative the drainers are akin to Royalists waging war against the Parliament, while the *Anti-Projector* returns to the gendered and sexualized analogies of the forest protests: "I am sure they have committed a Rape upon the Republic, in ravishing the good People of this Nation (by their Tyranny and Oppression) out of their Properties and Liberties."[363] A grant to drain was inherently uncertain and lacking in boundaries, and the uncertainty and disrespect for boundaries made it akin to civil war and to rape for the fenmen. Draining could not be fit neatly into the bounds of the law, but was uncertain and thereby defied neat legal categories.

VI. Conclusion

Even as the English elite sought to make the fenmen regular through reorganizing the landscape, the fenmen resisted in surprising ways. They playfully unsettled the norms and expectations of gender roles by cross-dressing during the forest riots. They resisted enclosure through drainage by asserting both procedural norm and principles from Magna Carta against the transfer of broad discretionary powers under conditions of uncertainty. Against efforts to remake the landscape in order to make them good,

[361] Anti-Projector (1646), pg. 3.
[362] Maynard (1650), pg. 5.
[363] Anti-Projector (1646), pgs. 6-7.

regular, predictable citizens, the fenmen continually defied both the regular categories thrust upon them and also sought to undermine the basis of the authority to pursue these projects by emphasizing the inherent uncertainty in drainage undertakings. Their practices and legal argumentation participated in a broader seventeenth century trend toward the less powerful litigating their grievances up the social ladder.

What we have seen in this chapter is a moment of upheaval from 1625-1655 where elites sought to use landscape reformation as a tool of reform aimed at regularity, met in turn by a common effort to destabilize regular categories like gender and undermine bases of legal power by appealing to norms and Magna Carta. In the next chapter we turn to how this conflict played out in the courts, as new concepts of statistical regularity began to undermine the basic premise that uncertainty placed a significant limit on the sort of actions humans could rightly undertake.

Chapter 4

The Legalization of Foresight

In the previous two chapters we have seen how physical space came to be governed in a more uniform manner. We see this first through the abolition of sanctuary and resultatnt complete jurisdiction of the common law, and second through the privatization of previously-common land. This chapter turns to the process by which foresight was developed and made legally binding upon citizens. It looks to the way that concepts of natural regularity were incorporated into voluntarism by the English bench to require citizens to behave as if the world were law-governed and treat their past experiences as reasons for action in the present to minimize harm to others in the future.

This new form of binding foresight was not only an emergent legal standard, but it was also a norm with disciplinary power that filled the vacuum left by the decline of church discipline represented by the office of the ordinary discussed in Chapter 1. James Tully has also identified a similar transition, and I take my work to be in furtherance of the project he once described as follows:

> [A] new practice of governing conduct was assembled in the period from the Reformation to the Enlightenment. My aim is to describe this ensemble of power, knowledge, and habitual behavior at the point, 1660-1700, when its relatively enduring features consolidated [...] This mode of governance links together probabilistic and voluntaristic forms of knowledge with a range of techniques related to each other by a complex of references to juridical practices. Its aim is to reform conduct: to explain and then deconstruct settled ways of mental and physical behaviour, and to produce and then govern new forms of habitual conduct in belief and action. Finally, this way of subjection, of conducting the self and others, both posits and serves to bring about a very specific form of subjectivity: a subject who is calculating and calculable, from the perspective of the

> probabilistic knowledge and practices; and the sovereign bearer of rights and duties, subject to and of law from the voluntaristic perspective.[364]

As Tully and others have noted, a new form of governance emerged in England between 1660 and 1700. It mobilized emergent notions of probability within a juridical context to erect new legal standards to govern the relations among citizens. Its executors were not primarily the police, but rather neighbors and juries backed by judges. It was never promulgated in statute, and perhaps because juries and judges rather than parliament authorized it, it was rarely protested, contested, or politicized. Yet, the everyday lives and habits of English citizens came to be governed differently.

To briefly outline the argument to come, Tully focuses on Locke's role in this transition, and this story of Locke's role has recently been pushed in the direction of probability by Douglas Casson.[365] I extend this story of the role of probability in mid-seventeenth century English political life, but instead of focusing on Locke as has been done very ably by Tully and Casson, I aim to illuminate the complexities of what Tully calls the development of the "voluntary perspective" as it interacted with the law: even as voluntarism enabled the development of probability, the translation of probability into a legal obligation of foresight depended upon a working understanding of the world as a law-governed place associated with the Thomistic intellectualism that voluntarism was supplanting. The outcome is a form of legal responsibility derived from voluntaristic forms of observation, but dependent for its legal authority on the earlier intellectualism.

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[364] James Tully, Governing Conduct: Locke on the Reform of Thought and Behavior, in *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: 1993), pg. 179.
[365] See Douglas Casson, *Liberating Judgment: Fanatics, Skeptics, and John Locke's Politics of Probability* (Princeton, NJ: Princeton University Press, 2011).

In the emergent notion of responsibility, we see not a clean break from the intellectual past, but rather an uneasy alliance of intellectualism and voluntarism made necessary by the decline of the ordinary. The focus on how these theoretical categories played out in political events complicates Tully's argument that the story of scientific development in mid-seventeenth century England was one of voluntarism wholly supplanting intellectualism.

Intellectualism and Voluntarism

As Tully summarizes the situation, the academic life of England after the Civil War was caught between two big, basic competing schools of thought about how the world worked, intellectualism and voluntarism. Both were rooted in theological positions about God's relationship to the world, with significant consequences for understanding how the world works. Intellectualism, often associated with Thomas Aquinas and expressed in the *Summa Theologica* but also prominent in Hugo Grotius's *De Jure Belli ac Pacis*, emphasizes God's reason and intellect over his will and omnipotence. The natural world, for intellectualism, was then created as a rational and purposive order, and it can be understood by rational human beings who also share in God's reason. For intellectualism, as Tully puts it, "It is possible by reason to know the nature or essence of things and from these definitions to demonstrate the necessary relations among things."[366] For intellectualism, the world is rational, ordered, and essentially knowable.

[366] Tully (1993), pg. 202. I rely on Tully throughout this section.

In contrast, voluntarism emphasizes God's will and omnipotence and therefore does not think that the world is a rational order since rationality would limit God in a way that would make him not omnipotent. Nature is not purposive, as the intellectuals thought, but rather a creation that God continues to create by acting directly in the world. Tully writes that this voluntarism carries startling implications:

> It follows that 'nature' is simply contingently related particulars and the 'laws of nature' are observed regularities which god could change any time. There can be no *a priori* knowledge of the necessary and immanent relations in nature, because these do not exist. Knowledge of 'nature' must be *a posteriori* observation of individuals and generalizations. These generalizations will be 'hypotheses' that describe the regularities and, because the relations among things are contingent, they will be probable, not certain.[367]

For the voluntarist, nature is a collection of particulars and its order is only probable, not necessary. Only through observation can we come to understand the world, and our knowledge will always be circumscribed and probabilistic. Scholars including Tully, Casson, and Steven Shapin are the latest in a long line to have argued that a revival of voluntarism in the seventeenth century underpinned the emergence of early modern science, and that position is now well established.[368]

We have seen in the last two chapters that the mid-seventeenth century was laying the groundwork for more legal stability and certainty, not less; how is that narrative of stability, regularity, and predictability compatible with the voluntaristic position that the world is contingent on the will of God, and that human knowledge of it is (at best) probabalistic? Further, if science was becoming less certain about foreseeing outcomes, how could the legal system be imposing new responsibilities of foresight upon citizens?

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[367] Ibid, pg. 203.
[368] See Tully (1993), pg. 203, footnote 95 for extensive references.

The answer that I present below is that the common law bench remained influenced by elements of the intellectual tradition via Calvinist theology, and that the standards of responsibility it articulated represent a hybrid of judges' intellectual background and the voluntaristic environment. Even as voluntaristic scientists articulated a probabalistic worldview as a way of articulating *un*certainty about the world, the intellectual bench argued that past experience constituted a solid guide to action in the present and its future consequences.

I. Judicial Intellectualism

While voluntarism was inspiring scientific inquiry, the English judiciary remained significantly influenced by the older intellectual tradition. Even as Locke was arguing for a voluntaristic worldview, he was also arguing against the dominant legal thought of his era articulated by Richard Hooker. As Alexander Rosenthal has recently argued, "Hooker totally rejects voluntarism in favor of the intellectualist teleological account of natural law, which he holds in common with Aquinas."[369] Hooker thought that voluntarism, as Michael Walzer put it, "endangered the ancient, elaborate, and lawful structure of human life, giving way to a kind of outlaw individualism."[370] Hooker set the tone for the seventeenth century bench, and his tone was militantly intellectual.

Matthew Hale inherited Hooker's sensibilities and sought to make peace with voluntarism. While he was a good Calvinist Puritan who believed in God's will as the

[369] Rosenthal, *Crown Under Law: Richard Hooker, John Locke, and the Ascent of Modern Constitutionalism* (Lexington Books, 2008), pg. 68.
[370] Walzer, On the Role of Symbolism in Political Thought, *Political Science Quarterly*, June 1967, pg. 191.

animating force of the world, Hale argued that there is nothing contingent in the world. While he stressed the role of God's will in the world, he also concluded that, "in reality there is nothing in the World Contingent, because every thing that hath bin, is, or shall be, is praedetermined by an Immutable Will of the first Being."[371] While Hale emphasizes God's will, he maintains an ordered worldview where nothing is contingent. Other prominent seventeenth century jurists like Edward Coke and John Selden share a significant focus on the role of reason and stability in the law.

Even as voluntarism was overcoming intellectualism in scientific thought, the same cannot necessarily be said for legal thought. Prominent jurists ranged from outright hostility for voluntarism (Hooker), to a less direct focus on reason and stability in the common law (Coke and Selden). This tension between the intellectualism of the bench and the resurgence of voluntarism underpin the particular form of modern responsibility that played an integral role in what Tully describes as a new form of governing conduct.

II. *Trespass* without *Force and Arms*

The legal foundation of this governance was not a statute, battle, or protest movement. Instead, it was a simple and perhaps banal procedural distinction in trespass law. More of English life was governed by the case law of trespass than all specific statutory prohibitions combined, so it should not be surprising that this new governance should express itself in those terms. Although this paper avoids unnecessary legal

[371] Matthew Hale, *A Discourse of the Knowledge of God, and of Our Selves* (London, 1688). Quoted in Peter Harrison, Voluntarism and Early Modern Science, *History of Science*, vol. 40, (2002), pg. 75.

doctrinal debates and terminology as far as possible, a brief introduction to English standards of trespass is necessary here. I will introduce the case standard here in order to clarify what is at stake, before moving on to the cases that established this standard.

A citizen who wished to file a civil suit in late seventeenth century England had two main options: he could claim direct harm (*trespass with force and arms*[372]) or he could claim negligence (*trespass in a similar case* or later simply *case*).[373] Trespass with force and arms was an old and well established standard that a citizen was strictly liable for the outcome(s) of his direct actions: for example, if a man were repairing the roof of his house and he dropped a stack of shingles on the busy street below, his liability for all direct damage would be presumed. Trespass with force and arms primarily deals with cases in which the defendant's person or property physically contacted and demonstrably harmed another person's body or other property.

In contrast, *trespass on the case* or *in a similar case* (hereafter simply *case*) emerged as a standard of holding people liable for indirect harm resulting from what we would now call negligent action.[374] Case was a solution to the problem that under the

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[372] Often referred to with the Latin phrase *vi et armis*.

[373] Charles Gregory argues that trespass on the case was actually a misnomer because it was supposed to be a new standard that did not rely on the existing principles of trespass with force and arms. See C. Gregory, Trespass to Negligence to Absolute Liability, *Virginia Law Review*, (1951), pg. 363.

Also, it is worth noting that a suit could also be brought for breaking the king's peace (*conta pacem* or *contra pacem regis*), but those suits would be recognizable as criminal cases rather than civil to a modern reader and so I set them aside.

[374] The emergence of the case standard is the subject of a long-running debate sparked by Theodore Plunckett's 1931 argument that, contrary to common belief, the case standard did not emerge from the in *consimili casu clause* of Edward I's Statute of 1285 generally accepted to have founded the concept of trespass. This argument developed into the stronger position that case did not develop out of trespass with force and arms at all. I

standard of trespass with force and arms many wrongful damages were unrecoverable because they were indirect and unintentional.[375] What case allowed was recovery for damage resulting from a defendant's action that was not illegal per se, but was in conflict with the custom of the realm or the normal way of doing things. "In this form," John Bell and David Ibbetson write, "all the plaintiff had to do was briefly to state the facts which

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think this argument is largely of medieval concern since no one I am aware of disputes the existence of the case standard in the seventeenth century. A reader interested in the development of the case standard could, in addition to the sources on case cited below, also consult: Morris Arnold, Towards an Ideology of the Early English Law of Obligations, *Law and History Review*, 1987; Elizabeth Jean Dix, The Origins of the Action of Trespass on the Case, *The Yale Law Journal*, May 1937; David Ibbetson, *A Historical Introduction to the Law of Obligations* (Cambridge: Cambridge University Press, 1999) chapters 3, 4, 6, and 8.

[375] Charles Gregory illustrates the pre-case problem of unrecoverable damage as follows:

> [S]uppose the defendant in a particular instance was building a house adjacent to the highway. As he was carrying a beam along a scaffold, he stumbled and unintentionally dropped the beam on the sidewalk, so that it hit a passerby named White on the head, causing him severe harm. White could easily procure a writ of trespass [with force and arms] and recover damages. It was immaterial that the defendant dropped the beam unintentionally; and it made no difference whether or not the defendant was negligent or otherwise at fault. This was a trespass under the early law; and this primitive conception of trespass implied all the fault that was necessary for liability. Shortly thereafter, let us assume, Black came walking along and stumbled over the beam, falling so that his head hit the beam, with the result that he sustained identically the same harm as that suffered by White. Suppose that the defendant had not had time to remove the beam from the sidewalk nor to post warnings; and also assume that Black neither saw the beam as he walked along nor was careless in having failed to see it. When Black sought a writ entitling him to sue the defendant, there was none available which was appropriate for his case; and he was unable to recover damages. That was because there was no trespass [with force and arms] by the defendant against him, since the force initiated by the defendant had come to rest before Black was hurt. Indeed, the only force involved in Black's case was that supplied by Black himself when he came walking along and stumbled (1951, pg. 362).

In Gregory's example, White is made whole by the old standard of trespass with force and arms because the harm is direct. In contrast, similarly injured Black is denied recovery because the harm is unintentional and indirect. It is precisely cases like Black's harm that case was developed to address.

he claimed had occurred, to assert that these constituted wrongful conduct on the part of the defendant and that as a result of that he had suffered loss, and to seek a remedy. There was no need for any formal allegation of force or breach of the King's peace, and no theoretical limit to the situations which could potentially be brought within the scope of the action."[376] Through case, norms became legally binding and damage from their breech recoverable. Under this standard, a plaintiff could assert that the defendant had acted wrongly by violating a common norm, and that norm did not need to be spelled out in statute. S.F.C. Milsom writes that complaints under case, "might now assert new rights and duties which had no independent existence in the common law." In distinction to trespass with force and arms which protected existing rights, "case created new ones."[377]

So what rights and duties did case "create" in a legal sense? The short answer is that case created whatever rights and duties a plaintiff could get a jury to agree existed and a judge to uphold. The case standard contained the possibility for bringing a wide range of human activity under its governance because it extended the concept of liability beyond situations of human touch and contact to govern remote interactions. The extent of these possibilities came to be realized in the 1660s as conceptions of probability emerged and influenced public perceptions of reasonable behavior, understandings that the courts used to outlaw unreasonable behavior with the consequence of producing a calculable population.

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[376] John Bell and David Ibbetson, *European Legal Development: The Case of Tort* (Cambridge: Cambridge University Press, 2012), pg. 66.
[377] S.F.C. Milsom, Not Doing is No Trespass: A View of the Boundaries of Case, *The Cambridge Law Journal* (1954), pg. 106.

III. The Accident at Blackfriars on Sunday, October 26th, 1623

Explanations for accidents were multiple and competing prior to the 1660s, and a case from 1623 illustrates the conceptual hurdles that the standard of trespass on the case had to overcome. The basic facts of the case are that in the middle of a church service where there were about 200 people in attendance, in a room connected to the French ambassador's residence at Blackfriars, the floor broke and about 100 people were killed.

Voluntaristic explanations were forthcoming, focusing on the will of God in the event. One contemporary tract drew special attention to the fact that this was a Catholic service, and so the collapse must have religious significance.[378] "Now from this fatall accident ariseth a question, whither it were a judgment of God or no?" For the writer, the question of divine judgment is primary because it allows a tragedy to play a role in an existing religious-political dispute. While "the Papists will haue it a mere accident, and so impute it to the Antiquity of the building and the rottennesse of the timber," that would be a shallow explanation. "Why should we not," he asks instead, "absolutely determine it a Vengence of God on his and our enemies, seeing Papists themselues are so vncheritable to repute vs all damned hereticks, to detest and abhorre our congregations, to hate and maligne our persons, to scoffe and deride our profession [...]"?[379] The answer is clear to

[378] Joad Raymond attributes authorship of this pamphlet to the initials W.C. I do not have any record of seeing that signature on the document. I will check for those initials the next time I am at the British Library. See J. Raymond, *Pamphlets and Pamphleteering in Early Modern Britain* (Cambridge: Cambridge University Press, 2006), pg. 111.
[379] *Something Written by occasion of that fatall and memorable accident in the Blacke Friers, being the 26. of October 1623.* British Library Catalog 860.k.17. A transcription

the author: given a choice of ascribing causation to "the rottenness of the timber" or "a Vengence of God on his and our enemies," supernatural vengeance is the correct answer – clearly a voluntaristic response.

Another contemporary writer, Thomas Goad, offers a far different explanation, conscious of the religious politics involved but ultimately appealing to principles of physical causation rather than divine intervention. Goad takes as a central character the coroner who was authorized by the King to make an impartial finding of fact as to the cause of the accident. Rather than embed himself in the immediately effected parties, Goad takes the vantage point of a disinterested third person observer. The coroner, he notes, initially suspects fowl play, thinking "that some of the Protestants, knowing this to be a chiefe place of their [Catholics'] meetings, had seceretly drawne out the pin, or sawed halfe sunder some of the supporting Timber of that building."[380] In other words, he suspects that a group of Protestants had sabotaged the floor of the Catholic sanctuary. Yet, despite this initial suspicion, there was no evidence to support that explanation. After a physical examination of the scene, the coroner decided that accusing the Protestants of fowl play, "was found to be a calumny no lesse ridiculous, than malitious."[381] Absent corroborating evidence, the coroner rejects his original hunch.[382]

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of the relevant passages can be found in the Appendix. With all primary sources I have left the spelling and grammar original.

[380] Thomas Goad, The Dolefull Even-song, in *Fatal Vespers at Blackfriars and Other Tracts*, British Library G.19571. Relevant excerpts are included in the Appendix.

[381] Ibid.

[382] This is particularly significant because Goad was known to be invested in the religious disputes of the day, and published a number of strongly anti-Catholic pamphlets in the 1620s.

Turning back to the physical evidence for answers, the coroner called in a team of building experts and had them assess the physical construction of the place. What they found was faulty construction and rotten wood:

> The most probable apparant cause of the suddaine failing of that floare, charged with suck a weight of people, was iuged to bee in the maine Sommier[383] thereof, which being not aboute ten inches square, had in the very place, where it brake, on each side a mortaise hole directly opposite the one against the other, into which were let the Tenants of two great pieces of Timber, called Girders: so that between those Mortaises, there was left not above three inches of Timber. This Sommier was also somewhat knottie about that place, which, in the opinion of the Architects, might make it more brittle, and readie to knap in sunder.[384]

To summarize this account, a group of architects examined the scene and determined that the wood was poor quality in the first place, that it had rotted away, and that the supports broke under the weight of an unusually large congregation. Goad focuses on the world as a law-governed place as an intellectual, rather than as a place where God's will was continually manifesting itself in unpredictable ways like the voluntarists. In 1623, we can see both worldviews playing out in public.[385]

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[383] *Sommier* here means "a bearing beam in a building" (OED). It comes from the French word of the same spelling that refers to the slats that support a mattress on a bed. Interestingly, this passage is the first known use of the term in English, and it was only used two more times by 1631, when it fell out of use. *Mortaise*, another construction word of French origin and spelling that refers to the recessed end of a woodworking joint, had come into English use by the 15th century and continues to be used alternately with the English spelling *mortise* even today.

[384] Goad, see Appendix.

[385] In his recent book on English pamphleteering, Joad Raymond suggests that this intellectual/voluntarist narrative misses a significant part of the drama with the Accident at Blackfriars. In his analysis of these same two pamphlets, he argues that news of harm to the widely disparaged Catholic population would be generally popular with the Protestant majority and so it served as a convenient jumping off point for advancing one's own views further. He argues that, "Both offered detailed accounts of the disaster, exceptional for a domestic news item of political significance, perhaps justified by the providential subtext of God's punishment of the unrighteous. At least until the later1620s

IV. Class and the Production of Knowledge

Underneath the intellectualim/voluntarism debate there was another layer of division along class lines that was especially apparent in legal cases. This division can be seen in *Angell v. Satterton* (1663). Christopher Satterton was the captain of a ship onboard which a cannon had failed to fire. He directed Angell, one of his sailors, to investigate the cause of the malfunction, apparently from the muzzle-end. The cannon discharged, maiming Angell when the cannonball removed his leg and put out one of his eyes. He sued Satterton for damages, arguing that Satterton was responsible for his maiming. In response, Satterton argued that he was not responsible for maiming Angell since the cannon going off was an accident. The King's Bench determined that because the damage was accidental, Satterton was only responsible for a nominal amount. The class element involved in this case is readily apparent. Satterton is the captian of a large ship, while Angell was a common sailor – perhaps the commonest onboard since he was the one nominated to go look down the barrel of a loaded canon. Ultimately, it was Satterton's concept of responsibility that held sway with the highest court in England, and he did not have to accept the placement of blame for Angell's injury. The story of blaming is one of social classes coming to share a common set of understandings based,

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non-inflammatory expressions of anti-Catholicism could be used to unite readers, to persuade them of a shared interpretation." Raymond here argues that this Catholic accident was not only written up in pamphlet form as a news item, but that the pamphlets were a method of advancing an interpretation of the facts grounded in a particular worldview against other interpretations grounded in competing worldviews. Joad Raymond, *Pamphlets and Pamphleteering in Early Modern Britain*, (Cambridge, Cambridge University Press, 2006), pg. 111.

as I explain below, on a regularized understanding of the world expressed by probabilistic reasoning articulated by the authority of juries and judges. The cases used to illustrate this development primarily have fact patterns involving either livestock or guns, two pieces of personal property with some unpredictability, and distributed across social classes.

The changing role of social class in judgment has been most thoroughly investigated by Steven Shapin. Shapin argues that at the beginning of the sixteenth century truth was established through the testimony of a gentleman.[386] Gentlemen, in contradistinction to common people, were assumed to be "competent sensory agents" – part of the identity of being a member of the gentlemanly class was to accurately perceive the world.[387] Within this gentile environment is was important not to disagree with others too firmly or doubt their perceptions because doing so would not just be a question of knowledge but a question of social class. The appropriate technique for dealing with inevitable differences of understanding was to build in some uncertainty to your language and avoid ever creating a situation where someone had to be wrong.[388] Shapin writes that, "Civil conversation demanded that claims be made in the due forms of *impression*, presented with modesty, argued with circumspection, and proffered with due allowance for natural variance in men's wits and interests. […] A judicious skepticism about the quality of knowledge and a temperate probabilism about its certainty were therefore

[386] Steven Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (Chicago: University of Chicago Press, 1994), pg. 77.
[387] Ibid, pg. 75.
[388] Ibid, pg. 117.

resources for the constitution and protection of civil conversation."[389] The gentlemanly world used uncertainty to avoid differentiating between members of its class and to at the same time preserve its position as a privileged group of knowers.

This deliberate and built-in uncertainty ran exactly counter to the emergent scientific revolution. Scientific knowledge sought greater certainty and clarity (even if it accepted some uncertainty in the world), and this search for clarity ran counter to the gentlemanly effort to speak with circumspection and allowance for difference.[390] In opposition to the old form of knowledge, science proposed a much less social experience in which, "if you really want to secure truth about the natural world, forget tradition, ignore authority, be skeptical of what others say, and wander the fields alone with your eyes open."[391]

Even in the 1660s, the idea that observation and recordkeeping were important was relatively new, especially for human populations and human activities. Lockyer argues that the lack of basic records significantly inhibited the implementation of Tudor projects, and although Thomas Cromwell required all parishes to keep records of baptisms, marriages, and deaths starting in 1538, that recordkeeping was spotty at least until the Tudor poor law of 1601.[392] By 1660, comprehensive numerical recordkeeping of individual human activities was only about sixty years old in England, and for the first sixty years their use was primarily a matter of the nobility governing the poor.

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[389] Ibid, pg. 118; *emphasis original*.
[390] Ibid, pg. 120.
[391] Steven Shapin, *The Scientific Revolution* (Chicago: University of Chicago Press, 1996), pgs. 69-71.
[392] Lockyer (2005), pgs. 153-154.

V. Probability and Foresight

In the first few years of the 1660s, the analysis of those numbers was abstracted from its initial class-based governing purpose, and reworked as a set of general principles applicable to all citizens. Working from a growing stock of data, members of the Royal Society moved from simply collecting information to analyzing that information to answer general questions about their society. In his *Natural and Political Observations* (1665), John Graunt, a Fellow of the Royal Society, concludes his extensive dataset on a pondering note: "To what purpose tends all this labourious bustling and grouping?"[393] He then answers his own question with a string of research questions ranging from basic population questions, to military readiness, to public health, to religious sectarianism. The possibilities are clearly extensive, encompassing much of social life. Graunt clearly feels his audience shares the opinion that these questions are important and worthy, dismissing any skeptics as dullards when he writes that, "those, who cannot apprehend the Reason of these Inquiries, are unfit to trouble themselves to aske them."[394] Graunt appears to have perceived himself to be in a community of like-minded individuals who shared his enthusiasm for this sort of analysis, as he expects that by sharing his report with them they will also take up the work.[395]

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[393] John Graunt, *Natural and Political Observations Mentioned in a Following Index, and Made Upon the Bills of Mortality*, pg. 143. British Library C.194.a.1206. Excerpts included in Appendix.
[394] Ibid, pg. 145.
[395] Graunt appears to be handing his work over to the Society for help when he writes that, "The Accounts which follow, I reckon but as Timber and Stones; and the best inferences I can make, are but as hewing them to a Square: as for composing a beautiful

Graunt's data were taken up by a Royal Society and a broader English elite enthusiastic for the emerging science of statistics and hungry for observational evidence whose analysis could reveal new truths about their society, a period Ian Hacking has characterized as a sharp and revolutionary rupture in intellectual history. For Hacking, that rupture consisted of a multiplying of data such as Graunt's, an emerging understanding that data could be used as evidence to reason inductively, and that those inductions revealed general truths about a regular world.[396] These understandings of observation, the validity of induction, and the possibility for general inference, Hacking argues, were altogether new in the early 1660s. "The decade around 1660," he writes, "is the birthtime of probability."[397] That birth was begun by Pascal and Fermet's exchange in 1654, disseminated by Huygens' publication of the first probability textbook in 1657, the publication of the *Port Royal Logic* in 1662, and the activities of the Royal Society on a regular basis throughout.[398] According to Hacking's argument, the modern concepts of evidence and probability emerged around 1660.

To say that our modern concepts of evidence and probability emerged around 1660 is perhaps to beg the definition of those concepts. Conventionally, one would focus on the formal techniques of numerical manipulation developed during that period, but that focus leaves out a whole category of legal and political implications, applications, and consequences. In early modern England describing a thing or event as probable was

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and firm structure out of them, I leave it to the Architecture of the said Society, under whom I think it honour enough to work as a Labourer" (Graunt, pg. 154).
[396] Ian Hacking, *The Emergence of Probability*, 2nd ed (Cambridge: Cambridge University Press, 2006), pgs. 11-12; 31-38; 1.
[397] Ibid, 11.
[398] Ibid, 11.

evaluative, carrying normative weight in a way that it does not today. The Latin word *probabilis*, from which probability derives, at times meant "worthy of approbation," and in early modern England *probable* carried the idea of being "worthy of approval" because a thing or person or set of events likely resembled the truth.[399] A focus strictly on the formal techniques misses this normative element of probability, and misses a great deal of what the Royal Society saw themselves to be doing. Peter Buck writes of Graunt and his later collaborator William Petty that, "they conceived the uses of mathematics in terms of creating order rather than discovering its immanent principles."[400] In as much as probability was descriptive of a set of observations, it was also proscriptive for the ordering of society.

The everyday consequence of the attention given to probability around 1660 was an extension of the areas of human life described by probability and governed by its logic. As a practical matter, the English legal system practiced some liability based on basic principles of probabilism, although they were generally informal to the point of being taken for common sense. For example, in *Boulton v. Banks* (1658) we can infer from the judgment that Banks' dog bit one of Boulton's pigs and killed it. Boulton sued Banks on the basis that Banks' dog was a known threat to pigs and won. The court concluded that, "an Action lies against one who keeps a Dog (knowing he is accustomed to bite Hogs) if he kills one. And that it is not lawful to keep such a dog."[401] This logic

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[399] Hacking (2006), pgs. 18-19.
[400] Peter Buck, Seventeenth-Century Political Arithmetic: Civil Strife and Vital Statistics, *Isis*, (Mar. 1977), pg. 67.
[401] *Boulton v. Banks* (1658) in *Crooks Reports*, pg. 138. British Library E.1730. Excerpts in Appendix.

that an animal that behaves dangerously is likely to be dangerous in the future so that the owner is liable for that known danger does not depend on the probability emerging around the 1660s, but is far older. It is an application of the Ox Goring Doctrine found in Exodus that holds that liability is derived from knowledge of the character of the individual animal.[402] There is a legal practice of nascent probabalism here: if a dog is

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[402] Bernard Jackson comments that, "The goring ox must count as the most celebrated animal in legal history. From the Laws of Eshnunna through those of Hammurabi to the *Mishpatim*, surfacing once again in the *Digest* of Justinian, and thence through assorted Canon Law sources into medieval and modern law, this beast has attracted an almost obsessive interest" (2006, pg. 256). Given the attention the goring ox has received, it is worth taking a moment here to explain the issue. The goring ox in Hammurabi's Laws is presented as a known threat:

> If while an ox is passing on the street (market) some one push it, and kill it, the owner can set up no claim in the suit (against the hirer). If an ox be a goring ox, and it shown that he is a gorer, and he do not bind his horns, or fasten the ox up, and the ox gore a free-born man and kill him, the owner shall pay one-half a mina in money. If he kill a man's slave, he shall pay one-third of a mina (*Code of Hammurabi* 250-252, trans. L.W. King).

The later version in Exodus with which the English of 1658 would have been most familiar reads:

> When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten; but the owner of the ox shall not be liable. If the ox has been accustomed to gore in the past, and its owner has been warned but not restrained it, and it kills a man or a woman, the ox shall be stoned, and its owner shall also be put to death. If a ransom is imposed on the owner, then the owner shall pay whatever is imposed for the redemption of the victim's life. If it gores a boy or a girl, the owner shall be dealt with according to this same rule. If the ox gores a male or female slave, the owner shall pay to the slaveowner thirty shekels of silver, and the ox shall be stoned" (Exodus 21:28-32, NRSV).

The Code of Justinian draws our attention further to the character of the ox, arguing that a gorer is an individually defective animal in the same way that a mule that refuses to pull is defective implicitly because its actions are not characteristic of its species. From Hamurabi through Justinian, the theory of liability presented is based on the character of the individual animal and does not present a general duty of care for all animals. Bernard Jackson, *Wisdom-Laws: A Study of the Mishpatim of Exodus 21:1-22:16* (Oxford: Oxford University Press, 2006). For an examination of the historical influences on and context of this passage, see David Wright, *Inventing God's Law: How the Covenant Code of the Bible Used and Revised the Laws of Hammurabi* (Oxford: Oxford University Press,

known to have bitten pigs in the past, it is likely that he will do it again and the owner is liable for any damage that might occur. Under this long-established set of expectations about protecting the community from dangerous animals, Boulton blamed Banks for the harm done by his dog and successfully sued for damages.[403]

What the emergence of probability facilitated was an extension of probabilistic moral, legal, and political logics throughout human life. Rather than, for example, legal standards based on the character of an individual ox being deviant from his general species characteristics, we confront a growing set of legal principles framed in general and expansive terms. J.H. Baker points to *Mitchell v. Allestry* (1676)[404] as the widely acknowledged "breakthrough" in this rethinking of responsibility for negligence.[405] In *Mitchell*, William Allestry and his servant Thomas Scrivener were breaking two horses for pulling a coach in Little Lincoln's Inn Fields where there was "a throng of many subjects then and there walking about," among which were James and Mary Mitchell. As might be imagined, the ending was not happy. The horses "ran upon her the said Mary and there threw her to the ground with great force and ran over her with the aforesaid coach, so that the same Mary was so seriously crushed and broken in her body and limbs that by reason thereof she became lame and mutilated and cannot now be restored to perfect health." Allestry's attorney did not dispute the facts, but argued that, "the mischief which happened was against the defendants will," and so he ought not be held

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2009), ch. 8.
[403] For a contrary finding in a situation of a dog biting a pig, see *Boulter v. Best* (1632).
[404] In Baker and Milsom, *Sources of English Legal History*, 2nd ed. (New York: Oxford University Press, 2010), pgs. 631-633.
[405] J.H. Baker, *An Introduction to English Legal History*, 4th ed. (Bath: The Bath Press, 2002), pg. 411.

liable. The King's Bench disagreed, holding that, "It was the defendant's fault to bring a wild horse into such a place where mischief might probably be done by reason of the concourse of the people." In other words, Allestry had a responsibility to evaluate the situation in light of the probability of different outcomes, and in light of those possibilities and probabilities, take actions to minimize public danger. This is a departure from the Doctrine of the Goring Ox because it is about regular normal behavior rather than deviant behavior. Nobody suggested in this case that the horses in question were anything other than inexperienced and untrained. One of the precedents set by *Mitchell* is the creation of a general duty of care to not create a situation where "mischief might probably be done." No longer is negligence a matter of protecting the public from a demonstrated and known harm in a particular case (as in *Boulton*), but rather about mitigating danger generally.

While the sphere governed by principles of probability was rapidly expanding on this earth, those same principles also began to exercise force in the spiritual realm as well. Hacking has argued that the Royal Society that was involved in advancing probability was also creating a theology based on similar principles. In particular, they made a unique form of the Design Argument. They argued, "that the way things are, constitutes evidence of a supreme being," and that, "A universe so well constructed could only be the work of a sublime artisan."[406] In essence, they argued that through observation of the world one would see evidence for the existence of God and understand

[406] Hacking (2006), pg. 82.

that evidence to point toward a supernatural Creator.[407] This is a departure from the deductive arguments of the Catholics (most prominently the Ontological Argument) in the sense that it proceeds from the observation of evidence to infer the probable existence of God. It was an effort to demonstrate the existence of a Being humans had not seen through the experience of their senses, and those experiences were for the first time rivaling deductive demonstration for sway.[408]

If the Design Argument was an effort to argue that God's existence is probable, the *Port Royal Logic* closes with an effort to extend the logic of probability and future outcomes into the realm of spiritual belief and also to express their limits. The final chapter of the *Logic* is devoted to practical action in light of the probability of various outcomes. First, the authors beseach their readers to think probabilistically about all of their actions and, "in order to judge of what we ought to do in order to obtain a good and to avoid and evil, it is necessary to consider, not only the good and evil in itself, but also the probability of its happening and not happening..."[409] As a general rule, citizens should be calculating about their behavior, weighing their decisions not only according to good and evil, but also probability. There is one case where even a small probability of obtaining a good would be worth undertaking, and that is where the good is of infinite worth – "eternity and salvation" which "cannot be equaled by any temporal

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[407] While a different form of the Design Argument is present in Book X of Plato's Laws and Aquinas' Fifth Way in the Summa, Hacking argues that what the Royal Society does differently from Aquinas is to view the world as a passive, created object rather than an agent. For further explanation of the Design Argument, see Stephen Davis, *God, Reason, and Theistic Proofs* (Grand Rapids, MI: Eerdmans, 1997), pgs. 97-116.
[408] Hacking (2006), pg. 83.
[409] *The Art of Thinking: Being the Port Royal Logic*, trans. T.S. Baynes (Edinburgh: Sutherland and Knox, 1750), pgs. 359-360. Hereafter *PR Logic*.

advantage."[410] The good of eternal life is so overwhelming that its probability or improbability pales in comparison to the good; the only reasonable action is for a person to seek it.[411] This argument, later made famous by Pascal,[412] demonstrates that spiritual matters can be governed by the same logical structure of good/evil and probability as other human behavior even if the proscribed path is unique in matters of eternal importance.

Emergent with probability in the 1660s was an expansion of the spheres of human life governed by probable logic and an extension of that governance to all citizens. Culminating in *Mitchell v. Allestry* (1676), we have seen how probability underpinned an extensive and general principle of a duty of care applicable to all citizens. Further, the applicability of probabilism was extended beyond the temporal into the spiritual/eternal,

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[410] *PR Logic*, pg. 362.

[411] The *PR Logic* concludes with the following paragraph:

> This is enough to lead all reasonable persons to come to this conclusion, with which we will finish this Logic: that the greatest of all follies is to employ our time and our life in anything else but that which will enable us to acquire one which will never end, since all the blessings and evils of this life are nothing in comparison with those of another; and since the danger of falling into these evils, as well as the difficulty of acquiring these blessings, is very great (pg. 362).

It is difficult to overstate the impact the authors think their work may have. Not only is it vital to human action on a daily basis, it is also useful for the salvation of souls.

[412] Pascal made this formulation famous in his *Pensees* where he argues that because eternal life is an infinite good, it is reasonable to wager the earthly finite life in its pursuit even if the payoff is less than certain. For Pascal, the reasonability of the wager is clear: "if you win you win everything, if you lose you lose nothing. Do not hesitate then; wager that he does exist" (pg. 123). Although this focus on demonstrating the reasonability of faith in God using probabilistic logic might seem strange to a modern reader, both Pascal and the authors of the PR Logic are working to show that probability is compatible with religious belief. John Locke also includes a similar construction in his *Essay Concerning Human Understanding*. This demonstration of compatibility was necessary because of probability's association with gambling (dicing in particular), which biased the devout against it. Blaise Pascal, *Pensees*, trans. A.J. Krailsheimer, (New York: Penguin, 1995); see also Hacking (2006), ch. 8.

elevating its status from a banal, low science, to technique for evaluating sacred matters. The sort of probabalism invoked straddles the intellectual/voluntarism debate in the sense that it borrows a bit from each. On the one hand, it accepts uncertainty, focuses on observation, and makes probable judgments. In those senses it is voluntaristic. Yet, at the same time, it holds that probable judgments are accurate enough to constitute legal reasons for action, and in that sense they are made law. This is a case of natural law being replaced or subsumed by positive law.

Probability helped, then, to clarify who could be blamed for which acts and which results were disclaimable as accidents. In his 1679 text on English law, John Bridall details a standard of civil liability that reflects these new developments and extending liability for noncriminal actions. He argues that during target practice, building construction, or military drills sometimes "one is slain casually [...] without the will of him that doth the act," and in each case when there is no intentionality "this is no felony."[413] Yet, the lack of intentionality does not matter for civil liability. Bridall writes of these unintentional harms that:

> But in any of these Cases before put if a man be hurt or maimed only, an Action of Trespass lieth against him that was the cause of the hurt, or maime, though it be done against the parties mind and will; because in Civil Trespasses and injuries, that are of an inferior nature, the Law doth rather consider the damage of the party wronged, then the mind of him that was the wrongdoer.[414]

The standard of liability that Bridall summarizes here as common practice is in stark contrast to the standard used by the King's Bench in *Angell v. Satterton* (1662). Whereas

[413] John Bridall, *An abridgement of the lawes of England* (London: John Bellinger, 1679), pg. 47. This is an application of what legal scholars call the doctrine of *mens rea* today.
[414] Ibid.

in *Angell* intentionality was an element of civil liability, Bridall's text argues that it is beside the point. In contrast to the standard of 1662, by 1676 demonstrating liability focused solely on material facts because people were assumed to have the ability to foresee the outcome of their actions. To rule out excuses based on intentionality codified the standard that people ought to think through probable outcomes of their actions, foresee the consequences, and as far as possible abate risks to others. It was no longer enough to claim that a harm was unintentional, because legal authorities like Bridall had generally written intentionality out of the legal standard. The important outcome for our purposes of probabilism for legal practice was that it contributed to the marginalization of intentionality in liability cases.

We can see Bridall's principles illustrated in *Dickinson v. Watson* (1682)[415], which parallels the facts of *Angell* (1662) but had a very different outcome. Robert Dickinson brought suit against John Watson for "shoot[ing] hail-shot into the plaintiff's left eye with a pistol, whereby the sight of that eye was lost."[416] Of course, Watson argued that it was an accident; that

[415] In Milsom and Baker (2010), pgs. 377-378. It is worth noting that Dickinson was brought under a writ of trespass with force and arms, not trespass on the case. That distinction may indicate that the plaintiff understood himself to have been injured directly rather than indirectly, or it may simply indicate that the distinction was not especially important, what was important was that he ought to be able to recover for a recognized wrong. See *Cox v. Grey* (1610) for an example the court arguing that it is not necessary to file suit as trespass on the case in order to recover under the principles of case.

[416] *Hail-shot* was similar to what today would be called *bird shot*: multiple projectiles smaller than the bore diameter loaded over a single powder charge. The consequence of such a load would be to create a wound larger in diameter than a single bullet, but with less penetrating power. The range at which Watson shot Dickinson is unclear, but at a long distance a single hail shot pellet would have significantly less energy than a

> he was armed with the pistol mentioned in the declaration, loaded with hail-shot and, intending to discharge it in such a way that no damages should befall any of the king's subjects (no one being in sight), he discharged the pistol; and the plaintiff accidentally wandered in the way as it was discharging; and if any harm thereby befell the plaintiff it was inevitable, and against the defendant's will.

The King's Bench disagreed that the accidental nature of the harm excused Watson from responsibility. In contradistinction to *Angell*, the King's Bench held that, "in trespass the defendant shall not be excused without unavoidable necessity, which is not shown here." By comparing *Angell* to *Dickinson*, we can see that between 1662 and 1682 it became much easier to blame another party for a harm because the standard by which harm could be excused became *unavoidable necessity*, which is a very high threshold.

VI. Legal Responsibility

Recall that a citizen could make a claim for damages in two main ways. First, they could argue that the defendant caused them damage through physical touch under the standard of trespass with force and arms. Second, they could argue that the defendant had harmed them indirectly under the standard of trespass on the case. The second had expansive potential that began to be realized in the later seventeenth century courts, as we will soon see.

If the plaintiff had two ways of filing a case, the defendant had two options for defending himself. First, he could deny the facts: "I wasn't there," "it didn't happen like that," "I didn't do it," "it's not like he's making it out." Second, he could acknowledge the facts but offer an excuse. In order to offer a reasonable excuse, the defendant had to

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conventional musket ball which may explain how the injury was only to Dickinson's eye and not his skull or brain (i.e. how it was not more serious).

demonstrate that the harm was unavoidable or inevitable. "To escape liability," writes Stephen Gilles, "defendants who had prima facia caused harm had to establish that they should not be viewed as responsible for the accident because some other cause had made it impossible, as a practical matter, to avoid injuring the plaintiff. Under this approach, the question was not whether actors had behaved unreasonably – whether they *should* have avoided the accident – but rather whether they *could* have avoided it by greater practical care."[417] Thus, defendants arguing for an excuse rather than disputing the facts were arguing that prevention was outside the scope of their abilities. They needed to convince juries and judges that their ability to act was limited, circumscribed, and generally weak.

In court, the plaintiff and defendant argued serious cases before juries, and it is worth noting here that the juries of the late seventeenth century had significant differences from those empanelled today. The form and expectations of a trial by jury in the later half of the seventeenth century was in flux. Today we take for granted that jurors should be as ignorant as possible of the dispute and they should have no personal relationships with the litigants.[418] These basic principles are protected by procedural rules, *voir dire*, and the rules of evidence. Yet, for as much as we take these principles and procedures seeking neutrality for granted and a foundation of the jury trial system, this modern standard bears little resemblance to the right to trial by jury guaranteed by

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[417] Stephen Gilles, Inevitable Accident in Classical English Tort Law, *Emory Law Journal* (1994), pg. 577.
[418] John Marshall Mitnick, From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror, *The American Journal of Legal History*, July 1988, pg. 201.

Magna Carta. In contrast to any idea that jurors be neutral, a medieval juror was drawn from the vicinity of the crime so that they would be "self-informing" in the sense that they already knew the relevant facts; they were in that sense witnesses as well as judges.[419] Katherine Eisaman Maus tells us that, "the English jury system, unique in Europe, made local laypeople not only onlookers but participants in the revelatory process."[420] Testimony was unusual in a medieval court because there was an expectation that the jurors would have actively educated themselves about the facts before the trial.[421] A self-informing jury stands in stark contrast to the modern common law jury, and yet it was the medieval English expectation and common practice.

There is an extensive debate among legal historians about dating the transition from self-informed juries to the modern standards of evidence aimed at neutrality, and that debate swirls around the meaning of *Bushell's Case* (1670). In this case Edward Bushell appealed a fine levied upon him for contempt of court when he and the other eleven members of the jury returned a verdict that the trial judge found *contra plenam & manifestum evidentiam* (contrary to the plain and manifest evidence). The jury was ultimately fined, but Bushell refused to pay and was imprisoned. In his decision for the court, Chief Justice Vaughn found for Bushell on the grounds that judges are not in a

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[419] James Oldham devoted his 2004 Seldon Society Lecture to the issue of self-informing juries. He argues that there was a wide range of knowledge a jury might bring to court, from juries where one juror informed the others to specialized juries like those made up of all merchants or all matrons to hear cases presumed to necessitate special knowledge of the field. See James Oldham, *The Varied Life of the Self-Informing Jury* (London: Seldon Society, 2005).

[420] Katherine Eisaman Maus, Proof and Consequences: Inwardness and its Exposure in the English Renaissance, *Representations*, Spring 1991, pg. 33.

[421] Mitnick (1988), pgs. 203-204.

position to evaluate evidence. Noting that no evidence was submitted with the appeal, Vaughn finds that judges' evaluation of the evidence is not decisive. Rather, the entire question is how the jury received the evidence: "for how manifest soever the evidence was, if it were not manifest to them, and that they believed it such, it was not a finable fault, nor deserving imprisonment, upon which difference the law of punishing jurors for false verdicts principally depends." Here Vaughn appears to uphold the right of the jury to interpret evidence however they see fit. John Marshall Mitnick summarizes a strong interpretation of this case as implying that, "jurors enjoyed the prerogative to find on the basis of their own knowledge and consciences as well as and even in spite of evidence presented in court, unfettered by the threat of punishment by the judge."[422] Going along with this line would imply that in 1670 layperson knowledge and the worldview of the juror were trumpcards in the legal system.[423]

Yet, even though *Bushell's Case* indicates the limits of the judicial power to fine juries, it may not be indicative of general jury discretion because judges had and used other methods to get juries to fall into line, chief among them the ability to set aside a verdict and call for a new trial. Even as *Bushell's Case* appeared to strengthen jury prerogative, judges were regularly setting aside verdicts they found "against evidence." Mitnick argues that that in the latter half of the seventeenth century judges began a practice of granting new trials when they determined that a verdict was against evidence,

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[422] Mitnick (1988), pg. 207.

[423] There is also an argument in criminal law that juries frequently used their discretion to return verdicts at odds with the facts, especially in capital cases. For a collection of different perspectives on jury discretion, see *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800*, ed. Cockburn and Green, (Princeton, NJ: Princeton University Press, 1988).

although the legal standard remained unclear and likely uneven.[424] He writes that, "The expanded application of the new trial clashed head-on with the long-standing and exclusive right of the jury to construe the fact, and some reconciliation was necessary."[425] The reconciliation between jury and judge came by the late seventeenth century when new trials were only awarded in cases where the verdict went against the weight of the manifest evidence, although this standard was not officially recognized until the mid-eighteenth century.[426]

It was also possible that the bench could overrule the jury's verdict, as they did in *Sir John Chichester's Case* (1681).[427] Unbeknownst to him, the protective equipment had fallen off Chichester's sword during a fencing match so that he accidently killed his fencing partner, and so he was indicted for manslaughter. The jury returned a verdict of *chance-medly*, or excusable assault.[428] John Aleyn's record of the case says that, "the court would not accept the Verdict," because Chichester had a responsibility when fencing to "prevent the mischief that may ensue." Setting aside the jury's decision, the judges found Chichester guilty of manslaughter.[429] Although the jury may have

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[424] Mitnick (1988), pg. 215.
[425] Ibid.
[426] Ibid, pg. 216.
[427] Also sometimes spelled Sir John *Chichester's* Case.
[428] The actual manuscript reads the charge "chance-pedly," but Matthew Hale's later record of the case uses the correct term "chance-medly." I defer here to Hale's formulation. Black's Law Dictionary tells us that chance-medly is often used to describe any form of homicide by misadventure, although it is properly only used in cases of self defense. Matthew Hale, *History of the Pleas of the Crown: In Two Volumes, Volume 1*, pgs. 472-473.
[429] *Sir John Chichester's Case* (1681), see appendix for transcript.

understood its discretion to be broad, the bench was also willing to set aside a verdict with which they disagreed.

There was an extended push and pull between judges and juries over who was the authoritative interpreter of evidence, and that conflict was the context for making claims in the late seventeenth century.[430] It was an extended period of working out norms of authority and deference through the practice of litigation, and it is within that context that litigants were forced to make claims. Claims were then made to two audiences: first, the jury judging evidence according to their common sense, and second, the judge evaluating the evidence according to his own sense shaped by the leading learning of the day exemplified by the Royal Society and Grey's Inn. "Because the common law trial combined lay and professional elements, it incorporated both lay and professional epistemological assumptions and patterns of thought."[431] Managing and appealing to

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[430] This conflict between juries and judges is a rarely-noticed backdrop to jury trials from the late medieval period well into the early modern. Daniel Klerman has taken it upon himself to argue that the jury was still somewhat self-informing in the thirteenth century even though witness testimony was sometimes reported, while Thomas Gallanis has dated the modern form of the rules of evidence (which eliminate as far as possible the self-informing jury) to 1754. Given these established bookends is reasonable, then, to suppose that the conflict between juries and judges over the authoritative interpretation of evidence was long running (perhaps even extending from 1300-1750), although some degree of uncertainty will likely preserver simply because verbatim records of trials do not exist and the sources that do exist are partial and problematic. J.H. Baker devoted his inaugural lecture to a chair at Cambridge in 1998 to detailing the sorry state of the primary sources, asking perhaps rhetorically, "have we succeeded in disinterring enough of the evidence to write the history of English law?" He then answers flatly, "Of course we have not." J.H. Baker, Why the History of English Law Has Not Been Finished, *Cambridge Law Journal*, March 2000, pg. 66. Thomas Gallanis, The Rise of Modern Evidence Law, *Iowa Law Review*, 1998-1999, pg. 502. Daniel Klerman, Was the Jury Ever Self-Informing? *Southern California Law Review*, 2003.

[431] Barbara Shapiro, *A Culture of Fact: England, 1550-1720* (Ithaca, NY: Cornell University Press, 2000), pg. 12

these diverse epistemological assumptions was then a critical skill for successfully making a claim.

The preferred method of appealing both to the jury's desire to determine facts and evaluate credibility for itself while also playing to judges' desire to see verdicts compatible with the weight of the evidence was to compile a volume of evidence – often through testimony – that gained credibility through the improbability that it was all coincidental. Writing in 1675, Robert Boyle gives us a sense of how it was done using a criminal example:

> For though the testimony of a single witness shall not suffice to prove the accused party guilty of murder; yet the testimony of two witnesses, thou but of equal credit ... shall ordinarily suffice to prove a man guilty; because it is thought reasonable to suppose, that, though each testimony single be but probably, yet a concurrence of such probabilities (which ought in truth to be attributed to the truth of what they jointly tend to prove) may well amount to a moral certainty, i.e. such a certainty, as may warrant the judge to proceed to the sentence of death against the indicted party.[432]

The language of a "moral certainty" that Boyle uses here is indicative of the highest possible level of conviction in "matters of fact," and was used synonymously with "a satisfied conscience;" these two phrases later gave way to the modern phrase of "beyond a reasonable doubt."[433] Barbara Shapiro has argued compellingly that a "matter of fact"

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[432] Robert Boyle, *Considerations About the Reasonableness and Reconcilability of Reason and Religion*, pg. 182. Quoted in Lorraine Daston, *Classical Probability in the Enlightenment* (Princeton: Princeton University Press, 1998), pg. 63.
[433] Barbara Shapiro, Testimony in Seventeenth-Century English Natural Philosophy: Legal Origins and Early Development, *Studies in the History and Philosophy of Science* (2002), pg. 248.

in this context referred to an uncertain matter that was yet to be established; it was a question.[434]

Questions of fact were answered in a way that appealed to elements of the gentlemanly epistemology based on personal identity (as Shapin argues, above), the emergent epistemology of probability (as Boyle identifies), and the epistemology of common sense directed at determining evidence credibility (as Minick outlines). Against these forms of affirmative argument, defendants often asserted claims of excuse against presumed responsibility (as Gilles notes).

M.J. Prichard calls *Mitchell v. Allestry* (1676) "the landmark" for how trespass on the case was extended using notions of probability to make citizens liable for remote action, and so I will illustrate these principles using that famous case.[435] Recall in *Mitchell* that William Allestry and his servant had decided to train horses in a public place, the horses spooked and ran over Mary Mitchell so that "she became lame and mutated." Mitchell sued Allestry for £200, and at trial a jury awarded her 40 marks. On appeal before the King's Bench,[436] the complaint began by juxtaposing Allestry's social class (they note his title, *esquire*, as well as his accompaniment by a personal servant) with his negligent actions (actions undertaken "improvidently, rashly, and without due consideration of the unsuitability of the place for the purpose"). Just because Allestry was a gentleman, his behavior ought not be presumed reasonable. In the complaint,

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[434] Barbara Shapiro (2000), pg. 10.
[435] M.J. Prichard, Trespass, Case and the Rule in Williams v. Holland, *The Cambridge Law Journal,* 1964, pg. 285.
[436] The appeal process by which *Mitchell* came before the King's Bench is not exactly clear.

Allestry is characterized as a man out of touch with nature, particularly the nature of horses. The plaintiff's strategy in the complaint is to pry apart the presumption of gentlemanly reasonability from Allestry's demonstrated behavior.

The record of the deliberation shows a bench leaning on expectations that Allestry foresee the probable outcome of his actions to override claims that the whole situation was an excusable accident. The accident was not excusable because, "It was the defendant's fault to bring a wild horse into such a place where mischief might probably be done by reason of the concourse of the people." Allestry is at fault because he did not foresee the probable consequences of his action. The court echoes the complaint in arguing that he discounted "the throng of many subjects then and there walking about" as a reason for acting differently. Allestry acted unreasonably by not taking the reason of his fellow citizens' presence as a guiding fact for his behavior, and for that unreasonable behavior he was rightly held responsible. There was no need to show that the outcome of Allestry's action was intentional or necessary, just that it was probable.

Mitchell has traditionally been taken as a leading case for the unfolding of trespass on the case into negligence, and then eventually into torts. And while it is a leading case, it is one of many in a trend toward probabilistic reasoning and standards of behavior coming to govern citizens' remote actions. J.H. Baker writes that, "by 1700, lawyers were beginning to perceive a new general principle: that a man was 'answerable for all mischief proceeding from his neglect or his actions, unless they were of unavoidable necessity.'"[437] Claims to accident had lost their presumed power to excuse,

[437] J.H. Baker (2002), pg. 411.

and the burden now fell on the defendant to show why he should not have foreseen the outcome of his actions. One subsequent textbook stated as established legal doctrine that, "Every man ought to take reasonable care that he does not injure his neighbor. Therefore wherever a man receives any hurt through the default of another, though the same were not willful, yet if it be occasioned by negligence or folly the law gives him action to recover damages for the injury so sustained."[438] *Mitchell* signals an historic shift in the common law world away from excuse by accident toward presumed liability for remote consequences of one's actions. By the eighteenth century it was up to the defendant to show that he had a right to act in a way that caused injury rather than on the defendant to demonstrate that a wrong had occurred.

VII. Voluntarism, Probabilism, and the Case Standard

The new case standard as articulated in *Mitchell* may seem at odds with a voluntaristic worldview. After all, if the world is chaotic, why should we be able to foresee, anticipate, and prevent harm to others? One answer is that the voluntarism of the late seventeenth century was influenced by Calvinism's emphasis on God's omniscience (all knowing-ness), as much as by William of Ockham's earlier emphasis on God's omnipotence. This shift is can be seen in Matthew Hale's writing reference earlier in this chapter. Hale emphasized God's will in writing that, "The Will of the First Cause is the Cause of all beings and operations in the World," but also channeled Calvin in concluding that, "in reality there is nothing in the World Contingent, because every thing

[438] Baker and Milsom (2010), pg. 637.

that hath bin, is, or shall be, is praedetermined by the immutable will of the first being."[439] For Hale, the will of God is not associated with contingency or a lack of order, but rather with his omniscience expressed through predestination of the world and all people.

Calvin expresses this principle of omniscience most prominently in the *Institutes*, where he argues that the world is not uncertain, but rather our imperfect judgments and faulty knowledge of God's will make it appear so.

> [O]ccationally as the causes of events are concealed, the thought is apt to rise, that human affairs are whirled about by the blind impulses of Fortune, or our carnal nature inclines us to speak as if God were amusing himself by tossing men up and down like balls. [...] But Christ declares that, provided we had eyes clear enough, we should perceive that in this spectacle the glory of his Father is brightly displayed. [...] When the sky is overcast with dense clouds, and a violent tempest arises, the darkness which is presented to our eye, and the thunder which strikes our ears, and stupefies all our senses with terror, make us imagine that every thing is thrown into confusion, though in the firmament itself all continues quiet and serene. In the same way, when the tumultuous aspect of human affairs unfits us for judging, we should still hold, that God, in the pure light of his justice and wisdom, keeps all these commotions in due subordination, and conducts them to their proper end.[440]

What Calvin expresses here is voluntarism in the sense that worldly events are attributable solely to the will of God, but there is no chaos or radical contingency that were common in earlier versions of voluntarism. Through faith, we are to understand the world not as a place "whirled about by the blind impulses of Fortune," but rather one where God is conducting events "to their proper end." Yes, God's will provides the animation, but his justice and wisdom mitigate Fortune's chaos rather than further it.

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[439] Peter Harrison, Voluntarism and Early Modern Science, *History of Science*, 40 (2002), pg. 74.
[440] John Calvin, *Institutes of the Christian Religion* (1537), Book 1, Chapter 17, Section 1.

While maintaining the understanding that God is all powerful, all knowing, and perfectly just, Calvin and the Puritans emphasize his wisdom and justice rather than his power as early voluntarists had done.

The juridical thought that produced the duty of foresight was not radically voluntarist in the sense that it assumed the world was chaotic and lacked even the appearance of being law-governed. Instead, it followed Calvin in arguing that even if God's will is animating the world, that does not mean that the world lacks the appearance of regularity adequate for foresight and everyday sorts of predictions. Rather, because God is wise and just, the world appears orderly, and our past experiences constitute a solid ground from which to anticipate the future consequences of our actions.

This orderliness is foundational to the case standard. Only in a regular, orderly world whose order represents wisdom and justice rather than Fortune is it possible to even conceptualize negligence, much less formulate a code of behavior for citizens. The case standard accepts and expresses a minimally voluntaristic worldview in that it acknowledges that human affairs are probable, but it rejects the prior notion that there is enough chaos in the world to excuse most accidents. Instead, it holds that the probable outcomes of human actions constitute legal reasons for action in the present, and it makes citizens accountable for failures to anticipate harmful results.

Conclusion

Responsibility and Change

The concepts underpinning and justifying practices of responsibility underwent significant changes in seventeenth century England, from a pre-modern conception where humans acting in a presumably chaotic world could disclaim responsibility for the consequences of their actions by claiming those outcomes were accidental, to a type of responsibility that looks much more recognizable today, in which all citizens have a significant obligation to foresee and avoid harming others. The most dramatic example is citizens shooting one another: in *Angell v. Satterton* (1662) a claim to accident excused Satterton for shooting Angell with a cannon, but twenty years later in *Dickinson v. Watson* (1682) that same appeal to accident did not excuse Watson for shooting Dickinson in the eye with a pistol. In those twenty years, the common law developed the responsibility for citizens not to shoot one another. The responsibility not to shoot others is just one illustrative example of the responsibility not to harm others except, as the King's Bench said in *Dickinson*, in cases of "unavoidable necessity."

Such a change in practices of responsibility altered both the form of the state and the practices of being a citizen. The state took on extensive new responsibilities and also lost a few. Through the process of minimizing sanctuary, the state legal system was no longer rivaled for authority in adjudicating cases of irresponsibility. The state's role in property management became less one of landlord and more one of record keeper, surveyor, boundary marker, and dispute resolver as previously-public land passed into

private ownership through the early enclosures. Agents of the state, primarily judges, articulated and enforced standards of reasonable conduct based on and reflecting a probabilistic worldview, creating new standards by which citizens could be held responsible.

This is certainly not a set of changes that James I envisioned or intended in 1610 when he described himself as a "speaking law."[441] The unfolding of the seventeenth century broke significantly from James' vision of government based on royal authority and prerogative, and came instead to resemble something much closer to our modern conception of the rule of law with mass buy-in and participation in the legal process as a primary method of solving serious disputes. The seventeenth century ended with elites far more constrained by the law than it began.

Even as the role of the state changed significantly, so also the requirements and possibilities of citizenship morphed. Some possibilities were taken off the table. Being a debtor in sanctuary became impossible as sanctuary was abolished. Living the lifestyle of "subsistence luxury" through fishing, hunting, and gathering on the Fens and commons disappeared as the marshes were drained and their dry beds plowed, and the common land enclosed. Being a horse trainer in London proper was prohibited, and being a shoddy carpenter carried serious new risks. Once-common ways of living and being at odds with the rationalization of both the landscape and the citizenry disappeared beyond the horizon of possibility.

[441] Wooton (1986), pg. 107.

While some possibilities disappeared, other new responsibilities emerged. In a basic way, the responsibility to obey the law was strengthened since after sanctuary there was no publically condoned method of avoiding responsibility for crimes. Responsibilities to work in a regular and disciplined manner increased in scope as the possibilities of living off shared property were significantly reduced through drainage, enclosure, and consequent privatization. While not articulated outright, a responsibility to participate in the commodity economy emerged, since the penalty of not eating in other ways was amplified and made more likely. The regular behavior of work, exchange, and leaving others alone was rewarded – if only by the absence of sanctions like hunger or legal sanction - while deviance was punished. These new responsibilities were a significant part of what Tully describes as "a subject who is calculating and calculable, from the perspective of the probabilistic knowledge and practices; and the sovereign bearer of rights and duties, subject to and of law from the voluntaristic perspective."[442] The dynamic between the calculating subject and and modern responsibility is important, especially in the present, and I turn to it below.

The Responsibility to Forecast (Some of) the Future

An important aspect of modern responsibility is that it expects of citizens that they look into the future and act in ways that do not harm others. Whether it is with our horses, or our cannons, or our pigs, responsibility requires that we not harm one another, and in the event that we fail to fulfill that responsibility the state provides a forum and set

[442] Tully (1993), pg. 179.

of legal remedies for those who are damaged. Today we might add to that list and think tentatively about other sorts of harms. Responsibility may require that we not harm one another with our waste disposal, with our technologies, or with our consumption.

Contemporary conceptions of responsibility often think about the scope of responsibility without considering the role that time plays in the concept and practice. Spacialists like Jeremy Waldron focus on an experience of proximity, thereby limiting the temporal boundaries of responsibility to the present.[443] The relational position, advocated by Soren Reader and Samuel Scheffler, looks to existing relationships for responsibilities, and in that sense it accepts a relational status quo: our current relationships seem to comprise the exclusive terrain of our responsibilities.[444] Neither the spacial nor the relational understandings equip moderns to fulfill the responsibility to look into the future.

Margaret Urban Walker's expressive-collaborative model that, "looks at moral life as a continuing negotiation among people, a practice of mutually allotting, assuming, or deflecting responsibilities of important kinds, and understanding the implications of doing so," seems likely to be temporally bound as well.[445] If the negotiating people are presently-existing adult human beings likely to represent their own perceived interests, there seems to be no requirement that they look into the future and prevent potential harms to others. Yet, her caveat – that everyone engage in moral negotiation,

[443] Waldron (2003).
[444] Reader (2003); Scheffler (2001).
[445] Walker (2007), pg. 67.

"understanding the implications of doing so" – may serve as an important limitation on the negotiation.

At the conclusion of *Moral Understandings*, Walker notes that responsibility is a sort of practice that has to be taught, learned, and actively sustained. "We learn this," she writes, "by learning our places in a system of assigning, accepting, and deflecting responsibility for things open to human care and effort."[446] Walker emphasizes the human interactions of assigning, accepting, and deflecting. What I have alternatively emphasized is the category of "things open to human care and effort" is a historically-rooted and deeply political category. The practice of sanctuary justified itself in large part by sharing in an understanding of the world in which many important events were outside of human control, care, and effort. Alongside the decline in sanctuary, the category of "things open to human care and effort" grows to encompass previously-accidental events involving cannons, pistols, horses, and swords, among others. The expanding horizon of human efficacy and control served to also be an expanding horizon of responsibility. While responsibility is relational and the product of negotiations among participants in a shared moral discourse, the actions of those participants only partly determine the distribution of responsibility. The context in which that discourse occurs plays a significant role in determining what sorts of responsibilities are possible, reasonable, and enforceable.

Roads Lightly Traveled

[446] Walker (2007), pg. 235.

The construction of responsibility is not only a matter of creating and enforcing standards of behavior, but also through that creation and enforcement changing the sorts of citizens the English could or should be. As mentioned in the Introduction, James Tully describes this sort of citizen as, "a subject who is calculating and calculable, from the perspective of the probabilistic knowledge and practices; and the sovereign bearer of rights and duties, subject to and of law from the voluntaristic perspective."[447] This project has gone some way toward tracing the development of the human voluntaristic perspective, a world of "things open to human care and effort."[448] As outcomes of human actions in the world become the result of previous voluntary human actions - rather than the will of God or the whim of Fortune – humans themselves increased both their agency and the breadth of actions for which they could be held responsible.

There are a number of sorts of subject-construction that I do not think seventeenth century responsibility accomplished, that I should note here. First, I do not see a responsible subject being a person who is governed by conscience and capable of guilt, as Nietzsche describes in the *Second Essay* of the *Genealogy*, "an animal with the right to make promises": someone whose trustworthiness, steadiness, and reasonability are consciously enforced by the threat of guilt.[449] The mechanisms of responsibility that I have described do not include conscience or guilt. The process of making responsible citizens is not a matter of calibrating their internal moral compass, or strengthening their

[447] Tully (1993), pg. 179
[448] Walker (2007), pg. 235.
[449] Friedrich Nietzsche, *On the Genealogy of Morals and Ecce Homo*, ed. and trans. W. Kaufman (New York: Vintage, 1989), pg. 57.

commitment to principles of responsible behavior.[450] Second, the responsible self is also not a subject under disciplinary surveillance, in the Foucauldian sense of someone in, "a state of conscious and permanent visibility that assures the automatic functioning of power."[451] The mechanisms of responsibility did not rely on increased visibility throughout society. Certainly a form of panopticonic power was developing, as we saw in the Dymock farmstead plans, but its application served a specific sort of responsibility, the responsibility of work and labor. It did not merge with the state, or expand into a general method of social control, even as Foucault traces the emergence to this form of observational power precisely to the Plague in the late seventeenth century. Responsibility is not a significant manifestation of observational power.

The responsible subject this project has gone some way toward describing is a person who has internalized community norms of behavior in compliance with legal requirements backed by sanctions, but whose behavior has become so habitual that the legal origins of those habits are forgotten. This responsible subject is shaped by the judicial practices that Foucault described as, "the manner in which wrongs and responsibilities are settled between men," but also a shift in how humans were understood as agents serving as, "the foundation of all positives and present, in a way that cannot even be termed privileged, in the element of empirical things."[452] The responsible self occurs and emerges at this nexus: human efficacy increased in scope and intensity, and in

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[450] I borrow this point from Tully (1993) pg. 180.
[451] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (New York: Vintage, [1977] 1995), pg. 201.
[452] Michel Foucault, Truth and Juridical Forms, in *Power*, ed. J. Faubion (New York: The New Press, 2000), pg. 4. Foucault*, The Order of Things: An Archaeology of the Human Sciences* (New York: Vintage, [1970] 1994), pg. 344.

response judicial practices developed expectations reflecting that new scope and efficacy. The depth to which these new practices have sunk into us and our communities and become habits is evident in the lack of thought we give them; Tully tells us that "this self, so familiar to us in its relative regularity and law-abidingness, is [….] a product of centuries of subjection to juridical governance."[453]

Yet, the focus on torts in how this narrative of law's ruling reveals a side of the juridical subject that receives little attention. Given the agenda set by Foucault, it is not surprising to see a focus on criminal punishment leading to either deterrence or rehabilitation. For his part, Tully sees a consciously-obedient subject – "The self whose thought and action is always guided by a concern to be rewarded by the juridical apparatus and to avoid its punishment" – present in the seventeenth century.[454] Certainly the conscious avoidance of punishment was present in seventeenth century England, but what the addition of torts illustrates is that the juridical subject was also constructed by expectations that became habits: people no longer think to do the modern equivalents of asking others to look down the barrel of a loaded cannon with a smoldering fuse or break horses in a busy square. It is hard to conceive of engaging in some of the actions that resulted in the cases because the expectation not to behave in those ways has become so routinized that it is a simple habit. One element of juridical subjectivity illustrated

[453] Tully (1993), pg. 240.
[454] Tully (1993), pg. 240.

through torts is the governance of habit, rooted originally in law, but now mostly forgotten.[455]

Future Research Questions:

This research raises three lines of inquiry for further research that I outline below. The first addresses the dynamics of Ordinary power; the second, the role of statistics and statitistical thinking in legal reasoning; and the third, the dynamics of intergenerational responsibility.

First, the issue of Ordinary/ordinary power that I introduced in Chapter 2 may be a starting point for breaking down the Foucauldian construction of juridical and disciplinary power as exclusive forms, the former characterized by conscious avoidance of sanction, and the latter operating through normalization. Others have begun down this path. Francois Ewald, one of Foucault's students, has argued that we have erroneously conflated juridical power with legal power, which is not a move Foucault ever made. Juridical power is, Ewald argues, "the institution of law as the expression of a sovereign's power."[456] This juridical power is not characterized as an exclusive expression of the law, but rather a hallmark of it. Victor Tadros has gone so far as to argue that the term

[455] It is perhaps worth recalling here that the Ordinary (as a legal officer) had as his official clothing a *habit*. By clothing himself in a habit, he demonstrated to the world that he was set apart for different work than other members of the community, as he exercised the power of punishing deviant behavior and bringing the community into line. With the decline of the Ordinary and others clothed in habits as the cannon courts lost ground to the common law courts, we might note a parallel formation of new legal habits on the part of citizens. Such a shift could be thought of as a transmission of habitual power from a formal office (an Ordinary clad in a habit) into and among the people (engaged in ordinary behavior grouped into habits).

[456] Ewald, Norms, Discipline, and the Law, *Representations,* 30 (Spring 1990), pg. 138.

juridical refers to, "an arrangement or representation of power, rather than the law."[457] The question is, then, as Ewald puts it, "Is a theory or practice of law articulated around the norm possible? If so, what form would such a theory or practice take, and what would be the risks and possibilities associated with them?"[458] Both Ewald and Tadros articulate a theory of law that incorporates the norm, but they do so internally to Foucault's texts. The Ordinary could serve as an historical case study from outside of Foucault's work of how a particular type of juridical power migrated from a representative of sovereign power into the citizenry.[459]

Second, this project has touched on the historical place of statistics and probabilistic reasoning in common law decision-making. This is a long running dispute, with a bulk of scholars arguing that there is something inherently problematic about introducing probabilistic logic into legal proceedings, in one way or another denying the defendant the right to be tried as an individual on the basis of his or her actions. James Hackney has taken the strong position that the introduction of statistical reasoning into common law courts is an attempt to overcome the need for particular facts.[460] Others, like Charles Nesson and Laurence Tribe have acknowledged forms of usefulness for statistical inference in legal decisions.[461] Still others, like Richard Posner, advocate the

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[457] Tadros, Between Governance and Discipline: The Law and Michel Foucault, *Oxford Journal of Legal Studies*, 18.1 (1998), pg. 75.
[458] Ewald (1990), pg. 139.
[459] I use "sovereign power" here in the Foucauldian sense, not the Weberian sense.
[460] James Hackney, *Under Cover of Science: American Legal-Economic Theory and the Quest for Objectivity* (Duke University Press, 2007).
[461] Charles Nesson, The Evidence or the Event: On Judicial Proof and the Acceptability of Verdicts, 98 *Harvard Law Review* 7 (Spring 1985). Laurence Tribe, An Ounce of

use of statistical inference in pursuing just legal decisions.[462] What is lacking in this normative argument – whether probabilistic reasoning ought to be allowed - is whether such a way of thinking is in some way part of the common law, or altogether foreign to it. This project suggests that probabilistic reasoning serves as a foundation to our modern understanding of the common law, but more work remains to be done to engage with contemporary debates.

Third, insofar as this project has dealt with how time interacts with responsibility, it gestures toward intergenerational responsibility, which is certainly am emergent field. At bottom, responsibility is a question of who is in and who is out – from recognition or from consideration. Some people, some things, some events will almost certainly be left out. There are just too many people, too many interactions, and a future too long to really consider it all in every action. The world would quickly become too much for us, as Wordsworth put it, if we were to draw "late and soon" together into the present.[463] An important frontier of responsibility is incorporating as much of the future into our present judgments as possible without creating unrealistically high expectations for knowledge or simply becoming paralyzed by possibilities.

There are several drawbacks to using the legal system to enforce responsibilities. First, there is the well-documented problem of uneven access. Although as we saw in Chapter 4 responsibility emerged and developed alongside an explosion in popular access

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Detention: Preventative Justice in a World of John Mitchell, 56 *Virginia Law Review* 3 (April 1970).

[462] Posner, An Economic Approach to the Law of Evidence, 51 *Stanford Law Review* 6 (July 1999).

[463] The first line of Wordsworth's *The World is Too Much with Us* (1807) reads, "The world is too much with us; late and soon."

to and participation in the courts, access to justice remains uneven.[464] Second, any adversarial system promotes an interest-based vision of responsibility, which as both John Rawls and Jurgen Habermas have differently argued, perpetuates existing injustices through systems of rationalization. As Habermas puts it then, "The discipline of trained thought thus aims at excluding such interests."[465] Third, *standing* limits who and what can participate in legal forms of responsibility. Age and citizenship status are given limitations. More broadly, though, others are categorically excluded: the dead, those who are yet to be born, the trees, the rivers, and the fish.[466] Intergenerational and nonhuman forms of responsibility are marginalized because these groups lack direct standing and rely on ad hoc representation by human advocates making a case on their behalf.

Further, if the process of becoming responsible were to continue by way of the legal system or the legal form, it would have to overcome the problem of venue. In spite of Burke's classic characterization of society as "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born," it remains hard to get this partnership into a room together. For many seventeenth century parishioners of the Church of England, this venue problem was solved by the promise of a coming judgment day where, as Locke puts it in the *Essay*

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[464] Deborah L. Rhode, Access to Justice, 67 *Fordham Law Review* 1785.
[465] Jurgen Habermas, Knowledge and Human Interests: A General Perspective, in *Continental Philosophy of Science*, ed. G. Gutting (Malden, MA: Blackwell, 2005), pg. 316.
[466] Responsibilities toward the dead and methods of enforcement comprise a growing literature. See J. Jermey Wisnewski, What We Owe the Dead, *Journal of Applied Philosophy*, 26.1, pgs. 54-70; Raymond Angelo Belliotti, *Posthumous Harm: Why the Dead are Still Vulnerable*, (Lanham, MD: Lexington, 2012); James Stacey Taylor, *Death, Posthumous Harm, and Bioethics*, (New York, NY: Routledge, 2012).

Concerning Human Understanding, we "receive the Retribution he has designed to men, according to the doings of this life."[467] Absent the supernatural ability to suspend limitations on time and bring the living, dead, and yet-to-be-born together in a room or even serve the absent with notice to appear, the full scope of responsibility seems unlikely to be enforceable through the legal system. While this supernatural ability seemed relatively unproblematic to Locke and many of his contemporaries, responsibility in the present enacts itself in a significantly less enchanted environment. A task for the present is to come to and articulate an understanding of how and why we might create a new vision of responsibility between generations and develop practices of making it binding among ourselves.

[467] John Locke, *Essay Concerning Human Understanding*, 4.3.6.

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Appendix

This appendix includes relevant excerpts of cases cited in this paper not widely available in secondary sources. They are alphabetical by title. Every attempt has been made to preserve the original spelling and grammar in these transcriptions.

Document 1: *Abridgement of the Lawes of England*, Bridall

An Abridgement of the Lawes of England,
Touching Treasons, Rebellious Murthers, Conspiracies, Burning of Houses, Poysonings, and other Capital Offences.
With such Readings thereon as shew the several wayes whereby Offenders in such cases my become Guilty.
By John Bridall, Esq.
London, 1679.

[47]

Chance medley, or per Infortumium, is when one is slain casually, and by misadventure, without the will of him that doth the Act, whereupon death ensueth. Or Homicide by misadventure is when a man without any evil doth a lawful thing, or that is not prohibited by Law, and another is slain or cometh to his death thereby, as if one shoot at Butts, or at pricks, and kill a man, by swarving his hands, this is no felony; The same Law is of tiling an House, and a tile fall, and killeth one. So if one trained Souldier hurteth another in skirmish, of which hurt he dies, this being by misadventure is no felony. But in any of these Cases before put if a man be hurt or maimed only, an Action of Trespass lieth against him that was the cause of the hurt, or maime, though it be done against the parties mind and will; because in Civil Trespasses and injuries, that are of an inferior nature, the Law doth rather consider the damage of the party wronged, thne the mind of him, that was the wrong doer.

[pg. 51]
Mahim, or maime (Mayemium) cometh of the old French (Mehaigne) a Maime a corporal hurt, whereby a man loseth the use of any member. The Cononists call is Membri mutilationem, or Mayhem, is where by the wrougful Act of another auy member is hurt or taken away, where by the party so hurt is made unperfect to fight: As if a bone be taken out of the head: or a bone be broken in any other part of the body, or foot, or any member be cut: or by some wounds the sinews be made to shrink or other member, or the fingers be made crooked, or if any eye be put out, or the foreteeth broken, or any other hurt in a mans body, by means whereof he is made the less able to defend himself, or offend his enemy: But the cutting of an ear or nose, or breaking the hinder teeth, or such like, is no Mayhem, because it is rather a deformity of the body, then diminishing of strength, and that is commonly tryed by beholding the party by Justices. And if the

Justices stand in doubt, whether the hurt be Mayhem or not, they use, and [52] will of their own discretion, take the help and opinion of some skillful Chirurgeon, to consider thereof, before they determine upon the Cause.
[...]
[cont on 52]

By the ancient Law of England, he that maimed any man, whereby be lost any part of his body, the Defendent should loose the like part, (as he that took away another mans life, should loose his own) And this was grounded upon the Law of God [...]
[pg. 53]

This offence of May'em is under all felonies deserving death...

British Library, 1607/1256

Document 2: *Boulton v. Banks* (1658)

[Crook's Reports]
And Exact Abridgement of the Reports of that Eminent Lawyer *Sir. George Crook* Knight, One of the Judges of Both Benches, of Such select Cases as were adjudged in the said Courts the time that he was Judge in either of them. (1658).

[pg 136]
Ter.Pafc.8Car.Banc.Regis
[pg 138]
Boulton against Banks. H.7Car.Rot.276

Resolved, an Action lies against one who keeps a Dog (knowing he is accustomed to bite Hogs) if he kills one. And that it is not lawful to keep such a Dog.

British Library, E.1730

Document 3: *The Dolefull Even-song*

The Dolefull Even-song

[...] The next morning, according ot the Lawes of our Land, which prouide that the Kings Maiestie should haue and account of his Subiects dying Per infortunium, the Coroners Inquest was there impannelled vpon the dead corpses, that after their view of them, they might be buried with conuenient speed.

By the said Coroner, and Iury, especiall care was taken to suruey the place, and materialls of the ruines with all diligence, for the finding out the immediate cause and manner thereof: the rather for that it was giuen out by some presently vpon the mischance, that some Protestants, knowing this to be a chiefe place of their meetings, had

secretly drawne out the pins, or sawed halfe sunder some of the supporting Timber of that building. Which was found to be a calumny no lesse ridiculous, then malitious.

The most probable apparant cause of the suddaine failing of that floare, charged with suck a weight of people, was iuged to bee in the maine Sommier thereof, which being not aboue ten inches square, had in the very place, where it brake, on each side a mortaise hole directly opposite the one against the other, into which were let the Tenants of two great pieces of Timber, called Girders: so that between those Mortaises, there was left not above three inches of Timber. This Sommier was also somewhat knottie about that place, which, in the opinion of Architects, might make it more brittle, and readie to knap in sunder. The maine Sommier of the lower roome, was about thirteene inches square, without any such Mortaise; and brake, not)as the former) in teh middest, but within fiue foot of one end, and more obliquely and shiuering then the other. No foundation or wall failed. The roofe of the Gallery with the seeling vpon it remaine yet intire; as also a small filling wall, fastened to teh rafters, which yet hangeth where the floare is gone.

in Fatal Vespers at Blackfriars and Other Tracts, British Library G.19571

Document 4: *Natural and Political Observations*, Graunt

Natural and Political
OBSERVATIONS
Mentioned in a following INDEX,
and made upon the
Bills of Mortality.
BY
Capt. JOHN GRAUNT,
Fellow of the Royal Society.

With reference to the Government, Religion, Trade, Growth, Air, Diseases, and the several Charges of the said CITY.

-Non, me ut miretur Turba, laboro,
Contentus paucis Lectoribus.-

The Fourth Impression.

OXFORD,
Pringed by William Hall, for John Martyn,
and James Allestry, Printers to the
Royal Society, MDCLXV.

[Pg. 143]
The Conclusion.
It may now be asked, To what purpose tends all this laborious bustling and gropiug? To know,
1. The number of the People?
[pg. 144] 2. How many Males and Females?
3. How many Married and Single?
4. How many Teeming Women?
5. How many of every Seprenary, or Decad of years in Age?
6. How many Fighting Men?
7. How much London is, and by what steps it hath increased?
8. In what time the Howsing is replenished after the Plague?
9. What proportion die of each general and particular Casualties?
10. What years are Fruitful and Mortal, and in what Intervals they follow each other?
11. In what proportion Men neglect the Orders of the Church, and Sects have increased?
[pg. 145] 12. The disproportion of Parishes?
13. Why the Burials in London exceed the Christenings, when the contrary is visible in the Country?

To this I might answer in general, by saying, that those, who cannot apprehend the Reason of these Inquires, are unfit to trouble themselves to aske them.

[pg 153]
An Appendix.
Forasmuch as a long and serious perusal of all the Bills of Mortality, which this great City hath afforded for almost fourscore years, hath advanced but the few observations comprised in the fore-going Treatise; I hope very little will be expected from the few scattered papers that have come to my hands since the publishing thereof, especially from one that hath learned from the Royal Society, how many Observations go to making up of one Theoreme, which like Oaks and other [154] Trees fit for durable Building) must be of many years growth.

The Accounts which follow, I reckon bnt as Timber and Stones; and the best inferences I can make, are but as hewing them to a Square: as for composing a beautiful and firm structure out of them, I leave it to the Architecture of the said Society, under whom I think it honour enough to work as a Labourer.

My first Observation shall be... [observations follow, with 21 pages of tables].

British Library, C.194.a.1206

Document 5: *Sir John Chichefter's Case* (1681)

[opposite cover sheet]
I do approve of the Publishing of the Reports of the Learned and Judicious Author for the benefit of the Students of the Law.

[Cover sheet]
Selected Cases In B.R. 22, 23, &24. CAR. I. Regis, Reported by John Aleyn Late of Greys Inn Esq; with Tables of the names of the Cases and of the matters therein contained: Also of the names of the learned counsel who argued the same. (1681)

[12]
Pasch. 22 Car. Banco Regis

Sir John Chichefter's Case
Sir J.C. was indicted of Manslaughter, and tried at the Bar, and evidence was that he and his Man were playing at foils, and the Chafe of Sir John's Scabbard fell off unknown to him upon a thrust, so that the Rapier went into his man's Belly, and killed him. And the Court directed the Jury, that forasmuch as such acts are not warranted by Law, the parties that use them ought at their own peril to prevent the mischief that may ensue, for consentwill not change the Case; and therefore though there were no intention of doing mischief, yet the thrust being voluntary, was an assult in Law, and death ensuing, the offence was Manslaughter; yet the Jury found it Chance-pedly, but the Court would not accept the Verdict, but charged them if they varied from the Indictment to find it specially. And Bacon said he had known a Jury bound over to the Star-chamber upon the like Cause, whereupon they found him guilty , and day was given him to procure his Pardon, &c.

British Library, 5805.c.7

Document 6: ***Something Written on the occation of that fatall and memorable accident...***

Something
Written by occasion
of that fatall and memorable accident in
the Blacke Friers on Sonday, being the 26. of
October 1623.

[pg. 7] On Sunday [pg 8] the 25. of our October, & fift of Nouember by the Romane account, there happened a memorable and lamentable disaster at a Popish meeting, or conuenticle in a house adioyning to the French Embassadors in the Black Friers: for between the hours of three and foure in the afternoone, as the Iesuite Priest was in the midst of his sermon, or if you had rather, his exercise: It pleased God, that the roome wherein they were placed, being two stories high, fell downe at once with the breaking of the maine Beame, to which the Ioice were fastened, and drauethe lower roofe or roome vnder them with it violently to the bottome, whereby the whole company, except some few placed in windowes, and standing close to the walls, were in a manner bruised, or

smothered betweene the two Seelings, to the vtter losse of a 100. persons or thereabouts, there being in number aboue 200. at first in the assembly...

[pg 9] Now from this fatall accident ariseth a question, whither it were a judgement of God or no? or whether we may well put it into the Catalgue of his wrath and vengeance? to answer which, I will first tell you, what the Papists say: Second, what the Protestants may say: Thirdly, I will open the story more particularly: Fourthly and last of all, I will referre it with a conclusion to your owne soules, for vse and observation.

First, then the Papists will haue it a meere accident, and so impute it to the Antiquity of the building, and the rottennesse of the timber...

[pg 11] Secondly, concerning the Protestants with feare and trembling, they immpute it to Gods judgement, and vengeance...

[pg. 27] Now to the last part of my diuision, which is a conclusion, and referring it to your owne censures. A appeale ot the obstinatest Papist in England: Why should we not absolutely determine it a Vengence of God on his and our ene [pg 28] mies, seeing Papists themselues are so vncharitable to repute vs all damned hereticks, to detest and abhorre our congregations, to hate and maligne our persons, to scoffe and deride our profession...

British Library, 860.k.17

Document 7: ***A Vvord of Comfort***

A vvord of Comfort.
OR
A DISCOURSE
CONCERNING
The late lamentable Acccident of the fall of a roome, at a CATHOLIKE Sermon,
in the Black-friars at Londone, wher-
with about fourscore per-
sons were oppressed.
WRITTEN
For the Comfort of Cathliks, and Information
of Protestants, By I.R.P.

[... pg. 5] And Gods Omnipotent Wisdomd, as he resolued for reasons best known to himselfe, to deuide indifferently amongst the good & bad, these terrible casualityes of mortall life: So likewise in his Mercy, he would haue his seruants warned heerof abundantly by his holy Word.

[Long defense of the idea that God's will is a mystery follows, made with evidence from the Bible and lives of the saints.]

British Library, 86.k.25
1623

And Exact Abridgement of the Reports of that Eminent Lawyer *Sir. George Crook* Knight, One of the Judges of Both Benches, of Such select Cases as were adjudged in the said Courts the time that he was Judge in either of them. (1658).

Document 8: ***Whyte Against Rysden***

Whyte against Rysden

Action Case. The Plaintiff had lent the Defendant his horse from L. to Exon, and there to be safe delivered, &c. The Defendand did misuse his horse, and he demanded him of the Defendant at Exon, and he refused, but converted the said horse to his own use. Found for the Plaintiff, dam. 10 l. Moved in Arrest, that the Declaration is nought to joyn all these Torts in one Action. Also the Tryal ought to have been at L. where the beginning of the bargain was, and not where the conversion. Also, intire Damages is not good for all these Torts. But resolved, The Tryal good, and Damage well assest.

1. The Tort was, the not delivering according to bargain, and then refusing that, and converting, he may have action for both, and together. But had he de [10] murred to the doubleness fo the Declaration, otherwise. And so the Tryal is good, and Damages well assess'd. Judgement 7 Rep. 1. Bulmers Case.

British Library, E.1730