THE LAW OF PROPERTY

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Class 02

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LAW AND JURISPRUDENCE IN AMERICAN HISTORY

CASES AND MATERIALS

Fourth Edition

Stephen B. Presser
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LAW AND JURISPRUDENCE IN AMERICAN HISTORY

CASES AND MATERIALS - SIXTH EDITION

Stephen Presser / Jamil Zainaldin

THE ENGLISH HERITAGE - INTRODUCTION:

The Development of Legal Institutions and Common Law to the Time of Sir Edward Coke

Many of the dynamics of modern law, society, and political institutions are evident in the first 400 years following the Norman conquest of England in 1065. The Romans invaded England in 43 AD. By 300 A.D., we can speak of Britannia, as the Romans named it, as "Romanized."

With Italy and Rome threatened by the invasions of the Goths and Vandals, in 407 A.D. Constantine III called Britain's military legions home. Without Roman protection, the Britons were soon overwhelmed by invading bands of Angles and Saxons from Germany, and later Vikings and Danes. These new occupiers set up their own kingdoms, though in time the Danes and English emerged as the dominant elements. (The word "law" is derived from Danish.)

Edward "the Confessor" (1042 66), an Englishman, was the first to unite the country under a single ruler, though his hold was tenuous. The Christian Church was by now an established institution, through the influence of the Romans and the later efforts of missionaries. Its clergy were among the few who were literate. Customs, laws or "dooms" of particular kings, "oaths," and grants of land ("bocs," which is the origin of the word "hook" because it contained the written record of land grants) made up the legal infrastructure of this essentially primitive society.

In Anglo Saxon England, most village conflicts were settled informally among warring clans, and the king's law was more a guide than a mandate. Still, what was later to become English criminal law originated in this Anglo Saxon era with the concept of a superior right of the king to impose his own brand of law on anyone violating his "peace," which extended to his habitations and eventually to markets and roads.

Not less important is the Anglo Saxon concept of "right" which was an extension of the sphere of the King's Peace. A right was understood as the space to which the King's Peace extended, and this space, which might include a physical or geographic area, also could include persons. The Anglo Saxon term "folc riht" embodied this notion of a personal right.

Edward the Confessor's death in 1066 left an already unstable country vulnerable. That same year Duke William II of Normandy crossed the channel and defeated Harold, Edward's successor, and his Anglo Saxons at the Battle of Hastings. William the Conqueror, as he became known, embarked on an ambitious resettlement of the English lands by Norman nobles, and he imposed a new regime of central administration. The Anglo Saxon shires (or counties, supervised by the shire-reeve, or "sheriff") were kept intact, as were local units of the shire, known as "hundreds."

These ancient administrative forms each had local courts run by laymen, and continued to be useful. The inspired contribution of the Normans was to create, in steps, a bureaucracy on top of these local customary institutions that in time established the king and his courts as the basis of a new law "common" to the realm.

This administrative structure carved out royal jurisdiction for felonies, certain civil disputes, and taxation; introduced a process in writing, known as royal "writs", for initiating action; and formed centralized royal "courts" to adjudicate civil complaints and criminal actions. The name "court" was taken from the noun describing the royal household that included advisors and administrators. The Normans also introduced juries, a Norman practice, and "justiciars" or judges to whom the king delegated his authority as his representative in the courts.

French, the language of the Norman king and his barons, also became the language of the royal courts. "Law French" was an amalgamation of Anglo French that gave us words such as plaintiff defendant and brief. Latin, the language of the church and the educated, found its way into law through the writ system; writs were issued on parchment in Latin, and bore a royal seal. The writ initiated civil action in a royal court by asserting a right or complaining of a wrong. Among the better known writs are habeas corpus, mandamus, and certiorari. Until 1731 Latin was the language of record in common law courts.

The Magna Carta (1215) or Great Charter grew from the disgruntlement of Norman barons who believed their customary rights were being abused by King John. These abuses included arbitrary arrests and imprisonment, the imposition of fines, and other grievances. At Runnyinede Meadow, on the banks of the Thames River, nobles extracted from John his written approval of a list of specific rights. The Great Charter was something of a housekeeping document, the sorting out of rights that were presumed to exist and in need of affirmation. The real importance of this document comes from the meaning later attributed to it. For the first time, it set forth a concept of a supreme law that no person was above, not even a king

The Great Charter also contained phrases and concepts later generations on both sides of the Atlantic would reinterpret in light of contemporary events, such as "No scuttage [taxation] or aid shall be imposed in our kingdom except by the common council of the kingdom..." Chapter 39 of the Charter reads: "No free man shall be taken or imprisoned or disposed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land."

The Development of Legal Institutions and Common Law to the Time of Sir Edward Coke - Continued

While the Charter was revised, reissued, and confirmed many times, Chapter 39 clearly points to what we now know as due process of law, and to law as a potential bulwark against arbitrary power an extraordinary and early contribution to constitutional jam.

In 1397-1399 the enlargement of the great Westminster Hall was completed. Here the royal central courts finally came to rest, assuming the trappings of a permanent and authoritative judicial system. They included the Court of Common Pleas (civil and appellate jurisdiction), the Court of Kings Bench (criminal and appellate jurisdiction), and the Court of Exchequer (jurisdiction over taxation, finances, and accounting involving the king). The existence of circuit courts, or "assizes," in the countryside allowed the central courts to stay put and to function primarily as courts of appeal. It was from this early royal adjudicatory system that the main elements of the future Anglo American legal system sprung: the development of substantive common law; a highly formalized process for initiating, hearing and trying cases; a class of professionals who represented clients before these courts; a system of record keeping, and a judicial establishment known for its competence and expertise. The Normans and Angevins (the Normans' French successors to the crown) introduced system, process, and rules, backed by the royal authority and the emergence of a professional class prepared to encourage allegiance to law.

The distinction between common law and legislation in post-Conquest England was murky. The courts were formed, by officials from the King's household. These included his political advisors (the Curia Regis) and the justiciars, his personal representatives. Similarly, legislation was the product of the king in his council and tended to take on the character of ad hoc lawmaking and adjudication in response to complaints, a process not unlike judging. In any event, this lawmaking was seen as a complement to rather than a departure from custom and common law.

The authority of the king to participate in lawmaking was unquestioned, though his presence in the legal process being carried out in his courts came to be more a fiction than a fact, creating the opportunity for the tension between the King and his judges which you will soon observe.

Not until after the reign of King Edward III (1327 1377) did Parliament begin to form as a distinctive body composed of Lords and Commons, each of whose consent (with the king's) was eventually necessary for the enactment of laws. During the later Tudor period, and especially during the reign of Henry VIII (1491 1547), legislation took on the form of a distinct departmental activity based on careful drafting of bills, Parliamentary debate, and policy making.

As Parliament evolved into a formal institution with specific powers, it eventually began to assert a self-conscious power to change law, including common law, or to enact new law, its only limit being its capacity to bind a future Parliament, although this development was not completed until well into the Seventeenth Century. At the same time that the "High Court of Parliament" as it was then called, began to evolve into an institution to make rather than interpret the law, adjudication was evolving as the task of a distinct non-legislative department a judiciary though there is little doubt that judges enjoyed latitude in interpreting the language of legislation. The precise nature and authority of the legislative and judicial jurisdictions, however, were based on custom and practice. The possibility for conflicting interpretations of authority and law was always present among king, Parliament, and the courts; the tricky part was how to determine the rules to play by when fundamental questions of authority and jurisdiction were involved, as occurred in the reign of King James I.

Medieval law (1066 to approximately 1500) was complex, entwined in "feudal" custom and practice. Under feudalism, the social system of the Normans, the king owned the land and granted rights to others, his "tenants," to its use. In return they made payment, rendered services, or may have owed other obligations. A tier of rights might descend from king and through nobles, to farmers, to craftsmen, and finally to the lowest order who were "serfs," usually the Anglo-.Saxons in Norman England. For all practical purposes, a serf lacked any rights at all. In theory, only the king owned lands outright. Feudalism was not a Norman invention; it was a pattern of rule and service common in Europe at the time of the Conquest, and one that the Normans brought with them. The expectations that formed around feudal rights of tenure and obligations were evident in the complex law (to modern eyes) that took form through disputes in courts. Long after feudalism receded as a social system, its vestiges could still be found in English law.

Norman land law, because it was rooted in a variety of tenures, called upon conceptual powers that arrayed minute detail with overarching ideas Not surprising, a final Norman contribution to Anglo-American legal history was the treatise writer, the unofficial clarifier who drew law together by explaining the significance of leading cases. The first great treatise writer in English history was known as "Bracton," (c. 1210 1268). The man (or men) who wrote Bracton's work was probably a judge, and Bracton's treatise on The Laws and Customs of England was not only a guide for the judges who followed: it was the first work to present early Norman law as a "system" (the common law) that contained basic "rules" discovered through logical analysis of precedent. Using both Canon and Roman law for comparison, Bracton was the first to use concepts and theories to explain an unwritten law. To use F.W. Maitland's words, he was the "crown and flower of English jurisprudence." He gave intellectual credibility to English common law and to the profession of lawyers.

The importance of the relationship between the crown and the church cannot be overestimated as a matter of English history, and had far-reaching effects in law. The relationship was often problematic, as the murder of Archbishop Thomas a Becket at the instigation of King Henry II showed (1170). Difficulties could flare up around any number of areas, from jurisdiction, to the ownership of church lands, to the binding force of papal decrees.

The Development of Legal Institutions and Common Law to the Time of Sir Edward Coke - Continued

Because the common law developed apart from Canon law with its Roman law roots, Church and common law courts at times clashed in politically tinged contests of the kind that you will soon see occupying James I and Sir Edward Coke. These clashes were not only about the authority to decide cases, but also involved fundamental differences in legal procedure and the sources of law, and pitted emerging desires for English nationalism against the continental Roman heritage.

Centralized kingship, the rise of central courts, the emergence of a class of learned legal professionals, the formation of a common law that encompassed substance and process, a distinction between precedent-based adjudication and legislation, the idea of a supreme law, and the presence of an intellectual and conceptual approach to law are among the elements of the new legal system the early Norman and Angevin kings and their successors called into being.

The elements exerted a profound shaping influence not only on the constitutional development of English law spanning almost 900 years, but on the English colonies of the seventeenth and eighteenth centuries who viewed themselves as beneficiaries of the rights and privileges of the English constitutional system.

Note: Early English legal history is normally divided chronologically by kingships. The reign of French Norman kings includes the Normans, Angevins, and Plantagenets (1066 1485). The Tudors of Welsh origin succeeded to the throne in 1485 and ruled through 1603. In 1603 King James VI of Scotland, a Stuart, acceded to the throne as King James I of England. The Stuart line ended with Queen Anne (1714).

SECTION A. THE KING AND THE CHIEF JUSTICE: JAMES I AND SIR EDWARD COKE

The Common Law, the Civil Law Tradition, the Church, and the King

There are two great strands of legal thought in the West. One is the Anglo American "Common Law" tradition originating with the England of the Middle Ages. The other is the Civil Law tradition originating in Continental Europe. Through the historical processes of colonization, innovation, and adoption, the two systems have become the dominant traditions in the world today.

The "civilian" tradition has its origins in classical Roman law. In the sixth century, Roman Emperor Justinian promulgated a new summary and update of the law in the *Corpus Juris Civilis*. During the Middle Ages, approximately 500 to 1450, legal scholars developed and spread Roman law through the Byzantine Empire. The defining characteristic of the civilian tradition is the written law, or code, founded on broad principles and doctrines. Legislative in nature, Civil Law was interpreted and applied by courts on the basis of deduction from first principles. Because the Roman-based legal tradition is founded on scholarship and official statements of what the law is, it is sometimes referred to as "the learned laws." The legislator is the most powerful actor in this tradition. For civilians, the lawyer and judge function more as trained technicians of law, for their task is not to discover the law, or even interpret it, but to apply it.

In contrast, the developing English common law was founded on local customs, traditions, and precedent. Its method of proceeding was the case, and its manner of proceeding was adversarial, with each party represented by attorneys. The rules of the common law were derived from prior cases, and therefore are "unwritten" (to distinguish them from officially-promulgated and drafted legislation). Moving from the specifics of the case to general principles, the common law mode of reasoning was inductive. The centrality of tradition, custom, the law case, the attorney, the judge, and the inductive method of reasoning is what most distinguishes common law from Roman law. The judge and the lawyer are the most important actors in this tradition, and their job is to "discover" the law.

The "leaned laws" exerted an impact in England through the Church's Latin culture and Canon law, which borrowed from classical Roman law. Though the Romans introduced Christianity in the British Isles, it was Augustine's mission in Canterbury around the time of 600 that is dated as the English Church's beginning. The Synod of Whitby in 644 consolidated the Church in the medieval era, insuring that the Roman branch of Christianity prevailed over the Celtic branch. William the Conqueror, a Christian, strengthened the Church and among his first acts was the appointment of Norman prelates with close ties to the Holy See. William also created a system of courts through which the bishops' spiritual authority was exercised. These courts were called "ecclesiastical" because they pertained to matters of the Church, the Greek word for which is ekklesia. They were made distinct from the "temporal" or regular courts at the levels of the county shire and local hundreds, and also from the king's court (Curia Regis).

Jurisdiction of the ecclesiastical courts was based on the law of the Church, or Canon law. The influence of the Church ranged widely in English society, and so therefore did its law. The Church exercised jurisdiction over marriage, other familial issues, inheritance of personal property, sexual offenses, and breaches of faith. Church law was administered by bishops' chancellors Appeals lay to the archbishop and ultimately to papal delegates or to the Papal Curia in Rome Because church law was administered by clergy learned in Canon law, the jurisprudence of the English Church developed separately from common law. At times, Church law seemed to be a rival system to common law because it was continental in origin and not beholden to English traditions or customs.

The Common Law, the Civil Law Tradition, the Church, and the King - *Continued*

Conflicts between the Church and the crown in early English history were inevitable, and they tended to flare around issues of taxation and revenues (the king controlled most of the Church's land), the appointment of bishops, and discipline by the Church of royal officials and representatives. As we will see in the dispute between Coke and James I, there was also the question of what was, or was not, temporal or spiritual. Much of this conflict was worked out not through contests between pope and king, but through private litigation. By means of the "writ of prohibition," a judge who believed the common law's jurisdiction was being sidestepped could pluck a case out of the ecclesiastical court.

The relationship between Church and Crown changed fundamentally in 1534, when Parliament enacted the Supremacy Act and officially broke all ties with the Church in Rome. Henry VIII originally instigated what became the English Reformation because the pope denied his request for an annulment of his marriage to Catherine of Aragon, which would have freed him to marry Anne Boleyn. Even if Henry had not forced the issue, the Reformation probably would have occurred in England at some point, for its appeal was present before Henry wed Anne. On the continent, the Protestant Reformation was begun by Martin Luther when he nailed his Ninety Five Theses to the door of the Wittenherg Church in 1517.

While Henry disapproved of the study of Canon law at Oxford and Cambridge, he did create the Regius Chair of Civil Law at Cambridge. Also during his reign the Society of Doctors of Civil Law was founded. The judges and advocates in the ecclesiastical courts, which were continued under the Reformed English Church, were doctors of Civil Law, and this body of scholars furnished the legal and clerical professionals for Courts outside the common law. On the continent and in England 1ng the Renaissance, there was a revival of interest in classical Roman literature and law, as well as classical Greek philosophy. There were some English royal advisors who favored a "reception" of the Civil law as a replacement for the common law, seeing the continental system as more rational, consistent, and based on time-proven principles. Civil law was also well suited to a system of centralized administration and control, making it an ideal tool for European monarchial absolutism.

The English Reformation led to a number of royal administrative developments that shifted more power to the crown. One was the creation of the Ecclesiasticai Court of High Commission by the King, which replaced the pope in criminal matters and became the legal mechanism for enforcing conformity to the new Church of England. As we will see, this court used the oath ex officio to force a person to testify against himself in opposition of the common law privilege against self-incrimination.

Another encroachment on common law was the Court of Chancery. The Court of Chancery grew out of petitions to the king for special justice because the civil complainant, for one reason or another, could not gain satisfaction through the royal central courts. Initially created from the king's court in the late fourteenth century, Chancery, because it was not a common law court, was bound by less formality of procedure and was not hindered by precedent or rules. By 1460 its jurisdiction (and business) enlarged, making it as important as the common law courts. The Court of Chancery dispensed "justice" in accordance with the dictates of "conscience." This was an Aristotelian concept popular during the Renaissance that held great appeal, and when operating in unison with common law, offered an important corrective to England's relatively rigid legal system.

Under the Tudors, however, and especially Henry VIII, Chancery showed a certain disdain for common law as it adopted an aggressive stance in relation to the central courts. Tudor Chancellors tended to be Church men who served the king; their background was in Canon and Civil law and they were inclined toward continental systems and the idea of centralized power.

As we will see, the widening gulf between courts of common law and equity reached a highpoint during the reign of the Stuart King James I, with the face off between the king, Coke, and behind the scenes, Lord Ellesmere, who served as James' Chancellor (1596 1617).

Courts like Chancery that grew from the king's council took the name of "conciliar" or "prerogative" courts because they were created by means of the king's prerogative to satisfy claims of justice made to him personally. The Court of Star Chamber, taking its name from the gilded stars on the roof of the chamber it met in, was one such court founded in 1487; it functioned as the king's tool for the prosecution of crimes and offences that could not be tried at common law or could not be entrusted to a jury. These were usually cases of a political nature, and included offenses like riot, libel, forgery, perjury, and conspiracies. Because Star Chamber acted outside of the common law, it enjoyed streamlined procedures that made action speedy: The Attorney General prosecuted cases, and trials were by affidavit and interrogation rather than by jury. Torture, or its threat, was the usual tool for obtaining confessions, and punishments included fines, imprisonment, the pillory, branding, and cutting off of ears but not death. Star chamber rulings could not be appealed.

For a portion of its history, like the Court of Chancery, Star Chamber was accepted as a supplement to common law courts, and it may well have corrected deficiencies in the central royal courts that frustrated notions of justice and fairness. The potential for abuse of executive power was always present, however, and under Henry VIII, traditionally regarded as one of the most absolute and ruthless of English kings, Star Chamber became a useful tool for persecuting dissidents and non-conformists.

Under the Scots Stuarts, who never enjoyed the popularity of the Welsh Tudor monarchs Henry and Elizabeth, the Star Chamber prerogatives began to chafe, especially when, Charles I, the son of James, used it in place of convening Parliament. Eventually Parliament abolished Star Chamber as one of the reforms of the English Revolution.

The Common Law, the Civil Law Tradition, the Church, and the King - *Continued*

In all, the centralization of authority under Henry VII and the Tudors, and his elevation as the head of the Reformed Church of England was an extraordinary augmentation of royal power. The common law, with its origin in custom and archaic feudal traditions, was certainly open to criticism. Its procedures had become dilatory, and its use of Law French highly archaic. The common law was also the exclusive domain of a learned profession, lawyers and judges, jealous of their position as the sole interpreters and transmitters of an unwritten law.

To legal scholars trained in Canon and Roman law, the common law was a throwback to a more primitive time. Yet, as you will soon note, it was this law, according to Coke, that was and ought to be supreme in the land because it was source of English liberties and rights, protector of both ruler and ruled, as he put it. Henry's (and later the Stuarts') reach for power was part of a modern European trend toward centralizing national authority and lawmaking. The existence of Chancery and Star Chamber, and the prerogative courts that borrowed their procedure from Civil law, offered an impressive set of legal tools that any modern monarch would want to have. They also became symbols in a power struggle between Parliament and the king that would lead to the violent events of the English Civil War and the interregnum of 1640 1660, but not be finally settled until the "Glorious Revolution" of 1688.

For colonial Americans, the significance of these events was not fully felt until almost a century later. Then, the Americans rediscovered the political theory and argumentation of the radical Whigs who had struck at monarchial power in the name of English liberty, and employed these arguments against the British. As the colonials moved toward Revolution, the target was Parliament instead of the king, and the goal was creation of a republic, instead of the constitutional monarchy England had become.

AMERICAN LEGAL HISTORY

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KERMIT L. HALL
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LAW IN THE MORNING OF AMERICA - THE BEGINNINGS OF AMERICAN LAW, TO 1760

In his famous book The Common Law (1881), Oliver Wendell Holmes, Jr. (who later became a U.S. Supreme Court justice) concluded that "the life of the law has not been logic; it had been experience." He observed that “the felt necessities of the times, the prevalent moral and political theories," and "intuitions of public policy, avowed or unconscious" have been central to the development of American law.

The development of law in early America illustrates the wisdom of Holmes's observation. The English who came to America brought a well-developed legal culture with them. Their cultural "baggage" included English statutes, case law, and common law, as well as local rules, customs, and usages. They came from a legalistic society, and some of the early leaders, like John Winthrop of the Massachusetts Bay Colony, had legal training and experience. But new conditions and changed social circumstances led, almost immediately, to both subtle and dramatic legal changes. Colonial law was a dynamic as it blended the inherited English legal culture with new rules that were necessary for a new environment. In addition, some colonists brought with them ideas about law that were quite distinct from what existed in England. Quakers in Pennsylvania, for example, firmly believed that law should be merciful, and thus they consciously rejected the huge number of English laws that provided for capital punishment.

English inhabitants of the mainland colonies, even those who were born in the New World, did not think of themselves as "Americans" until the last third of the eighteenth century. Rather, they considered themselves English people who happened to be living outside of Great Britain but within the Empire. They therefore regarded themselves as heirs of the English constitutional tradition, especially those parts of it that guaranteed individual liberty. Yet, even as they stressed their "rights as Englishmen," these settlers discovered that New World conditions both required and allowed for an alteration of English ways.

Some English Protestant thought emphasized both the individual and the community. It thus laid a foundation for the prominent place of individualism in American law, giving American legal institutions, both public and private, a strong bent toward protecting the rights of the individual. At the same time, the communitarian element of Protestant theology - especially among the Puritans and Quakers - suggested a role for law in protecting the community. American law has never been exclusively individualistic in its emphasis. Community needs, rather than those of the individual, were particularly important in the early period when English Americans felt themselves beset on all sides by hostile peoples: Catholic Spaniards to the south, Catholic French to the north, Indians everywhere, and enslaved Africans in their midst. This feeling produced a fortress mentality that used law to fortify the community.

Although Americans thought of themselves as English people, the very act of creating new societies provided both the opportunity and the necessity for inventing or adapting legal institutions appropriate to the New World environment. For example, legal institutions that supported the established church in England, such as canon law and its ecclesiastical courts, were unsuited to the new colonies. The religious dissenters in New England and Pennsylvania rejected all church hierarchy, and the Anglican Church never became the established church in these places. Even where Anglicans predominated, like Virginia and Georgia, the lack of an educated clergy or sometimes any clergy at all made it impossible for church courts to successfully cross the Atlantic. In the religiously heterogeneous colonies, like Rhode Island, New York. New Jersey, and South Carolina, adoption of canon law was both impractical and irrelevant. Instead, these colonies, along with Pennsylvania, pioneered in creating governments that tolerated religious diversity. The emergence of religious toleration in the colonies was an adaptation to conditions unique to the New World.

Americans ultimately created a legal order based on older traditions and ideas, but which in the end was significantly different. They accomplished this without having to crawl out from underneath centuries of legal tradition and custom found in Europe. Americans often selected out of the English heritage only those legal elements that met their needs. Rhode Island's 1663 charter, for example, limited conformity to those English laws suited to the "nature and constitution of the place and people”. In 1833 Justice Joseph Story summed up this tradition in his book Commentaries on the Constitution. noting that the colonists "did not carry over with them all the laws of England when they migrated hither, for many of them must, from the nature of the case, be wholly inapplicable to their situation, and inconsistent with their comfort and property. "Rather they brought "with them all the laws applicable to their situation, and not repugnant to the local and political circumstances, in which they are placed." Americans created their legal order in a spirit of eclectic opportunism, drawing from various sources of law and devising new rules of law when they found nothing suitable in existing systems.

While never fully free to reject all English laws they did not like, or adopt all new rules they wanted, Americans were less constrained than their English cousins in molding laws to fit their society's needs. Consequently, American law was easier to reform and more instrumentalist in its development than British law.

Americans did not develop their laws unthinkingly or reflexively. On the contrary, they displayed a remarkable sophistication in thinking about the governance of their societies. In addition to English common law and statutes, they drew freely from a variety of legal sources, including Roman law, local English law and customs, contemporary justice-of-the-peace manuals, and some biblical law (especially in the early seventeenth century). Similarly, they turned to various sources for political theory including the writings of Montesquieu, James Harrington, and John Locke.

The Beginnings of American Law, to 1760 - *Continued*

Thus, by the eve of the Revolution, Americans had developed a political philosophy to support the choices they made about the directions of their legal development. Eventually, they reaffirmed their commitment to the English common law as the foundation of their legal order, but it was the common law stripped of unsuitable doctrines. Americans regarded the common law as a guarantor of personal liberty after the American Revolution.

Early American law contained within itself the basis of the legal and constitutional order of the post-Revolutionary states and nation. During the colonial period, American law incorporated some essentials of what we today call the rule of law, including concepts of higher law, limited government, separation of powers, an independent judiciary, due process of law, and consent as the basis of legal obligation. Legal development in the colonial period anticipated much of what later became American constitutionalism. Law, as historian Arthur Bestor has observed, both molds people and the way they think as much as it is molded by them. So it was with law in America's morning. We have become the people that we are today in part because of the laws that we adopted, borrowed, and created in the early English settlements.

THE ENGLISH HERITAGE AND MAGNA CHARTA

American law traces its beginning to the landmarks of English constitutional development. The earliest and most revered of these was Magna Charta. The "great charter" began as an agreement between King John I and the leading barons of England. On June 15, 1215, the barons surrounded the king on Runnymede Island and forced him to sign the document. Much of the document's sixty-three chapters dealt with property, inheritance, and feudal obligations. But a number of significant provisions were directed at the fair administration of law, fundamental justice, and basic rights.

Magna Charta
1215

Magna Charta was ostensibly designed to protect the barons and their property from the king. However, the language of the document was more open-ended and ultimately became available to "all free men of our realm."

More than half a millennium later, many of its provisions had evolved into important constitutional provisions and legal principles in the United States.

For example, Chapter 17, requiring that lawsuits "not follow the royal court around," evolved into the provision in Article III, Section 2, of the United States Constitution, requiring that Congress fix the places where couns would meet.

Similarly, Chapter 18 can be seen as the ancestor of the grand jury.

Chapters 20 and 21 of the Magna Chana, providing that fines be "in proportion to the degree of' the offense, led to the ban on excessive fines found in the Eighth Amendment to the Constitution.

Chapter 35 is the ancestor of the provision in Article I, Section 8 of the Constitution that authorizes Congress to "fix the Standard of Weights and Measures."

Chapter 39 is the source of modem procedural and substantive due process.

Magna Charta's law-of-the-land phrasing appears in many of the early American state constitutions and, together with the concept of due process, is at the core of modern concepts of the fair administration of justice and the protection of fundamental liberties. Magna Carta contains many key concepts of American law, such as the idea that the government cannot take private property without compensation, the notion that no one can "sell" justice, and the commitment to maintain a legal system based upon "the law of the land".

John, by the grace of God, king of England, lord of Ireland, duke of Normandy and Aquitaine, and count of Anjou, to the archbishop, bishops, abbots, earls, barons, justiciaries, foresters, sheriffs, stewards, servants, and to all his bailiffs and liege subjects, greetings.

1. In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; . . . We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.

* * *

The Magna Carta - ***Continued***

17. Common pleas [trial courts] shall not follow our court [that is the "Royal Court"], but shall be held in some fixed place.

* * *

18. Inquests of novel disseisin, of mort d'ancestor, and of darrein presentment shall not be held elsewhere than in their own county courts, and that in manner following; We, or, if we should be out of the realm, our chief justiciar, will send two justiciaries through every county four times a year, who shall alone with four knights of the county chosen by the county, hold the said assizes in the county court, on the day and in the place of meeting of that court.

* * *

20. A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his "contentment"; and a mercljant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage" if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighborhood.

* * *

21. Earls and barons shall not be amerced except through their peers, and only in accordance with the degree of the offense.

* * *

28. No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

* * *

30. No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

* * *

31. Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.

* * *

35. Let there be one measure of wine throughout our whole realm; and one measure of ale; and one measure of corn, to wit, "the London quarter"; and one width of cloth (whether dyed, or russet, or "halberget"), to wit, two ells within the selvedges; of weights also let it be as of measures.

* * *

38. No bailiff for the future shall, upon his own unsupported complaint, put anyone to his "law," without credible witnesses brought for this purposes.

* * *

39. No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

* * *

40. To no one will we sell, to no one will we refuse or delay, right or justice.

* * *

45. We will appoint as justices, constables, or bailiffs only such as know the law of the realm and mean to observe it well.

* * *

63. Wherefore we will and firmly order as is aforesaid. that the English Church be free, and that the men in our kingdom have and hold all the aforesaid liberties, rights and concessions, well and peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all respects and in all places forever, as is aforesaid.

The Beginnings of American Law, to 1760 - *Continued*

Note: Due Process and the Law of the Land

Two parliamentary enactments of the late Middle Ages explicitly extended some of the benefits of Magna Charta beyond the nobility to all subjects of the realm. An act of 1346 provided that "every Man may be free to sue for and defend his Right in our Courts and elsewhere, according to the Law" (20 Edw. III, c. 4).

A law passed in 1354 introduced the phrase "due process of law" for the first time into English law and declared that "no Man, of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor put to Death, without being brought in answer by due Process of Law" (28 Edw. III, c. 3).

American courts in the nineteenth and twentieth centuries were to hold that the phrases "law of the land" and "due process of law" were equivalent. The notion of "due process" would eventually emerge as a driving force in the expansion of legal rights for all Americans.

Note: The Reformation and Tudor England

Until 1531 Roman Catholicism was the official, or "established," church for England. As the Protestant Reformation swept northern and parts of central Europe, King Henry VIII of England remained a staunch Catholic. In 1521 the pope declared Henry to be a "Defender of the Faith" after the English king wrote a small book attacking Martin Luther's writings.

However, in 1527 the pope rejected Henry's request for an annulment of his marriage to Catherine of Aragon, his Spanish wife. Henry responded by initiating what is known as the English Reformation. He broke away from the Catholic faith and in 1531 became head of the newly created Church of England (also known as the Anglican Church), which became the official religion of his nation.

The king of England was now the head of the church, which increased its popularity within the realm no longer would England be subject to the nilings and decisions of n foreign potentate. In addition, Henry distributed or sold vast amounts of church lands, thus giving many of England's elite a financial stake in the religion. The new church abolished priestly celibacy, which gained Henry support among many of the clergy, and most English clerics easily made the transition to the new faith.

While most Englishmen and women were happy to abandon Catholicism, some thought the English Reformation had not gone far enough. English followers of the Swiss theologian John Calvin wanted to further reform, or "purify," the Church and were thus called Puritans. These dissenters argued for the abolition of the church hierarchy, including bishops and archbishops, and demanded a less elaborate form of worship.

Henry generally tolerated these dissenters but never supported their goals. His successor, King Edward VI, was far more sympathetic to the Puritans, but his short reign (1547 1553) prevented any fundamental changes in the new church.

Edward's early death put his oldest sister, Mary, on the throne. Queen Mary (r. 1553 1558) was the daughter of Henry's first wife, Catherine of Aragon; like her mother, Mary was a practicing Catholic and as such wanted to bring England back under the authority of the pope. Queen Mary brutally persecuted Protestant leaders, especially Puritans, ordering many to be burned at the stake. The reign of "Bloody Mary," as she was known, was mercifully brief. But its impact on subsequent constitutional developments was profound.

The deaths of the Marian martyrs, burned at the stake at Smithfield, were alive in the historical memory of many eighteenth-century Americans. This left them with a profound fear of tyranny and for many Americans an equally strong fear of the Catholic Church.

Mary's death led to the reign of her younger sister Elizabeth "Good Queen Bess" as she would be known. Under Queen Elizabeth I (r. 1558 1603), the people of England enjoyed growing prosperity and, by the standards of the era, remarkable freedom. Elizabeth did not tolerate open dissent political or religious but she also claimed that she did not seek "windows into men's souls" and thus did nothing to persecute Puritans and other Protestant dissenters as long as they quietly practiced their faith and did not challenge her reign.

Under Elizabeth, England experienced a cultural golden age, exemplified by the writing of William Shakespeare and Christopher Marlowe. In 1585 the first English settlement in the New World was attempted at Roanoke Island, off the coast of present-day North Carolina. Meanwhile, the defeat of the Spanish Armada in 1588 made England a world power and set the stage for successful English settlements two decades later.

At the death of Elizabeth in 1603, England turned to her cousin, King James VI of Scotland. who moved south to become King James I of England. James was far more autocratic than Elizabeth, and his harassment of religious dissenters led some to move to Holland and later to America, where in 1620 they created the Plymouth Colony. Even before this, in 1607, England established its first successful New World settlement, Jamestown, which was the first town of the Virginia Colony.

The Beginnings of American Law, to 1760 - *Continued*

THE VIRGINIA COLONY

The Virginia Colony was organized as a joint stock company, but unlike a modem corporation, the charter for the corporation came directly from the king. The goals of the Crown were partially idealistic and religious, as the king hoped the colony would lead to the conversion of the "heathen" Indians. The investors (known as "adventurers of the company") bought stock in hopes of making a profit.

None of these goals and hopes were ever realized. Relations with the Indians were more murderous than religious, and the colony constantly lost money and was initially an economic and political failure. It was also a great human fiasco, with a huge death rate for the colonists and violent, often murderous relations with the local Indians.

In 1611 the stockholders in London sent Sir Thomas Dale to Virginia with men, supplies, and orders to impose a legal order based on the notion that as deputy governor he should "proceed rather as Chauncelor then a judge, rather uppon the naturall right and equity then upon the nicenes and letter of the lawe."

Instead he imposed a set of laws that were more military than civilian. While it may be unfair to blame Dale for these rules, since others in the Virginia Company were involved in their drafting and implementation, they are remembered as "Dale's Laws."

The attempts to impose this harsh rule through Dale's Laws succeeded only in alienating settlers. The charter was revoked in 1624 and a royal governor was appointed. By this time, however, three developments within the colony would have a long-term impact on American legal history.

In 1617 Virginians began to plant tobacco as a cash crop. This would set the stage for the development of a plantation economy and bring great wealth to Virginia's planter elite. In 1619 Virginia's landowners established the House of Burgesses - the first representative legislature in the New World. The experience in lawmaking over the next 150 years would prepare Virginians and other Americans for self-government after the Revolution.

Ironically, in the same year that an elected legislature arrived in Virginia, the first Africans also arrived. These blacks were treated as indentured servants, but within a generation Virginia would become committed to a slave-based economy in which race would become a marker of servitude and legal inferiority.

THE BEGINNINGS OF CONSTITUTIONALISM IN AMERICA

Throughout the American experience, the polestar of public law has been the concept of "constitutionalism," a vague and comprehensive catchword embracing the ideals of limited government, the rule of law, and the various structural devices that achieve the substantive content of republican government in America. The origins of constitutionalism long predated the Revolution and the creation of the American Republic. They derived partly from the way that we think about the sources of law, and partly from the way that Americans structured the governments of their societies.

The concepts first developed most clearly in two religiously based colonies: Plymouth and Massachusetts Bay. Both were settled by Calvinist Protestants who believed that the English Reformation of Henry VIII had not gone far enough. As one Puritan minister put it, in breaking with the Roman church, King Henry had lopped off the "head" of Catholicism (the pope), but left the "body" intact by maintaining bishops, elaborate ritual, and a top-down practice in which the people were more the recipients of religion than participants in it.

The Puritans and the Separatists differed in one fundamental way. The Puritans believed that the Church of England could be reformed—purified—and so they were willing to worship in the Anglican Church while in England. in addition to holding their own meetings and services; the Separatists considered the English church to be beyond redemption, and thus had separated themselves from it. On other matters, these groups were similar. Most important, they believed that churches, and the larger society, should be organized on the basis of a compact between the members. Compact theory and practice, as exemplified in the Mayflower Compact of 1620, was a basic element of constitutionalism. So was representative government, a logical derivative of social covenants.

Another central constitutional principle of American culture has been the conflict between governmental power and individual liberty. Americans confronted this dualism from the outset, especially in Massachusetts. Neither the Puritans nor the Separatists believed in religious freedom; they wanted to be free to worship as they wished hut did not have any interest in extending such liberties or rights to others. They stressed the need for conformity within their community

John Winthrop, a founder and longtime leader of the Massachusetts Bay Colony, addressed the issue in his lay sermon aboard the ship *Arhella* in 1629 just before the Puritans landed in Massachusetts. Here Winthrop coined the endlessly captivating image of America as a "city upon a hill." Winthrop emphasized the primacy of community over individual interests.

THE BEGINNINGS OF CONSTITUTIONALISM IN AMERICA - CONTINUED

Roger Williams, a learned and enormously well-liked Puritan minister who arrived in Massachusetts Bay just a short time after Winthrop, quickly rejected Puritan and Separatist orthodoxy. He ultimately espoused an altogether different approach to governance, condemning government efforts to coerce religious belief and practice. Ultimately he became the founder of the Rhode Island Colony, which allowed virtually unlimited religious free exercise and did not have an established church. Between them, Winthrop and Williams defined the polar opposites of power and liberty that have remained in tension throughout our political history.

The Laws and Liberties of Massachusetts (1648) provided a sophisticated official affirmation of the sources of governmental authority and underscored the growing belief in America that law should be published and accessible to the people. They also illustrate the variety of ways in which the Puritans attempted to merge a “Bible commonwealth” with the everyday needs of their society.

Constitutionalism also derived from the structuring of colonial government, which took different forms. The covenants of Plymouth embodied compact theory in its purest form. A variant was the liberal and democratic order established in Rhode Island under the influence of Roger Williams.

Emigration to the New World languished during the English Civil War and Protectorate but resumed vigorously after the restoration of the monarchy in 1661. The charters and compacts of the Restoration period embody many innovations in the forms and principles of government, such as the bizarre and abortive experiments in John Locke’s Fundamental Constitutions of Carolina, the liberal and democratizing approaches of William Penn in his Frames of Government for Pennsylvania, and the do-it-yourself innovations in guarantees for personal liberty in New York’s Charter of Libertyes (1683). All attest to the robust experimentation in a constitutional form of government that characterized America’s first century.

THE SOURCES OF LAW IN AMERICA

American lawyers have sometimes claimed that the common law was the only body of English law that Americans drew on for their own law, that it was adopted early in the period of English settlement, and that its reception was both inevitable and noncontroversial. Some judges still make such assertions. Yet, each of these assumptions is wrong.

More than half a century ago, the legal historian Julius Goebel speculated that it would have been unlikely that the settlers of New England would have replicated the common law "as absurd as to expect that they would establish a religious system on the principles of the Anglican Church." Rather, he suggested, in creating their new legal order they would have drawn on the body of law most familiar to them:

English local and customary law of the sort found in the borough customals and in the practice of the manorial and county courts. Subsequent scholarship has confinned Goebel's conjecture. The result was a heterogeneous body of law, "a layman's version of English legal institutions," as Daniel Boorstin called it.

In New York during the proprietary period (1664 1684), at least five separate bodies of law and judicial systems prevailed: Dutch civil law, which was based on Roman law; the "Bible codes" of the Connecticut immigrants in Westchester County and on Long Island, reaffirmed in the Duke's Laws of 1665; the laws enforced in the manoria! courts on Long Island and up the Hudson River valley; the new statutes enacted by the colonial legislature; and the common law, which was fully applied to New York in the legal reforms of 1691. But until it did, the common law met vigorous competition from its rivals.

A Dutch resident of Dutchess County expressed his contempt for the new system, declaring that he "valued no English law no more than a Turd." American law was composed in unequal parts of vaguely and inaccurately remembered fragments of common law, local law, Mosaic law (in most of New England and in parts of Long Island), and Roman law.

Colonial law was also constantly changing to adapt to the circumstances and physical geography of the New World. To further complicate the picture, the colonies borrowed from one another's laws extensively yet with great selectivity, choosing only those elements of law suited to their local conditions.

The English common law was a part of American law, of course, however imperfectly it may have been understood and received before 1700. So were parliamentary statutes enacted before the settlement of a particular colony. Subsequent statutes were not part of a colony's laws unless explicitly made applicable to it.

New England presents a special case, however.

Although the common law was eventually received there after the American Revolution, Massachusetts resisted the extension of English law before the 1690s.

THE SOURCES OF LAW IN AMERICA - CONTINUED

John Winthrop insolently proclaimed that "our allegiance binds us not to the laws of England any longer than while we live in England, for the laws of the Parliament of England reach no further, nor do the king's writs under the great seal go any further."

Moreover, in 1678, the General Court of Massachusetts Bay objected to the Navigation Acts, insisting that "the lawes of England are bounded within the fower [four] seas, and doe not reach America." John Adams, writing in 1776 as "Novanglus," also reiterated this viewpoint: "Our ancestors were entitled to the common law of England when they emigrated; that is, to just so much of it as they pleased to adopt, and no more. They were not bound or obliged to submit to it, unless they chose."

Note: Reception of the Common Law

The common law was eventually received in all American jurisdictions, including refractory New England, by the nineteenth century. The beginnings of reception may be found in the charters to companies and proprietors granted by the Stuart monarchs in the early seventeenth century. Most of these charters insisted that any laws enacted by the colonists for their own governance must conform to the legal culture of the mother country. The Massachusetts Charter of 1629 declared that the leaders of the colony "from tyme to tyme" were empowered "to make Lawes and Ordinances for the Good and Welfare of the saide Company, and the Government and ordering of the saide Lande and Plantation, and the People inhabiting and to inhabite the same" as long as "such Lawes and Ordinances be not contrarire or repugnanat to the Lawes and Statuts of this our Realme of England." A subsequent clause in the charter empowered the magistrates of the colony to "ordeine, and establishe all Manner of wholesome and reasonable Orders, Lawes, Statutes, and Ordinances, Directions, and Instructions, not contrairie to the Lawes of this our Realme of England."

Similarly, the charter of New Plymouth authorized legislation, "provided that the said lawes and orders be not repugnante to the lawes of Englande." The Maryland Charter granted lawmaking powers to the new government, provided that "the said Ordinances be consonant to Reason and be not repugnant nor contrary, but (so far as conveniently may be done) agreeable to the Laws, Statutes, or Rights of our Kingdom of England: And so that the same Ordinances do not, in any Sort, extend to oblige, bind, charge, or take away the Right or Interest of any Person or Persons, of, or in Member, Life, Freehold, Goods or Chattels."

Such provisions were the first step on the road to the reception of the common law in America, as well as to the transference of English libertarian traditions, such as the principles derived from Magna Charta. Viewed by the Crown at the time as a means of controlling distant settlements, the conformity clauses came to be seen by Americans in the next century as an assurance that the settlers enjoyed the same rights and liberties as English people who had never left the realm. At the same time, these provisions allowed for vast experimentation in lawmaking, and indeed through these powers the colonies developed their own laws on a variety of topics, including inheritance, water rights, land usage and personal rights, including the development of slavery.

BLACKSTONE

Long before Americans began to think seriously about the transit of English law, English judges and lawyers had begun to work out the basis for a theory of reception of their legal systems. This was not surprising, since the English had become active colonizers in the sixteenth century and had had to confront the practical problems of legal administration for places like Ireland even earlier.

After a century of development, the English theory of reception was summed up by William Blacksione, the magisterial commentator on English laws, in his four-volume treatise. Commentaries on the Laws of England (1765)

Sir William Blackstone was born on July 10, 1723, the son of Mary Blackstone and Charles Blackstone, of London. Blackstone's father, a silk merchant, died before Blackstone was born; his mother died while he was a young boy. Raised by an older brother and tutored by an uncle, Blackstone attended Charterhouse and Pembroke College, at Oxford University, where his education included a thorough exposure to mathematics and logic. Blackstone entered All Souls College, Oxford, in 1743, and became a fellow in 1744.

In preparation for a law practice, Blackstone received a Civil Law degree in 1745, and became a barrister in 1746. In 1750, he became a doctor of civil law. One year later, he was selected as an assessor (judge) of Chancellor's Court.

In 1755, after three years of a lusterless law practice, Blackstone decided to devote all of his time to teaching law at Oxford. His first book, published in 1757, was titled ***"An Analysis of the Laws of England".*** In 1758, Blackstone was named Oxford's Vinerian Professor of English Law, receiving the first chair of common law ever established at the university. Blackstone's lectures were well received, providing students with a comprehensive introduction to the laws of England.

The Beginnings of American Law, to 1760 - *Continued*

BLACKSTONE - CONTINUED

The success of his lectures enhanced Blackstone's career. In 1761 he became a bencher (supervisor and lecturer) at Oxford's Middle Temple. That same year, he was elected to Parliament, where he served for seven years although, according to most historians, he was not an especially ambitious or effective politician. Also in 1761, Blackstone married Sarah Clitherow, with whom he had nine children.

In 1765, Blackstone published the first of his four volumes of Commentaries. The treatise discussed the cases, rules, and legal principles outlined in his popular Oxford lectures. Each volume concentrated on a particular area of law personal rights, property rights, torts, or criminal law.

Blackstone's commentaries would prove the groundwork for U.S. jurisprudence. Entitled, ***"Blackstone's Commentaries on the Laws of England"***, they provided a systematic analysis of English Common Law between 1765 and 1769. It was an exhaustive compilation of Blackstone's Oxford University lectures on law. These commentaries was unprecedented in scope and purpose, and profoundly influenced the development of common law and legal education in England and the United States.

As Blackstone analyzed the laws, he also revealed their relationship to a higher power. Throughout his Commentaries, Blackstone wove the concept of "natural law,"or God's laws imposed on humankind.

Although some contend that Blackstone's work presented a more uniform and simplified system of law then actually existed in England at the time he wrote, even his harshest critics concede that Blackstone's effort to synthesize English law was indeed impressive, an had an enormous impact in his country and beyond.

Blackstone's Commentaries was particularly influential in the United States as the new nation sought to establish its own laws and legal system. Although Blackstone is seldom now cited by practicing attorneys, his importance and work remains revered in U.S. law. Over thirty editions of his commentaries have been printed in the United States and England.

In 1770, Blackstone became judge of the Court of Common Pleas and was knighted. He died on February 14, 1780, at age fifty-seven.

A HISTORY OF AMERICAN LAW

LAWRENCE M. FRIEDMAN

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THIRD EDITION

A HISTORY OF AMERICAN LAW

THIRD EDITION

Lawrence Friedman

PROLOGUE

Modern communications and technology have made the world smaller. They have leveled many variations in world culture. Yet, people still speak different languages, wear different clothes, follow different religions, and hold different values dear. They are also subject to very different laws. How different is not easy to sum up. Clearly, legal systems are not as different as different languages.

The new world, the world we live in urban, industrial, technological creates a certain kind of society; and this kind of society depends on and welcomes certain kinds of laws. An income tax, for example, is a common feature among developed countries. But the exact form that a tax law takes depends on the general legal culture. Americans are naturally used to American laws. Law is an integral part of American culture. Americans could adjust to very alien laws and procedures about as easily as they could adjust to a diet of roasted ants or a costume of togas. Judge and jury, wills and deeds, the familiar drama of a criminal trial, an elected assembly or council at work making laws, licenses to get married, to keep dogs, to hunt deer these are all part of a common experience, peculiar to the United States. No other legal culture is quite like it. Presumably, no other culture fits the American system quite so aptly.

Many people think that history and tradition are very strong in American law. There is some basis for this belief. Some parts of the law can be traced back very far the jury system, the mortgage, the trust, and some aspects of land law. But other parts of the law are quite new. The living law, the law we use every day, the law that affects us every day, including tax law, traffic codes, and social- welfare laws, is comparatively recent, on the whole.

While one Lawyer is advising his client how to react to a ruling from Washington, issued that very day, another may be telling his client that some plausible course of action is blocked by a statute well known to the lawyers of Henry VIII or by a decision of some older judges whose names, language, and habits would be unfathomable mysteries to both attorney and client. But the first situation is much more likely than the second.

Some parts of the law are like the layers of geological formations. The new presses down on the old, displacing, changing, altering, but not necessarily wiping out everything that has gone before. Law, by and large, evolves; it changes in piecemeal fashion. Revolutions in essential structure are few and far between. That, at least, is the Anglo-American experience. Most of the legal system is new, or fairly new; but some bits of the old get preserved among the mass of the new.

What is kept of the old is highly selective. Society may be fast or slow as it changes; but in either case, it is ruthless. Neither evolution nor revolution is sentimental. Old rules of law and old legal institutions stay alive only when they still have a purpose. They have to have survival value. The trust, the mortgage, the jury are legal institutions that can be traced back centuries. But they still have the vigor of youth. They have come down from medieval times, but the needs they now serve are twenty-first-century needs. They have survived because they found a place in the vigorous, pushy society of today a society that does not hesitate to pour old wine into new bottles and new wine into old bottles, or throw both bottles and wine away. At any rate, the theory of this book is that law moves with its times and is eternally new. From time to time, the theory may not fit the facts. But more light can be shed on legal history if one asks why does this survive than if one assumes that law, unlike the rest of social life, is a museum of accidents and the mummified past.

In an important sense, law is always up-to-date. The legal system always "works"; it always functions. Every society governs itself and settles disputes. Every society has a working system of law. If the courts, for example, are hide-bound and ineffective, that merely means some other agency has taken over what courts might otherwise do. The system is like a blind, insensate machine. It does the bidding of those whose hands are on the controls.

The laws of China, the United States, Saudi Arabia, France, of North and South Korea reflect the goals and policies of those who call the tune in those societies. Often, when we call law "archaic,' we mean that the power system of its society is morally out of tune. But change the power system, and the law too will change.

The basic premise of this book is this: Despite a strong dash of history and idiosyncrasy, the strongest ingredient in American law, at any given time, is the present current emotions, real economic interests, and concrete political groups. It may seem a curious beginning to a book of history to downgrade the historical element of law. But this is not really a paradox. The history of law has meaning only if we assume that at any given time the vital portion is new and changing, form following function, not function following form.

History of law is not or should not be a search for fossils, but a study of social development, unfolding through time. Law and society both have a long and elaborate history in the United States. Compared to some, the United States is a new country but Boston and New York are more than three hundred years old, and the Constitution may be the world's oldest living organic law. In short, enough time has elapsed for American law to be essentially American, the product of American experience.

But American law is not an isolate. It has, and has had, close affinities to other legal cultures. The most important immediate ancestor is easy to identify. The basic substratum of American law, as of American speech, is English.

Prologue- ***Continued***

Before the Europeans came, the country belonged to the native Americans. Europeans came late, but they came in force. They settled first along the coast. The Spanish settled Florida; the French built New Orleans. Swedes settled briefly on the Delaware; the Dutch pushed them out. Then the Dutch were overwhelmed by the English. The Hudson and Delaware settlements were added to a chain of tiny colonies, all English-speaking, along the Atlantic coast. Their populations grew. More Englishmen came. And English speakers, as Englishmen or Americans, ultimately pushed out the native peoples, took over their lands; and the lands of the French and the Spanish; and a big chunk of Mexico. They established an empire that stretched from sea to sea. And then they pushed out across the ocean to Hawaii, Puerto Rico, and the Philippines.

Each culture group lived by its own legal norms. Of many of the native laws, it is fair to say, not a trace remains. Others retained more vitality. There are native American communities today with their own court systems, and some bits and pieces of their tradition still live on. Some scholars have claimed to find a speck or two surviving from the Dutch legal tradition. The office of district attorney may be Dutch in origin. French law gained a more or less lasting foothold in Louisiana, and there (in translation) it stays. Spanish law sent down wider if not deeper roots; no state can call its law Spanish, but some aspects of Spanish or Mexican law (for example, the community-property system), persist in California and in other parts of the West. Everything else, if not strictly native, is English, or comes by way of England. or is built on an English base.

But English law was complex and bewildering. It is not easy to say which English law was the ancestor of American law. Colonial law the law of the colonies, up to Independence is, after all, an abstraction; there was no "colonial law" any more than there is an "American law," common to all fifty states. There were as many colonial systems as there were colonies. The original union was made up of thirteen states; but this thirteen represents, if anything, only a head count at one arbitrary time. Some colonies, such as Plymouth and New Haven, were swallowed up by larger ones. It was also the merger of two entities that produced New Jersey. Each of these entities had its own legal system.

Each colony, moreover, was founded at a different time. At least a century separates the beginnings of Massachusetts from the beginnings of Georgia. During this time, English law did not stand still. The colonies began their careers at different points in the process of legal development. During all this time, the law of the mother country was theoretically superior. But the colonial condition was not one of simple subordination, like the relationship of a ward to a city, or a county to a state. Even as a matter of theory, it was not clear which acts of Parliament and which court decisions were binding on the colonies. The colonies borrowed as much English law as they wanted to take or were forced to take. Their appetite was determined by requirements of the moment, by ignorance or knowledge of what was happening abroad, and by general obstinacy.

Mapping out how far colonial law fit English law is almost hopeless. Legal cultures differed in different colonies. New England deviated from standard English law more than the southern colonies did. The connection between the two sides of the Atlantic was always strong but never harmonious. They were also very far apart, in the literal sense. A big ocean separated them. It was hard for the mother country to control its unruly children. The colonies quarreled with the mother country over law as well as over politics and taxes.

Even after the Revolution, the legal connection was not totally severed. A complex legal relationship survived after 1776. English law continued to be imported, in some quantity, when and as needed. A thin, thin trickle remained even at the end of the nineteenth century.

English law, as we said, was complex and difficult. But what was English law? Two decades before the Revolution, Sir William Blackstone reduced to writing what he considered the core of the common law. His Commentaries on the Law of England, in four parts, can be printed out as one thick but manageable book.

This book, in its sluggishly elegant style, became a great bestseller, both in England and America. On the whole, Blackstone did a good job of putting the rank weeds of English law into some kind of order. But the picture he presented was partial and defective, like a dictionary that omitted all slang, all dialect, all colloquial and technical words. And even this imperfect guide was not available in the colonies before the 1750s. As such, they lacked a handy key to English law. Yet, a key was desperately needed. The English common law was one of the world's great legal systems; but it was incredibly hard to master or understand.

English law stood apart and still stands apart from most European systems of law. A modified, modernized form of Roman law swept over much of the Continent, starting in the middle ages. English law resisted the "reception," as the process is called. Modern continental law finds its highest expression in a code. "The law" in France and Germany is above all the law of the great codes statutes, in other words.

"Common law," on the other hand, was "unwritten law," as Blackstone called it. "Unwritten' was not meant literally; English and American laws are, if anything, overwritten. Blackstone meant, however, that the ultimate, highest source of law was not an enactment, not a statute of Parliament; but rather it was "general custom," as reflected in the decisions of the common-law judges. These judges were "the depositaries of the laws the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land," (1 El. Comm. 69).

Prologue- ***Continued***

Common law was judge-made law molded, refined, examined, and changed in the crucible of actual decision, and handed down from generation to generation in the form of reported cases. In theory, the judges drew their decisions from existing principles of law; ultimately these principles reflected the living values, attitudes, and ethical ideas of the English people. In practice, the judges relied on their own past actions, which they modified under the pressure of changing times and changing patterns of litigation.

As a general rule, common law adhered to precedent. Precedent is commonly considered one of the basic concepts of the common law. It was never quite a straitjacket, as some laymen (and lawyers) have tended to think, American judges have always assumed power to overrule an earlier case, if they considered the case seriously misguided. The power was not often exercised. Still, it was there, along with the more important power to "distinguish" an embarrassing precedent that is, to interpret it into oblivion, or twist its meaning. In any event, the common law was and is a system in which judges are kings. Whether they are following or distinguishing precedent, they create and expound principles of law.

In its prime, the decided case was one of the basic building blocks of law. For a long time, judges looked at statutes with great suspicion. Statutes were unwelcome intrusions on the law, and were treated accordingly. In continental law, all law (in theory) is contained in the codes. In common law, many basic rules of law are found nowhere but in the published opinions of the judges.

What Parliament can do in a month's intensive work, a court can do only over the years. And it can never do it quite so systematically, since the common law only handles actual disputes, actual cases. It cannot deal with hypothetical or future cases. If no one brings up a matter, it never gets into court. It is no answer to say that all important questions will turn into disputes; "disputes" are not litigation, and only litigation actually, only appellate litigation makes new law.

Nor is it easy for judges to lay down quantitative rules, or rules that can't be carried out without heavy public support (in the form of taxes), or rules that would have to he enforced by a new corps of civil servants. Judges are supposed to decide on the basis of legal principles. They decide specific cases; but they have only limited power to regulate. They are not equipped to decide what the speed limit ought to be, or what food additives are carcinogens, or what animals should go on the list of endangered species. An English (or American) court could not possibly "evolve" a Social Security law. The common law is therefore not only slow; it is also impotent to bring about certain important kinds of legal change.

Older English law was often as devious in making changes as it was (sometimes) slow. The culture of the common law shied away from formal, overt abolition of obsolete doctrines and institutions; English law preferred to supersede and ignore them. Trial by battle, a favorite of medieval romance and costume movies, was not done away with in England until 1819. For centuries, it slept in its sarcophagus; but a chance mistake in court, in 1818, reminded the legal profession that battle was still a legal possibility. An embarrassed Parliament quickly buried the corpse (59 Ceo. III, c. 46, 1819).

Legal evolution sometimes took the form of shortcuts called legal fictions. The rise of the action of ejectment is a famous example. Suppose two men we will call them Henry Black and Richard Brown are fighting over title to a piece of land. Brown is in possession, but Black has a claim to it. Each thinks he is the rightful owner. Medieval common law had a form of trial that could be used to resolve this dispute, but this form of action was torturous and heavy-handed. Ejectment developed as a way around it. In ejectrnent, the pleadings papers filed in court would tell a rather odd story. A man named John Doe, it seems, had leased the land from Henry Black. Another man, named William Styles, held a lease from Richard Brown. Styles (it was said) had "ejected"John Doe. In fact, Doe, Styles, and the two leases were pure figments of legal imagination. Black and Brown were the only real people in the case. This mummery (which everybody, the court included, knew to be false) served the purpose of bringing the issue of title before the court. Only now it was a case about a lease (well, an imaginary lease). Because it was a lease case, the ancient land actions (which did not apply to leases) could be avoided, and a more streamlined procedure used. In the' course of time, ejectment itself caine to be considered a complicated nuisance. But this action was not reformed in England until past the middle of the nineteenth century.

The strange history of ejectment is not an isolated example of high technicality and fiction. What is the nonlegal mind to make of a social institution that treats corporations as "persons," which at times classified slaves as real estate, and that allowed a plaintiff to state that the city of Paris was located in England, or that London (admittedly it rains a lot there) was located on the high seas; and in each of these cases, the defendant was not allowed to contradict these absurdities? One of these, the corporate fiction, is still alive (and useful); the others served their purpose and then died out. Enough high technicality survives to make Anglo-American law a difficult system for both lawyers and lay people. But the common law was involute, over-formalized, and fiction ridden not because it was changeless, but precisely because it was constantly changing.

Part of the problem lay in the traditional theories in which the common law was tightly swaddled. In theory, the common law was not man-made in the ordinary sense; the judges uncovered the law (or found" it); they did not make it, or tamper with it as it was found. The modern idea of law as essentially man-made, as essentially a tool or an instrument, was foreign to the classic common law. Change therefore had to be hidden, disguised. Blunt, overt reforms (by judges) were out of the question. Moreover, working doctrines of law, however quaint they may seem, must be acting as the servants of some economic or social interest. In a society with many rough, contentious holders of power, at war with each other, the court can effect power relations only slowly and subtly. Otherwise a delicate balance is upset.

Prologue- ***Continued***

Moreover, foolish traditions are tolerable as long as they are harmless. The abolition of trial by battle illustrates this point. If trial by battle had not been all but dead, it could not have survived to the nineteenth century. Powerful engines of change can and do exist inside the legal system but they may be, and often are, outside the courts. Some major changes take place in law by means of opening and shutting institutional valves. Subject matter moved from one legal agency to another. The courts gained work, lost work, then gained new work. Parliament's role got stronger; the king's power waxed and waned. In the course of these changes, some ancient, specialized, essentially marginal kinds of business stayed with the courts. Because they were colorful and old, these fossils attracted more attention than they deserved. They gave an impression of an archaic, hide-bound system; but this impression was in large part false.

Then, too, a good deal of the law is not addressed to the public directly. Lawyers stand between the laymen and the lawmaker. It is the business of the lawyer to tolerate and master artifice. After all, technical difficulty is one of the lawyer's excuses for existing: his power, his income, his monopoly; his stranglehold on court work, on the drafting of documents, and on the counseling of clients.

The English bar was, by the time our story opens, an important influence on the shape of English law. The evolution of the bar was a long and complicated process. But by 1600, English lawyers plainly were a profession a group of men trained and educated in law. They were not, however, trained at universities, at Oxford or Cambridge. Lawyers came out of the Inns of Court, in London.

The Inns had no connection with the universities. They had no connection with Roman law or with the general legal culture of Europe. Young men at the Inns, if they learned anything, learned English law, English pleading, English legal experience. Legal training was primarily practical, not theoretical. This peculiar bent in English legal education helped the common law to resist the seductions of a rejuvenated Roman law, at a time when continental law fell under the spell of the “reception."

In England, too, the bench was recruited from the bar. Lawyers and judges made up a single legal community, with a shared background and common experiences, as they do to this day. They formed a cohesive group, a kind of clan, or guild.

For these reasons and others, then, the common law came down through the centuries with some of its past sticking to it, like a skin it never quite succeeded in molting. This skin was strongly colored by the feudal past. But it was only a skin. Medieval English practice left deep marks on the language and habits of common law lawyers; but as the economy, and society, and culture changed, so too did the common law its substance, its guts, its bones and body, even as form and language kept a certain amount of ancient attitude.

The classic common law was utterly obsessed by two central topics: formal legal process and the law relating to land. A second's thought tells one, however, that these two topics could not have been all of the living law of England, any more than the life of great lords could have been the life of everyone in England. Common law was, essentially, the law of the royal central courts. It was this law, basically, that the great English jurists, up to and including Blackstone, described. But the royal central courts, by and large, handled the legal problems of a tiny group of people. Leaf through the pages of Lord Coke's reports, compiled in the late sixteenth and early seventeenth centuries; and you will find a colorful set of litigants, all drawn from the very top of British society lords and ladies, landed gentry. high-ranking clergymen, and wealthy merchants. Common law was an aristocratic law, it was a law for and of the gentry and nobility. The masses were hardly touched by this system and only indirectly under its rule except for the bite of a rather savage system of criminal justice.

There was law on the manor, law that controlled the common people and bound them to their betters. This was local law, customary law; and it made very little impact on the treatises, on books like Blackstone's. Law books were written at the seat of power: they dealt with the king's kind of law. The day-to-day law of the lower orders was barely noticed in these circles.

Nor did common law, which was royal law, the law of the realm, in fact cover the whole kingdom. Authority was not so centralized and compact. There was no single focus, no single legal culture. English law was pluralistic; it took many forms, and it varied from place to place. It was a little bit like the law of England's later colonial empire, especially the African colonies, where official law, modeled on the mother country, was dominant in the capital, among expatriates and businessmen, while in the countryside. customary law was left largely to fend for itself. In England, too, in the Middle Ages, many local customs, like local dialects, lived on alongside the common law.

Primogeniture, for example inheritance of land by the eldest son was the common-law rule, but not the rule in the county of Kent. In Kent, under the system known as gavelkind tenure (abolished in 1925), land descended to all the sons equally. Local and customary law had important influence on the law of early America. Colonial practice derived in part from that law which the settlers knew best: the local laws and local customs of their communities back home.

Even for important affairs of important people, the reign of the common law was not undisputed; it had to contend with rival courts, institutions, and subsystems of law. In the end, the royal common law usually won out. But it won only by granting deep concessions. Language once more is a useful analogy. The Anglo-Saxon language held out against onslaughts of Norse and French, and two culture tongues, Latin and Greek. But the surviving language English was drenched with foreign words, and heavily overlaid with foreign syntax.

Prologue- ***Continued***

Modern common law is full of Roman-law words and ideas and is also heavily indebted to equity, admiralty, and the law merchant, branches of law that were basically indebted to continental law-ways.

Of the formal rivals of the common law, the most astounding was the peculiar system, administered by the chancellors, known as equity. Since early medieval times, the chancellor had been an important royal official. The chancellor's office the chancery was responsible for issuing writs to the common-law courts. Through a long and complex process, chancery itself became a court. But it was a court with a difference. Chancery did not follow strict common-law rules. Looser principles governed, principles in accord with prevailing ideas of "equity."

The chancellor was said to be "keeper of the king's conscience." As such, he had the power to dispense with unjust rules. The chancellor was a clergyman, originally; and he could read and write (no small achievement). He had a staff of scribes, too, who were in charge of the machinery" of writs, the documents that petitioners needed to set legal processes in motion. This power gave him a strategic position in the royal system of justice. Over the course of time, the chancellor, as the king's delegate, loosened the rule of the common law in a number of fields of law. The theory of "equity" developed to explain the chancellor's power, and reduce his work to some kind of logical order. The ad hoc character of equity rules gradually disappeared. One could speak of rules, principles, and doctrines of equity as well as of "law." Equity became. in short, almost a system of antilaw.

In England, in short, two contradictory systems of civil law coexisted and not always peacefully. Yet, in many ways law and equity complemented each other. The common law could proclaim duties and rights; it could award money damages. But it could not force anybody to act (other than to pay money). Equity, on the other hand, had a whole battery of supple remedies. The injunction was one of these. An injunction is an order commanding a person to do something (or sometimes to stop doing something). It is enforceable because, if a defendant disobeys, the chancellor can declare him in contempt of court, and put him in jail without further ado. Equity had power over persons, not over things. It could not renderjudgments that actually affected the title to the land, for example. It could only act on the parties. The chancellor could order B to give A's land back to him. If B refused, the chancellor could send him to jail until he obeyed. But the chancellor could not give A the land directly.

Procedurally, the two systems were very different. Equity was closer to continental law and to canon law. No jury ever sat in a chancery court. The jury was purely a common-law institution. On the other hand, many familiar doctrines, and some whole branches of law, such as the law of trusts, grew up out of equity rules and equity practices.

What was curious, perhaps unique, was the separation, within one legal system, and one country, of these two systems, law and equity. A person could have a claim that was good in equity and bad in law; or vice versa. For example. the common law judges tended to consider a deed of land valid so long as it was executed in the proper form. In equity, however, the deed had no effect if it was the product of fraud or deceit, no matter how good it was in form. Hence, a claim based on a deed might win or lose, depending on which courtroom door the plaintiff entered.

Courts of common law paid no attention to the norms of equity. For their part, an equity court would dismiss a case if the plaintiff had an "adequate remedy at law."

Relations between the two systems were different, of course, at different times. In Tudor-Stuart days, open and bitter conflict broke out between equity and law. The common law lawyers did not succeed in driving their rival out of business, much as they would have liked to. After a time, the two systems came to a rough and ready coexistence. In the nineteenth century, equity and law finally "merged' in most of the states. This meant, basically, that there would no longer be separate courts of equity and law; judges would handle both systems in a single court, and with a single procedure. Where rules of law and equity collided, equity usually won. Some states, Massachusetts for one, had never had a system of equity. Most of the states made their merger move in the nineteenth century, New York, for example. New Jersey, however, did not abolish its chancery courts until 1947. And in little Delaware, the separate chancery court has lasted into the twenty-first century.

Even though equity, almost everywhere, is gone as a separate entity, its historical memory lingers on, and makes a difference. The right to trial by jury often depends on whether the case would have been, in the past, an equity case or not. Chancery was not the only court that did not follow strict norms of common law.

The court of star chamber was an efficient, somewhat arbitrary arm of royal power. It was at the height of its career in the days of the Tudor and Stuart kings. The Star chamber stood for swiftness and power; it was not a competitor of the common law so much as a limitation on it a reminder that kings and queens could not safely entrust high state policy to feisty, independent courts.

The special commercial courts also outside the common law lasted longer than star chamber. The royal central courts, absorbed in the tangle of land titles, paid little attention to the Lombard merchants, and to the bankers and tradesmen, foreign and native, who bought and sold and trafficked and used the customs and habits of international business. The mercantile courts, however, Were sensitive to these customs and habits; and knowledgeable about them. In these courts, a separate body of law the law merrhant governed, rather than the ordinary law of England. There were various types of commercial courts, including the colorful courts of piepowder, a court of the fairs where merchants gathered.

Prologue- ***Continued***

Sir Edward Coke spoke of it as a court of "speedy justice . . . for advancement of trade, and traffic," as fast "as the dust can fall from the foot."

Through fair courts and merchant courts, English law and practice recognized the merchant's ways of doing business. From these sources, English law learned to handle the documents from which modern checks, notes, bills of exchange, and bills of lading are descended. Eventually, the ordinary courts absorbed the law merchant into the bloodstream of the common law; and the merchant courts decayed. By the seventeenth century, this process was well advanced.

A final key figure in this development was Lord Mansfield, who died in 1793. Mansfield, deeply versed in Roman and continental law, had a sure touch for commercial cases. His decisions were sensitive and responsive to the merchant's needs and ways.

Admiralty, the law of the high seas and maritime commerce, was another. "rival" of the common law. Admiralty too had an ancient international tradition, quite separate from the common law. As early as the sixteenth century, the English court of admiralty came into conflict with the common-law courts. The struggle for control over sea law was not finally resolved for many years. It was not the romance of the sea that was at stake, but power over naval policy and international transport.

Family law marriage and divorce was also largely outside the pale of common law. Marriage was a sacrament; church courts, even after the Reformation, maintained jurisdiction.

The law of succession to property (in modern law, wills and estates) was curiously divided; the common law controlled inheritance of land; church courts controlled inheritance of personal property. The two courts used quite different rules. If a man died intestate (without a will), his eldest son inherited his land. But the children shared equally any personal property (money and goods). The ecclesiastical courts, like, the courts of equity, did not use common-law procedures; a jury, therefore, had no role in its decisions.

This prologue has laid heavy stress on courts. But one must not assume that all English law was judge-made. A great deal of law came, directly or indirectly, from King and Parliament. In Renaissance England, there was nothing like the steady stream-of statutes that is usual today. But there were statutes; and they were important. Some of them fundamentally altered the structure and substance of the law. Some were carried over into the colonies.

English law was never static. The law of Charles II was not the law of Edward I, and it was light-years away from the law of King Alfred. Mostly, what has been described is what resulted from centuries of evolution and enactment, roughly at the time of the settlements. England, in 1600, stood on the brink of a period of the most profound changes, a period that has not yet ended.

As far as the legal order is concerned, probably the single most important aspect of this modern period has been a revolutionary shift in the attitude of society toward law. In traditional cultures, law was basically static: a divine or time-honored body of rules. It defined people's place in the order of society. In modern times, law is a tool, an instrument; the people in power use it to push or pull toward some definite goal. The idea of law as a rational tool or instrument underlies all modern systems, whether capitalist, socialist, fascist, whether democratic or authoritarian. And all modern societies govern by and through law through rules, regulations, statutes, decisions. And these norms are constantly growing, shrinking, changing. The period covered by this book is a period of restless and insatiable change.

Discovering The Meaning of Property - A Review of Fundamental Rights

By Dr. Robert T. Farley, J.D./L.L.M.

Property rights are the lynchpin of liberty. They form a fundamental element of our freedom.

Long recognized as inherent to our humanity, our right to exclude, possess, use and transfer private property, is a quintessential benchmark, that defines our modern society and its quality of life.

Under our system of laws, property rights reside in the individual. They are personal and unique.

Think about freedom and you ultimately get back to property rights. For the unrestrained use and enjoyment of property is ingrained in our very being as Americans.

Take away property rights, and you take away an individual's freedom. Limit property rights, and you limit an individual's liberty. Restrict or impair property rights, and you diminish a person's quality of life.

The founders of our nation knew, and the system of laws they developed recognized, that the protection of private property rights was one of the most important factors to building a free society. They knew, if you want freedom, you better guarantee property rights, and the people's ability to freely exercise them.

James Madison, fourth President of the United States and the principal author of the United States Constitution and the Bill of Rights, encapsulated this vision when he said:

> ***"Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals ... This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."*** [1]

John Adams, second president of the United States and collaborative author of the Declaration of Independence, further amplified this view when he stated:

> ***"Property must be secured or liberty can not exist."*** [2] ***"The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."*** [3]

Thomas Jefferson, third President of the United States and the primary author of the Declaration of Independence, declared:

> ***"The first foundations of the social compact would be broken up were we definitely to refuse to its members the protection of their persons and property while in their lawful pursuits."*** [4] ***"Persons and property make the sum of the objects of government."*** [5]

John Jay, first Chief Justice of the United States Supreme Court, renowned legal scholar and author of the Federalist Papers (with Madison and Hamilton) pronounced:

> ***"It is the undoubted right and unalienable privilege ... not to be divested or interrupted in the innocent use of ... property. ... This is the cornerstone of every free Constitution."*** [6]

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1. James Madison, Selected Writings of James Madison, edited and assembled by Ralph Ketcham, (Hackett Pub. Inc. New York 2006), 52 - Political Essay on Property, First Published in the National Gazette - March 29, 1792 on Pages 266-68, Pg 223.

2. John Adams,, The Works of John Adams, Second President of the United States: edited and assembled by his Grandson Charles Francis Adams, (Boston: Little, Brown and Co., 1856), Published in 10 volumes. Vol. VI, pg 280.

3. John Adams,, The Works of John Adams, Second President of the United States: edited and assembled by his Grandson Charles Francis Adams, (Boston: Little, Brown and Co., 1856), Published in 10 volumes. Vol. VI, pg 9.

4. Thomas Jefferson, Thomas Jefferson: Letter to James Maury, 1812. ME 13:145

5. Thomas Jefferson, Thomas Jefferson: Letter to James Madison, 1789. ME 7:459, Papers 15:396

6. John Jay, John Jay The Making of a Revolutionary, Unpublished Papers, 1745-1780, Richard B. Morris, editor (New York: Harper & Row Publishers, 1980), Vol. I, p. 462, "A Freeholder: A Hint to the Legislature of the State of New York," Winter 1778.

George Washington, the first President of the United States and Presiding Officer of the Constitutional Convention, said:

> ***"[I]n a country so extensive as ours, a government of as much vigor as is consistent with the perfect security of liberty is indispensable. Liberty itself will find in such a government, with powers properly distributed and adjusted, its surest guardian. It is, indeed, little else than a name, where the government is too feeble to withstand the enterprises of faction, to confine each member of the society within the limits prescribed by the laws, and to maintain all in the secure and tranquil enjoyment of the rights of person and property. "*** [7]

Alexander Hamilton, Delegate to the Constitutional Convention, author of the Federalist Papers (with Madison and Jay) and first Treasury Secretary of the United States, declared:

> ***"The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the divinity itself; and can never be erased."*** [8] ***"It is the unalienable birthright ... to participate in framing the laws which are to bind ... either as to ... life or property."*** [9] ***"[T]he end and intention ... is to preserve ... life, property, and liberty ... from the encroachments of oppression and tyranny."*** [10] ***"What the law gives us an unconditional permission to enjoy, no person can legally withhold from us. It becomes our property, and we can enforce our right to it."*** [11] ***"In the general course of human nature, a power over a man's subsistence amounts to a power over his will."*** [12]

The State of Virginia, home of four of the first five presidents, adopted a Bill of Rights on June 7, 1776, written by George Mason, a delegate to the Philadelphia Constitutional Convention in 1787. Section 1 of this Declaration of Rights stated:

> ***"That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety".*** [13]

As can be seen from the above, the founders maintained a clear grasp of the connection between liberty, freedom and property rights. They understood that it is the pursuit of property that is the catalyst of freedom, and that a person's unfettered ability to freely exercise their property rights is the gateway of liberty.

Their's was not a concept of materialism. For nowhere in the founders' writings is wealth the focus of their arguments. It was not the value of the property that mattered. It was not the property itself, that the framers linked to liberty and freedom. Rather, they believed that it was the pursuit of property, and the exercise of the rights thereof, that are the key. They understood that it is not about equality of means or outcome, but rather about freedom and equality of opportunity.

Although the founders were intellectual giants, they were, also, however, reflective of their society's beliefs as a whole. They recognized that so many of their fellow Americans, became Americans, and came to this country, so that they could freely exercise and pursue property.

Gifted legal scholars like Madison, Jefferson, Jay and Hamilton may have been able to offer elegant, legal justifications for their fundament belief in property rights, but the average citizen too understood and held these same beliefs implicitly. Unlike most of the founders, this average citizen didn't express their view through legal prose. Instead they voted with their feet, coming to America from overseas, in order to seek the free exercise and pursuit of property. It was this embodiment of the publically held belief in property, as maintained in all of colonial society, as well as their intellectual philosophy, that compelled the founders to form our legal system, with a deep reverence for property rights.

This belief in property rights, and their pursuit, was instilled in the legal institutions and government that the founders created. Accordingly, one can see, throughout the Declaration of Independence, the Constitution and the Bill of Rights, that the pursuit of property, and a person's ability to freely exercise their property rights, is sacrosanct. It was upon this foundational pillar that the founders built. The system of government and law we enjoy today, is a reflection of their dedication to the principle that the pursuit of property, and the exercise of its rights, are indispensable and inseparable from liberty, freedom and the natural rights of man. As a result, this belief has been innately incorporated as a fundamental principle of our free government.

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7. George Washington, George Washington, First President of the United States - Farewell Address, authored September 17, 1796, published in The Independent Chronicle of Boston, Massachusetts, September 26, 1796, Paragraph 19.

8. Alexander Hamilton, The Revolutionary Writings of Alexander Hamilton, edited and assembled by Richard Vernier, (Liberty Fund, Inc. Publishing - Indianapolis 2008), pg 62.

9. Alexander Hamilton, The Revolutionary Writings of Alexander Hamilton, edited and assembled by Richard Vernier, (Liberty Fund, Inc. Publishing - Indianapolis 2008), pg 57.

10. Alexander Hamilton, The Revolutionary Writings of Alexander Hamilton, edited and assembled by Richard Vernier, (Liberty Fund, Inc. Publishing - Indianapolis 2008), pg 62.

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12. Alexander Hamilton, The Federalist, A Commentary of the Constitution of the United States, A Collection of Essays by Alexander Hamilton, James Madison and John Jay, edited and assembled by John C. Hamilton (J. B. Lippincott & Co. Pub. Philadelphia 1869), Federalist LXXIX, pg 583.

13. James McClellan, Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government, third edition (Liberty Fund, Inc. Publishing - Indianapolis 2008), Appendix F: Reprint of the Virginia Bill of Rights (A Declaration of Rights - June 12th 1776), pg 188.

Part One - Introduction:

Property is among the oldest and most fundamental of all legal concepts. From the dawn of recorded history, it has influenced relations among people and their societies.

Long viewed as a critical element of every person's existence, property represents so much of what is necessary for the preservation and quality of human life.

But it is the right to exercise control over property, and not the item itself, that gives property its value.

As such, legal scholars, for generations, have effectively viewed property, not in terms of a collection of "things", but rather, in terms of a collection of "rights".

With people's concerns, and society's demands, focused on property, the ever present need to protect property rights has led to the development of the law itself. Reciprocally, the development of the law, has shaped our concept of property. This means that a great deal of the law is derived from, and devoted to, property, its protection, and the rights surrounding it.

As such, the law, in great part, evolved from the need to protect property rights, and property rights, in turn, evolved from this legal recognition. The two are necessarily intertwined.

Society's understanding of the critical importance of property rights has also resulted in the recognition of property rights under natural law. Flowing from this concept, our society, and its laws, view property rights, not as privileges granted by the state, but instead, as rights that are intrinsic to our very existence as human beings.

As such, under our American system of laws, private property rights are inherent to our humanity, and it is government's sacred duty to respect and protect them. Government recognizes these rights, but it did not give them, and it can not take them away.

The societal respect for the value of private property rights, and their accepted recognition under law, have helped the western world in general, and America in particular, to grow and prosper to the highest status in human history. The very nature of private property rights is reflective in one's ability to excise those rights through the element of control. Control is the fundamental element of a property right.

As such, having the right to control property, by exclusion, possession, use and transfer, has become a fundamental pillar of modern civilization.

What is Property?

Just what is property? What does it mean? How is it defined?

In common parlance, when one thinks of what constitutes "property", they generally visualize 'items" or "things".

To view property through this limited vision, however, causes one to miss a very valuable element: "control".

Since it is only through the perspective of control, that one can truly understand the full nature of property, it is essential to think of property in terms of "rights". For it is only through that perspective, a merger of item with control, that a true legal understanding can be had. Accordingly, the law needs to view property, not in terms of a collection of items or things, but in terms of a collection of rights.

It is for this reason that "property" has been described by legal scholar, John Sprankling as "rights among people that concern things". [14] Professor Sprankling (a nationally respected authority on property law, Distinguished Professor and Scholar of Law at University of the Pacific - McGeorge School of Law, and author of the internationally renowned book "Understanding Property Law"), argues that under our system of law, "a high degree of owner autonomy is both desirable and inevitable" with respect to property. [15] Consequently, he continues, "clear limits on the scope of owner autonomy" are needed. [16] These limits, Professor Sprankling asserts, can best be expressed through the law by recognizing circumscribed rights in people with respect to their private property. [17] It is upon this basis, that our system of law has awarded control over property by means of rights.

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14. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 2.

15. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 4

16. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 4

17. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs 1.-9

The United States Supreme Court has a similar view, holding that the term "property" should be deemed to be "the group of rights inhering in the citizen's relation to the physical thing". [18]

Under these definitions, virtually every item that can have rights attached to it, can constitute property. Such can include almost anything that can be imagined, such as:

1. Real property (rights in land);

2. Personal property (rights in objects); and

3. Intellectual property (rights in ideas).

In short, property includes nearly every material thing, over which people can legally exercise rights.

In America today, under our federal system, most of the law of property is based in, and pronounced by, state law. [19] For it is in state law, where the common law rests, and where our nation's respect for property rights has been most applied. [20]

Property rights are, however, also fundamentally recognized and protected in the United States Constitution, as well as, in our nation's founding documents. [21] Additionally, one exception to the general principle of state based property law, is intellectual property, which is protected pursuant to federal statutes. [22]

In the State of New York, case law has established the baseline definition for the term "property". The Court of Appeals has defined the term "property" to mean "an aggregate of rights which are guaranteed and protected by government". [23]

New York's statutory definition, is secondary to the Court of Appeals pronouncement, and is found in the General Construction Law. This chapter defines the term "property" to include both"real and personal property"; defines the term "personal property" to include rights in "chattels, money, things in action, and all written instruments themselves"; and defines the term "real property" to include rights in "real estate, lands, tenements and hereditaments, corporeal and incorporeal". [24]

When the proverbial man on the street thinks of his property, however, he thinks of his home (real property) his car (personal property) and maybe even the invention he has always dreamed of when working in his garage (intellectual property). He may not be able to offer a precise definition of what property is, but he knows it when he sees it. Moreover, deeply ingrained in his American psyche, is the belief that the property under his dominion and control, is his, to do with pretty much as he pleases, with few, if any, restrictions of government.

This man on the street understands that he can not use his property to injure his neighbor, or that he can not violate some understandable public policy, such as torturing his dog or setting his cat on fire (personal property), but he holds the firm belief that outside of these restrictions, if he wishes to use his property in an otherwise unconventional manner, or even not use it at all, he has the legally protected right to do so. He knows that property, and the rights that go with it, are held as sacred under our system of free government, and that he has these protections against the government, and other persons, who may seek to violate those rights.

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18. U.S. v. General Motors Corp., 323 U.S. 373, 378 (1945), and see also, Newman v. Sathyavaglswaran, 287 F.3d 786, 795 (9th Cir.2002), cert. denied, 537 U.S. 1029 (2002).

19. Barlow Burke and Joseph Snoe, Property: Examples and Explanations, Second Edition (Aspen Publishers, New York 2004), The Law of Property, Common Law Cases, Pg 5.

20. Barlow Burke and Joseph Snoe, Property: Examples and Explanations, Second Edition (Aspen Publishers, New York 2004), The Law of Property, Common Law Cases, Pgs 5-7.

21. See The Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness") - with the "pursuit of happiness" being long held to be derived from the "pursuit of property" and Amendments V (No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation), IX (The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people), X (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people) and XIV (nor shall any State deprive any person of life, liberty, or property, without due process of law) of the United States Constitution.

22. For Patents, see Title 35 - United States Code, et. seq., for Trade marks see Title 37 - United States Code, et. seq., and for Copyrights see Title 17 - United States Code, et. seq.

23. Fulton Light, Heat and Power Co. v. State, 65 Misc 263, 288 (Ct of Claims 1909), aff'd, 200 N.Y. 400 (1911), reargument denied, 202 N.Y. 543 (1911), see also, New York Jurisprudence, Second Edition, (Thompson West Pub, St. Paul, 2005), Vol 87, Property, §1 Generally, Pg 28.

24. See New York State General Construction Law, Sections 38, 39 and 40, "Property", "Property, personal", and "Property, real", originally enacted as Chapter 27 of the Laws of 1909.

Despite an overall understanding by lay people of what property consists of, for generations, legal philosophers have had different perspectives as to what property means. [25]

- John Locke viewed property as essentially the product of one's labor. [26]
- John Jay saw it as a fundamental human right endowed by God. [27]
- Jeremy Bentham conceived of it in light of one's settled expectations. [28]
- Karl Marx perceived it to be the foundation of capitalism and class conflict. [29]
- G.W.F. Hegel declared it to be the extension of one's will. [30]
- Harold Demsetz envisioned it as a product of externalities. [31]

In light of all these seemingly different viewpoints, property is still, however, a concept we all can understand. For property is both a foundational basis in the law as well as a reflection of it. [32] It is unquestionably linked to society and to its needs. [33]

Although understandable, and relatively fixed, property is not intransigent. It is a concept, that can change over time. Since property is the expression of the rights conferred by law, and since the law and society can change over time, so can the concept of what constitutes property, and what rights of control over it are protected by law. [34]

But these dynamic changes have their limits. Like a glacier, any changes in property rights are slow to evolve. Because of its importance to both individual people, as well as society as a whole, property rights have long been held to be among the most sacred and relatively fixed in all the law. As seen above, these concepts are embodied and protected by our constitutions, statutes and case law. Under these legal embodiments and protections, the law recognizes that property rights are inherent to our humanity, and although not unchangeable, they need to be dependable and not easily modified.

It is with this perspective that we will begin to examine the meaning of property through a review of its fundamental rights.

It is upon this understanding that we will view property in terms of its simplest definition: ***The legally recognized rights relating to a material item or idea.***

It is in order to gain a true discovery, that we will conduct this examination through the prism of four postulates that define property law. They are as follows:

1. That Property Must be Viewed as a Collection of Rights not a Collection of Things;

2. That Property Rights are those Recognized by Law, the Law evolved from Property Rights, and they are intertwined;

3. That Property Rights are Inherent to our Humanity; and

4. That Property Rights Include the Rights of Exclusion, Possession, Use and Transfer.

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25. Barlow Burke and Joseph Snoe, Property: Examples and Explanations, Second Edition (Aspen Publishers, New York 2004), The Law of Property, Pg 3.

26. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Chapter 4: Of Property, Pages 140 - 158.

27. John Jay, The Life of John Jay, Chief Justice of the Supreme Court, edited and assembled by his Son William Jay, (J & J Harper Publishing Pub New York 1833) 2 volumes, Vol II, Pg 466

28. Jeremy Bentham, Theory of Legislation, Fourth Edition (Trubner & Co., London 1908), Part First: Objects of the Civil Law, Chapter VIII - Of Property, Pgs 111-113.

29. See Karl Marx, Das Kapital: A Critique of Political Economy, edited by Frederick Engels and translated by Samuel Moore (Charles Kurr & Co. Pub. Chicago 1921).

30. G. W. F. Hegel, Philosophy of Right, translated by S. W. Dyde, A Reprint of the original 1821 publication, (Batoche Books, Kitchner, ON 2001), Pgs 55-76.

31. Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347-357 (Pap. & Proc. 1967), reprinted in Property, by Jesse Dukeminier and James Krier, Fourth Edition, (Aspen Publishers. New York 1998), Pgs 40-47.

32. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 4

33. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 4

34. New York Jurisprudence, Second Edition, (Thompson West Pub, St. Paul, 2005), Vol 87, Property, §1 Generally, Pg 29.

Part Two: The Meaning of Property - Examining Property Through the Prism of the Four Postulates

In the attempt to discover the meaning of property rights under our American legal system, four postulates have been devised to provide perspective and enlightenment. Examining property rights through the prism of these four postulates will allow for a discussion of the legal foundations of property rights as well as their evolution. It is upon this mantle that a true understanding is sought.

1. That Property Must be Viewed as a Collection of Rights not a Collection of Things

Viewing property as a collection of rights rather than a collection of things serves a dual purpose. First, as aforementioned, the essential element which gives property its value, is not the item itself, but rather the ability to control the item. The issue of control is reflected by an analysis of rights. Second, it is only through a perspective of rights, that we are able to broaden our concept of property, to include many of the more abstract property interests of great value to modern society. Concepts such as intellectual property, future interests, and non possessory interests, do not lend themselves to be easily considered as "tangible items", and as such, are property interests best viewed through the context of rights. Accordingly, by employing this "rights" perspective, a more inclusive and accurate picture of what property actually is, and means, can truly be had.

A. The Concept of Right

In order to properly view property as a collection of rights, exactly what a right is, and where it came from, needs to be understood.

The legal concept of "right" is a relatively recent one, that was not fundamentally expressed until after the rise of English jurisprudence.

Indeed, according to Susan Ford Wiltshire, Chair of the Classical Studies Department of Vanderbilt University: "Theories of rights assume a dignity of persons and a status of individuals that did not exist in the classical world". [35]

To this end, Dr. Wiltshire contends that prior to the predominance of English jurisprudence, the legal status of an individual was determined by their relationship with the state. [36] As English jurisprudence developed however, with both the events surrounding the Magna Carta and the establishment of the Common law, the law began to see a "slow transition from a state-defined, to an individual-defined, political identity", driven primarily by a new belief in the concept of natural law. [37]

Fundamentally, the first step toward the development of the concept of rights can be traced back to ancient Athens, when the Greeks "invented the revolutionary idea that human beings are capable of governing themselves through laws of their own making". [38] Thereafter, the development of the concept of rights gained a significant boost, through the Romans' creation of their complex and sophisticated legal system. [39] Despite this foundation, however, the concept of "right" that we know today, did not begin to truly emerge, until after the establishment of English jurisprudence, and upon such time, as under its influence, the unification of political thought between clerics and legal scholars occurred, to create the concept of natural law. [40]

The 13th century was especially important for the development of "rights" as we know them today. The first transformation occurred during the early middle ages, which saw the replacement of a person's classical legal status through the state with a new similar bind with the Roman Catholic church (thus continuing to leave no room for the legal concept of non collective, individual "right"). [41] By the time of the 13th century, however, the establishment of English jurisprudence, as influenced by the occurrence of certain political and social events, began to change this perspective. [42]

During the 13th century, the combination of the establishment of the Common law of England, the events surrounding the Magna Carta, and the rise of a new clerical-legal philosophy (which started to impart human beings as instruments of God with fundamental, individual natural rights), began to put mankind on the legal path to "rights" [43]

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35. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Introduction, Pg 2.

36. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Introduction, Pgs 1-2.

37. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Introduction, Pg 2.

38. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), The Origins: Greek Philosophy and Roman Law, Pg 9.

39. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), The Origins: Greek Philosophy and Roman Law, Pgs 25-29.

40. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Law, Individual and the Church in the Middle Ages; English Beginnings: Common Law and the Magna Carta; and Enlightenment, Humanism and the New Thought, Pgs 39-88.

41. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Law, Individual and the Church in the Middle Ages, Pg 30.

42. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Law, Individual and the Church in the Middle Ages; English Beginnings: Common Law and the Magna Carta, Pgs 39-61.

43. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Law, Individual and the Church in the Middle Ages; English Beginnings: Common Law and the Magna Carta, Pgs 39-61.

I. The Rise of English Jurisprudence:

As a former Roman colony, the jurisprudence of England originated in Roman Law. Since English jurisprudence led to the development of the legal concept of "right", in order to fully comprehend this concept, it is necessary to not only understand its Roman origins, but also the development of the Common Law, the events of the Magna Carta, and the rise of a new clerical-legal philosophy which began to recognize the concept of rights itself.

a. Roman Law

The law of Rome "occupies a unique place in the history of our civilization". [44] Indeed, it has been said that the "Roman law is the single greatest legacy which the ancient world has bequeathed to the modern". [45] Over two thousand years after its development, Roman law still today forms the "basis for all the legal systems of Western Europe". [46] Even in England, and countries which evolved from English law (such as the United States), the influence of Roman law, although kept within limits "because of the early rise of a national legal profession and the early origination of a national common law", "is considerable and much greater than often admitted." [47]

Referred to as "the most original product of the Roman mind" [48], the invention of a comprehensive body of law was a development of Roman society. [49] This body of law, which was both comprehensive and practical, would establish within its purview, the foundational elements of what we know today as property rights. Due to its universal character, comprehensiveness, practicality, and refinement, and because of Rome's military strength, power and prestige, this body of law would prove both successful and enduring. [50] It would further form the foundation for all future English jurisprudence.

A fundamental basis shaping Roman law was the idea of continuity. Rome was the first civilization to openly recognize that the culture of Rome Itself, was greater and more eternal than any one ruler or emperor. Roman law became an extension of this view. For Roman society understood, that its civilization and culture would be extended and perpetuated through its law.

Roman Citizens were very well versed in the law. [51] Indeed, in Roman society, knowledge of the law was viewed "as the outstanding mark of a fine man". [52] Romans respected the law, took it seriously, and believed in its value and purpose. They built a legal infrastructure with courts, lawyers and procedures. They held an abiding interest in the creation and administration of the law, provided for its flexibility to address new challenges, and created a system that was both a comprehensive model and easy to copy. [53] Like so many other Roman institutions, the law was developed as a tool. A tool to order their civilization and its conquests. Inherent in these principles was the concept of justice. The root of the word, "jus", is a Latin legal term.

The very underpinnings of what we know today as rights in private property find their antecedents in Roman law. [54] For although Roman society was without question stratified, where class status dominated legal principles [55], it was also the first society to legally recognize the individual person (called persona) together with their claims and obligations (what we would call today their rights and duties). [56] Although, as aforementioned, these rights and duties were directly linked to a person's relationship as a citizen of the Roman state, or with respect to their state recognized relationship with a family, tribe or clan (unlike our modern view where such rights and duties are held by the individual) these principles, which established a legal relationship between property and its exclusion, possession, use and transfer, did offer a pathway to the development of modern property rights in the individual.

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44. Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), The Place of Roman Law in Western Civilization, Pg 3.

45. Frederick Walton, Historical Introduction to the Law of Rome, Fourth Edition, (WMW Gaunt & Sons Pub. Holmes Beach, FL 1994), Introduction, Pg 1.

46. Alan Watson, Roman Law and Comparative Law, (University of Georgia Press, Athens, GA 1991), Law and the Roman Mind, Pg 3.

47. Alan Watson, Roman Law and Comparative Law, (University of Georgia Press, Athens, GA 1991), Law and the Roman Mind, Pg 3; and Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), The Place of Roman Law in Western Civilization, Pgs. 4-6.

48. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), The Origins: Greek Philosophy and Roman Law, Pg 17.

49. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), The Origins: Greek Philosophy and Roman Law, Pgs 17-20; Alan Walton, Roman Law and Comparative Law, (University of Georgia Press, Athens, GA 1991), Law and the Roman Mind, Pg 3, and Frederick Walton, Historical Introduction to the Law of Rome, Fourth Edition, (WMW Gaunt & Sons Pub. Holmes Beach, FL 1994), Introduction, Pgs 8-9.

50. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), The Origins: Greek Philosophy and Roman Law, Pgs 17-20; Alan Watson, Roman Law and Comparative Law, (University of Georgia Press, Athens, GA 1991), Law and the Roman Mind, Pg 3, Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), The Place of Roman Law in Western Civilization, Pgs 4-6, and Frederick Walton, Historical Introduction to the Law of Rome, Fourth Edition, (WMW Gaunt & Sons Pub. Holmes Beach, FL 1994), Introduction, Pgs 8-9.

51. John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), Introduction - Law and Society, Pg 8.

52. Alan Watson, Roman Law and Comparative Law, (University of Georgia Press, Athens, GA 1991), Law and the Roman Mind, Pg 4

53. Alan Watson, Roman Law and Comparative Law, (University of Georgia Press, Athens, GA 1991), Law and the Roman Mind, Pg 3.

54. W. H. Kelke, A Primer of Roman Law, (WMW Gaunt & Sons Pub, Holmes Beach, FL 1994), Law, Pg 10.

55. John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), The Law of Status, Pgs. 36-67.

56. William H. Kelke, A Primer of Roman Law, (WMW Gaunt & Sons Pub, Holmes Beach, FL 1994), Family, Pg 16.

It is thus unsurprising that property interests comprised a large part of Roman law. Moreover, it is interesting to note, that accordingly, legal scholars have said, that perhaps more than anything else, the greatest focus of Roman law was "concerned with distinguishing meum from tuum, that is, with the rights of property, its ownership and conveyance, with those rights other than ownership which people may have over things". [57]

Roman Law focused on property, because the exercise of control over it, provides the avenue to wealth, and the engine of economic activity. Rome inherently understood this, and used its law to advance this idea.

For Rome was an empire based upon land, commerce, trade and its military. [58] Accordingly, its law helped promote both property rights and civilization across the then known world. Roman law did this by advancing conquest, instilling both consumer and merchant confidence, and by providing a consistent template for the governance and operation of conquered lands and peoples. [59] The law of Rome, especially upon its codification, helped to make its empire the greatest of its time.

Through its law, respect for the legal principles, and the concept of continuity, Rome became the center of civilization, power, wealth and trade for the entire known world. Roman law was carried to all its colonies for a framework of administration. Centered upon property rights, with those rights based in the society as a whole rather than in the individual person, Roman law addressed those practical needs that its empire required to run effectively, grow and prosper.

Under Roman law, these legally protected property rights allowed the Roman economy to flourish, businesses to develop, and trade to dominate all other nations and peoples. [60] The Roman concept of the law, acknowledged contractual agreements, invented corporations, established trade standards, and punished those who did not respect property rights. [61]

Like the great architecture for which it is known, Rome developed a system of law that was timeless and has provided a foundational element of all other legal systems throughout the ages.

American law, and its concept of rights, were derived from England. England was a part of the Roman Empire. [62] Conquered by the Romans, through a series of campaigns between 55 B.C. and 43 A.D., [63] the empire instilled in England the philosophy of respect for the law, as well as many foundational Roman legal principles. Due to its vast distance and difficulties of administration, however, the Romans allowed the English to develop a great deal of autonomy in their local law. [64]

For like several other former Roman colonies that suffered great distance from Rome, England developed its own system for making and enforcing the law. It used Roman legal principles as a template, but did not adopt all Roman law in specific. Consequently, although English law largely rejected many irrelevant parts of the Roman code itself, the Roman template and idea of the law being the basis for civilization and justice, and of its need for respect, did become an unquestioned value of the English people. As a result, from Roman times to the present, Englishmen could disagree over who should make the law, or over what laws should be made, but they always held dear and respected the concept of the law itself, and the fundamental procedures that were intended to produce justice.

When the Roman Empire fell, and England was left to fend for itself, this tradition of respect for the law, and the foundational basis that the law is a means to resolve disputes and deliver justice, had already taken hold in Britain for hundreds of years. Due to its distance from Rome before the fall of the empire, as well as the passage of time after its fall, however, by the time of the middle ages, the settled law under which the English people lived, had significantly diverged from the Roman Code. [65]

Accordingly, although the Roman code may not have expressly become the law of England, many of its core principles, including legal procedures, organization, practical outcomes, and respect for the rule of law, did become foundational attributes of the English Common law that was developed.

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57. John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), Property, Pg. 139.

58. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), The Origins: Greek Philosophy and Roman Law, Pgs 17-20; and John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), Commerce, Pgs.. 206-249.

59. John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), Commerce, Pgs.. 206-249; Frederick Walton, Historical Introduction to the Law of Rome, Fourth Edition, (WMW Gaunt & Sons Pub. Holmes Beach, FL 1994), Introduction, Pgs 8-14; Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), The Evolution of the Law, Pgs 52-54; and Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), The Origins: Greek Philosophy and Roman Law, Pgs 17-22.

60. John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), Property and Commerce, Pgs.. 139-249.

61. John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), Property and Commerce, Pgs.. 139-249.

62. Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), The Historical and Constitutional Background of Roman Law, Pg. 12.

63. Michael Grant, The History of Rome (Charles Scribner's Sons Pub., New York 1978), VI Caesar and Augustus, Pg. 218, and VII The Imperial Peace, Pg. 282.

64. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), The Origins: Greek Philosophy and Roman Law, Pgs 9-29, and English Beginnings. Common Law and the Magna Carta, Pg 51.

65. Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), Reception of Roman Law, Pgs. 197-198.

b. The Development of English Common Law.

In 1066, six centuries after the fall of Rome, William the Conqueror, a Norman Knight, who due to his illegitimate birth status had questionable property inheritance rights in his native France, formed an army, invaded England, killed its King Harold, and took over the throne of the country. [66] Proving an able ruler, William effectively began to unite the country and place it on the road to relative security and prosperity. [67]

William brought with him a respect for Roman law, as well as the concepts of feudalism, swearing oaths, and that one accused of a crime should be judged by a jury (from the Latin word "jurare", meaning to swear an oath).[68] Dedicated to these concepts, he began to transform both England and its people. As England developed into its own feudal system, English Law and its system of jurisprudence began to follow suit. Accordingly, the concept of subjectism (only having rights awarded by the sovereign as merely a subject of the king) started to be replaced with a growing sense of individualism.[69]

For feudalism "was contractual in nature, a matter of oaths and loyalties exercised in both directions between lords and vassals". [70] This concept relied on mutual obligations, and as such, highlighted the importance of the individual and his individual ability and right to swear the oath and fulfill the duty. [71] During the next century, this concept began to make its way into the legal beliefs of Englishmen. Consequently, Englishmen began to perceive that these oaths and promises meant something, and if a lord or king was a tyrant, then they could withhold their oath and duty. These reciprocal promises began to form legally supported expectations, and with them, the rudimentary basis for what we call today "rights".

By 1154, England was ruled by a distant decedent of William: King Henry, II. [72] By such time, feudalism had taken hold, and a growing sense of individualism began to become associated with the concept of being a citizen. [73] A talented and intelligent king, Henry (the first man to use the title King of England) greatly expanded England's territory (ruling significant portions of France, upon his marriage to Eleanor of Aquitaine, who was a of French royal lineage) and dramatically advanced England's trade and commerce. [74] Perhaps Henry's greatest accomplishment, however, is that he worked to promote a national and unified system of law through out England, and is thus regarded today, as the father of the English Common law. [75]

As this national and unified system of law began to develop (commenced by Henry's creation of the King's Magistrate Courts) the Common law began to emerge. [76] Local judges ruled on cases of disputes between parties (very often property disputes) and then following precedent of past decided cases, issued decisions to resolve the controversies. [77] This practice began to give those who could ask the courts to resolve their disputes (usually those who owned real property) an expectation that they could gain a just and predictable result under the law, based upon custom, justice and what was the right thing to do. [78]

According to Dr. Wiltshire, this developing English Common law was "common in more than one sense", in that, not only did it help "to produce a common culture", but that it also was "earthbound and daily instead of speculative and abstract" paying greater respect to individuals. [79] It lead the English people, and their law, to begin to recognize the emergence of natural law, and with it, develop a further concept of their own individual rights.

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66. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Late Saxon England, Pgs 93-99.

67. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), The Impact of the Norman Conquest, Pgs. 103-121.

68. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Amendments V, VI, VII and VIII, Pgs 158-159

69. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings: Common Law and the Magna Carta, Pgs 52-55.

70. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings: Common Law and the Magna Carta, Pgs 52-55.

71. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings: Common Law and the Magna Carta, Pgs 52-55.

72. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pg. 144.

73. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings: Common Law and the Magna Carta, Pgs 53-55.

74. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 144-163; and Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings: Common Law and the Magna Carta, Pgs 53-55.

75. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 144-163; and Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings: Common Law and the Magna Carta, Pgs 53-55.

76. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pgs. 53-55; and C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 149-151; and Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), Reception of Roman Law, Pgs. 197-198.

77. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pgs. 53-55; and C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 149-151; and Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), Reception of Roman Law, Pgs. 197-198.

78. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pgs. 53-55; and C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 149-151; and Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), Reception of Roman Law, Pgs. 197-198.

79. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pgs. 53-55

The Common law we know today was first developed through a process of legal reforms employed by King Henry, II. Dedicated to improving what he saw as peace and justice in his country, his legal reforms were vast and meaningful. Through a series of Assizes (decrees made upon investigation) he took measures to standardize legal outcomes, assure justice and promote faith in the legal system. [80] Henry's reforms included:

- The expansion of the authority of royal courts (the King's Magistrate Courts), to allow for the emergence of a new body of Common case based law to replace the disparate customs of feudal and county courts;
- The employment of jury trials to end the old Germanic trials by ordeal or battle;
- The extension of royal jurisdiction into the extensive, bewildering area of land disputes; and
- The development of the first systematic set of resolution standards in the crucial area of property law.[81]

Accordingly, Henry's systematic approach to law worked. It provided a common basis for development of royal institutions throughout the entire Kingdom, and created a more uniform, dependable and modern network of law. [82]

This new system of law, which would become known as the Common law of England, gave rise to expected, standardized outcomes in the resolving of disputes. These expectations in outcomes, which began to be held as a firm belief by all citizens in England, helped to develop the concept of rights. For it is in expectations, founded in law, that a right is created.

c. The Magna Carta - A Battle for Property Rights

Upon Henry's death in 1189, his eldest surviving son Richard (known as Richard the Lionheart) ascended to the throne. [83]

Handsome, charming, gallant and ambitious, Richard would spend less than six months of his ten year reign in England. [84] Immediately after his coronation, Richard, a battle hardened knight, began preparing to join the crusades. [85] The leader of a three king force on the third crusade (which also included Frederick of Germany and Philip of France), Richard gained international renown, as the instrumental field commander who lead Christian Forces to capture of the important Mediterranean Port City of Acre. [86] Heralded for his gallantry and bravery, Richard became a national hero of the English people.

During Richard's return home from the Crusades he was captured and held for ransom. [87] In Richard's absence, his aging mother Eleanor, and younger brother, John, (Henry and Eleanor's youngest son) were asked to temporarily administer the duties of the king. With the economy is shambles, massive expenditures from the Crusades, and Richard's ransom, John was forced to enormously raise taxes during an economic downturn. [88] Disliked by the people and nobility alike, a national clamor erupted for the return of his brother, the heroic Richard the Lionheart, as the rightful king, earning John the literary ignominy as the royal usurper in the tales of Robin Hood. (Richard on the other hand would become Prince Charming in Snow White).

Upon Richard's return from captivity to the throne in 1194, the economy rebounded and he recaptured all of the French lands lost by John during his absence.[89] Richard's successful re-ascension to the throne was seen as proof of John's ineptitude.

Just five years later, in 1199 Richard died, and John was crowned king in his own right. [90] Due to his poor performance years earlier, however, this was not without controversy, and several interests tried to place John's nephew Arthur, son of his deceased brother Geoffrey, on the throne. [91]

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80. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 150-151; and Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), Reception of Roman Law, Pgs. 197-198.

81. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 150-151; and Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), Reception of Roman Law, Pgs. 197-198.

82. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pgs. 53-55.

83. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pg.. 163..

84. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pg.. 161

85. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pg.. 163.

86. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pg.. 163.

87. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pg.. 164.

88. Geoffrey Hindley, A Brief History of the Magna Carta: The Story of the Origins of Liberty, (Running Press, London 2008), The Brothers Plantagenet, Pgs 12-22.

89. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 164-165

90. Geoffrey Huntley, A Brief History of the Magna Carta: The Story of the Origins of Liberty, (Running Press, London 2008), The Brothers Plantagenet, Pg 25.

91. Geoffrey Huntley, A Brief History of the Magna Carta: The Story of the Origins of Liberty, (Running Press, London 2008), The Brothers Plantagenet, Pg 25.

From 1199 to 1215, many of John's detractors were proven right. Showcasing his incompetence and failings as a ruler for over a decade and a half, John presided over a near depression like economy, lost nearly all England's holdings in Normandy and Angevin to an ambitious and capable King Phillip II of France [92] and became embroiled in a bitter dispute with Pope Innocent III over the right to select the next Archbishop of Canterbury. [93] In doing so, he completely lost the support and faith of the English people, the nobility, and the Catholic church. Accordingly, a battle for property rights was about to begin.

By 1215, scared and nervous by what had taken place in France (with the English supported barons deposed of their holdings), the landed barons of England, the people of property, desperate to protect their interests, had endured enough. [94] After suffering from incompetent government and high taxation, and fearful that France would invade and dispossess them of their lands (and thereby impoverish and/or kill them) these nobles raised an army to rebel against King John. [95] On June 15, 1215, their forces confronted King John at Runnymede, and forced him to put his seal on the Magna Carta (the Great Charter). [96]

The Magna Carta established one of the foremost foundations of modern British law. The United States Constitution and its Amendments (the Bill of Rights) viewed it as a guiding document for the further expansion of the rights and liberties of the people and the limitation of the power of government. Containing 63 clauses, this landmark document:

- Created a council to the King (a forerunner to parliament);
- Promised all freemen (the nobles) access to courts and a fair trial;
- Specified the protection of many property rights against infringement by the king and his agents;
- Eliminated unfair fines and punishments;
- Gave certain legal powers to the Catholic Church; and
- Addressed many lesser issues. [97]

Due to the nature of the feudal society, which was the source of the nobles' wealth and power, the Magna Carta did not, however, abolish involuntary servitude (serfdom). [98] That would take another 608 years in England, and 650 in America.

But despite this shortfall, the Magna Carta was still incredibly meaningful and historic. For with its signing, what the oaths of feudalism and the developing Common law had begun to recognize as custom and practice (mainly the ability of the individual to assert their property rights) now became, for the first time, the written and public law, by seal of the king. [99] Specifically, "the individual's safety, freedom and property were declared inviolate" and "were removed from arbitrary interference". [100]

It is interesting to note, that King John had no intention of ever honoring the promises he made in the Magna Carta, and merely saw it as an expeditious end to a temporary difficulty. With his death only a year later in 1216, King John, however, never had the opportunity to effectively repudiate its terms. Accordingly, the English people were thus able to then eternally promote the sovereign's sealed document, that granted and protected their rights and liberties.[101]

So meaningful did the Magna Carta become in the minds of the English people, that future monarchs felt compelled to promote, confirm and support it, ordering it to be publically read biennially, as a means to prevent insurrection. [102] As it became a document of common understanding, "men assumed it contained what they wanted it to contain", seeing in it the protections and guarantees they wished to see. [103] This document thereby became a threshold foundation for the legal concept of rights.

The significance of the Magna Carta, however, can not be overstated. For the first time in recorded history, a sovereign was forced (albeit at sword point) to limit his power, in writing, and to recognize the individual rights of his subjects (albeit the landed nobility). This, in an era of the divine right of kings, sent legal shockwaves across the known world, and caused scholars everywhere to start examining the concept of what would become known as "rights". All of this was caused by a desire of landowners to protect their property. [104]

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92. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 169-171

93. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 171-173

94. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 173-176..

95. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 173-176..

96. Geoffrey Huntley, A Brief History of the Magna Carta: The Story of the Origins of Liberty, (Running Press, London 2008), Timetable of a Crisis, Pgs 203-207.

97. Geoffrey Huntley, A Brief History of the Magna Carta: The Story of the Origins of Liberty, (Running Press, London 2008), Appendix - The Magna Carta, Pgs 311-324.

98. Geoffrey Huntley, A Brief History of the Magna Carta: The Story of the Origins of Liberty, (Running Press, London 2008), Appendix - The Magna Carta, Pgs 311-324

99. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pg. 56

100. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pgs. 58.

101. Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Myth, Pgs. 267-274.

102. Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Myth, Pg. 269.

103. Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Myth, Pgs. 269-270.

104. Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Myth, Pgs. 267-274.

d. Clerical Philosophy and the Recognition of Natural Law

The final element of the progression of English jurisprudence that led to the legal concept of rights, was a merger of clerical and legal philosophy that produced a recognition of natural law. This progression took four stages, from the body of Roman law (which produced a practical tool to order society and create legal rules that were definite, understandable and just), to the development of English Common law (which provided a uniform system of practically applying these rules of law, by means of precedent and custom, in order to produce definite, understandable and just results), to the Magna Carta (which gave individuals, as citizens, an expectation that no man, not even a king, could deny individual citizens the definite, understandable and just application of the rules of law), to the development of a new clerical and legal philosophy (which held that individuals, as endowed instruments of God, have certain legally recognized rights, to the definite, understandable and just application of the rules of law, by the state, that no man, or their institutions, have power to violate).

This progression, of English jurisprudence, developed a legal system of rules and procedures that created just expectations upon which citizens could rely. It further, for the first time in human history, produced a recognition of the inherent value and importance of the individual person, as a citizen within this legal system. By merging these two principles, it developed the legal concept of rights. Under this concept, each individual person, as a citizen of the state, is deemed to hold certain fundamental rights, to the definite, understandable and just application of the rules of law, that the law itself, has a duty to protect. This was the concept that was recognized through this clerical-legal philosophy of what became known as natural law.

Although great classical philosophers such as Socrates, Aristotle, the Stoics and Cicero, all espoused many foundational natural law concepts, that provided antecedents to the development of legally recognized rights in individuals[105], the true recognition of such rights came by means of these clerical-legal philosophers, after the sealing of the Magna Carta. [106]

There are certain times in history, which produce dramatic, meaningful change for the human condition. For English speaking people, 1215 was such a year. [107] The Magna Carta, especially how its was viewed after its signing, provided a major break with the way people looked at themselves, and fundamentally changed their relationship with both law and government. [108] As aforementioned, it was a document which recognized individuals as individuals, which promised legal guarantees that were deemed to be inviolate, and which offered everyone a promise of hope and empowerment, of which their classical ancestors had never dreamed. [109] It is for this reason, this sense of aspirational promise that it offered, that is why the Magna Carta has often been characterized as being seen how men wanted to see it, and containing in it, what they wanted it to contain. [110]

Without the influence of the Magna Carta, without its meaningful philosophical break with the past, it is unknowable whether English jurisprudence would have ever independently developed the legal concept of individual based rights that we know today. For it was under the influence of the Magna Carta, and the aspirational principles that it represented, that clerical-legal philosophers were able to complete the legal concept of rights. English jurisprudence relied on this progression, and the legal principles it produced, have stood the test of time, and exist to this very day.

The first development of the new legal philosophy, that led to the creation of the legal concept of rights, arose from clerical philosophers. This was not entirely predictable at the time, due to the fact that the Roman Catholic Church, through the Pope, had actually repudiated the Magna Carta. [111] But in the transformational year of 1215, an act of the pope himself, made this development possible.

A few months after the Magna Carta, in November of 1215, Pope Innocent III, one of history's most able popes, held the Fourth Lateran Council, in an effort to shape the theological structure and teachings of the Church, as well as the delivery of justice to its faithful. [112] "England was a staunchly Catholic country", and this Council, and the decrees issued from it by the Pope, would have profound effect upon England, its clergy, and its jurisprudence. [113] Canon 18 of this Council, discussed what would become the precursor of a doctrine of rights, by requiring just legal procedures in trials, as well as a blanket prohibition of all clergy from engaging in torturous activities, the blessing of trials by combat or ordeals, and pronouncement of capital sentences. [114] Influenced greatly by the legal reforms of Henry II for English jurisprudence, this Canon adopted many of the same principles, into the Catholic Church's doctrine for the entire world. [115] Through this Council, the Pope, viewed as God's representative on earth, gave his blessing for the Church to both study, and philosophically influence, the secular law.

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105. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), From Athens to America: The Evolution of the Idea of Rights, Pgs 9-29.

106. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), From Athens to America: The Evolution of the Idea of Rights, Pgs 9-61.

107. Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Introduction, Pgs. ix-xix.

108. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pgs. 56-60; and Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Myth, Pgs. 267-274.

109. Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Myth, Pgs. 267-274.

110. Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Myth, Pgs. 267-274.

111. Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Myth, Pg. 267.

112. Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Introduction, Pgs. xiv-xv.

113. Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Introduction, Pgs. xiv-xv.

114. R.C. Van Caenegen, Legal History: A European Perspective, (Hambledon Press, London 1991), Methods of Proof in Western Medieval Law, Pgs. 83-88

115. Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Introduction, Pgs. xiv-xv.

Upon this green light by the Catholic church, to permit the most educated persons of the day, clerics, to study and philosophically consider the impacts of the secular legal principles, 13th century clerical philosophers such as Thomas Aquinas, William Ockham and John Wycliffe, began to create the legal concept of individual rights from their emerging theory of natural law. [116] These men, brilliant philosophers and students of both religious and legal theories and relationships, held that individuals, as endowed instruments of God, have certain legally recognized rights, to the definite, understandable and just application of the rules of law, that no man, or their institutions, have power to violate. [117] Building off of secular law to advance their theories, it is unlikely that concept could have been effectively advanced, nor enthusiastically received, in a pre Magna Carta world.

This concept of rights was a developing one. For later, legal, non-clerical philosophers, such as Thomas Hobbes, Richard Cumberland and John Locke, leveraged these clerical derived perspectives, to produce a lasting recognition of individual based rights within English jurisprudence. [118] These rights, linked with life, liberty and property, today form the fundamental basis of Anglo-American law. [119]

This journey, that led to the development of the legal concept of rights, by means of clerical-legal philosophers, began in 1225. For it was in that year, within a decade of the Magna Carta and the Fourth Lateran Council, that the greatest ordained legal philosopher in the history of the Catholic church was born. [120] In a short life that lasted only 49 years, this Dominican philosopher, Thomas Aquinas, became one of the most prominent intellectual minds of his age [121] The son of Sicilian nobility, and a child of privilege, he was educated in the finest schools of Europe. [122] A student of the classical thinkers of Greece and Rome, Aquinas became well versed and proficient in their thinking, and a devoted disciple of the concept of reason. [123] A well traveled, brilliant and prolific writer, who produced 34 volumes in a 29 year period, he believed in individualism, and began the parade of philosophical constructs that was to form the basis for natural law. [124] Canonized fifty years after his death, by Pope John XXII, Thomas Aquinas was recognized by the First Vatican Council as the pre-eminent “Teacher of the Church”. [125]

Thomas Aquinas believed that men were instruments of God’s Devine will, and that as such, justice and law must reflect the importance and value of humanity, and the individual, in their mission to do God’s work. [126] Relying heavily upon reason and concepts of natural law derived from Aristotle and the Stoics, Aquinas argued in his masterpiece *Summa Contra Gentiles*, that “Grace does not do away with nature, it perfects it”. [127] His concepts of natural law, and his ability to combine philosophy, theology and law, through practical, reasoned solutions, made Thomas Aquinas a pioneer in the field of human thought. [128] His recognition of individual duties and claims, under both theology and law, laid the ground work for the development and recognition of the rights of man, and propelled the Catholic church to establish a new harmony between human and Christian values, through his interpretation of the natural law. [129]

While the writings of Thomas Aquinas never expressly declared the concept that men have abstract rights, or that the autonomy of the individual is the source of all law, his linking of the individual with the mission of seeking God’s Grace, and his belief that the law, and its implementation of justice, must respect that mission, and the value of the individual person seeking it, was a fundamental breakthrough in the development of the legal concept of individual based, inviolate rights. [130] This breakthrough would be taken to the next level, of actually declaring the concept of rights, and providing for their recognition under English jurisprudence, by another cleric philosopher, who was an intellectual disciple of Aquinas, the English Franciscan William Ockham. [131]

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116. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), From Athens to America: The Evolution of the Idea of Rights, Pgs 34-64.

117. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), From Athens to America: The Evolution of the Idea of Rights, Pgs 34-64

118. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), From Athens to America: The Evolution of the Idea of Rights, Pgs 72-88

119. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), From Athens to America: The Evolution of the Idea of Rights, Pgs 9-88

120. Ralph McInerny, Aquinas, (Blackwell Publishing, Malden, MA 2004), A Short Life: Pgs 3-4.

121. Ralph McInerny, Aquinas, (Blackwell Publishing, Malden, MA 2004), A Short Life: Pgs 3-8

122. Ralph McInerny, Aquinas, (Blackwell Publishing, Malden, MA 2004), A Short Life: Pgs 3-26

123. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Law, Individual and Church, Pgs. 35-39.

124. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Law, Individual and Church, Pgs. 35-39.

125. Jean-Pierre Torrell, St. Thomas Aquinas: The Person and His Work, (Catholic University of America Press, Washington, D.C., 2005), Epilogue: Canonization in Avignon, Pg. 321.

126. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Law, Individual and Church, Pgs. 35-39.

127. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Law, Individual and Church, Pgs. 35-39.

128. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Law, Individual and Church, Pgs. 35-39.

129. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Law, Individual and Church, Pgs. 33-39.

130. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Law, Individual and Church, Pgs. 35-39.

131. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Common Law and The Magna Carta, Pgs. 60-61.

William Ockham was an important transitional figure who lived in England from 1290 to 1349. [132] A Franciscan Friar, best known for the development of his maxim 'Ockham's Razor' (the simplest answer tends to be the best), he saw natural law as a positive reflection of the Devine will. [133]

A believer in the individual, Ockham created a volume of writing which established a "political theory not far removed from the classic theories of rights of the seventeenth century". [134] Indeed, he is said to have "inaugurated a 'semantic revolution' which transformed the traditional" ideas of natural law "into a new theory of subjective natural rights", marking "a 'Copernican moment' in the history of the science of law". [135]

Devoted to his Franciscan order, which held great respect for nature, minimalism, and the value of the individual, Ockham was heavily influenced by these beliefs in his intellectual theories. William Ockham, and other Franciscans theorized that, if "God has property in the world", then "human beings can, too, and in this one way, resemble their maker". [136] This basic perception about human beings, directly led to an individualistic political theory, and thus to an individual's ability to have rights. [137]

As aforementioned, in a world that had previously viewed people as having rights only through their role as citizens or subjects, this was a rather significant intellectual departure. But Ockham, a courageous and gifted intellect, took on even the Pope in making his arguments for this theory of individual rights. [138] The power of his beliefs gained followers, and Ockham, who became a national intellectual hero in England, provided inspiration to those developing English jurisprudence.

One such younger protégée of William Ockham was John Wycliffe.[139] Wycliffe, was a legal and theological scholar, Doctor of Divinity and a University Professor at Oxford. [140] He is most famous for being the first man to translate the Bible into the English vernacular. [141]

Wycliffe, who was 30 years younger than Ockham, lived from 1320 to 1384, and has been credited with advancing the theme of the "individual as a fully fledged, autonomous, independent member of society who had inherent, inborn rights." [142] This extension of Ockham's views would lead to the evolution of individual right based liberties, and would create an entirely new way of thinking about human autonomy and individual rights. [143]

Ockham and Wycliffe's philosophy had a marked influence upon English jurisprudence. For once "individuals are considered autonomous human beings, endowed with natural human rights, they are no longer 'subjects' or mere 'members' of a higher power". [144] With Common law and public acceptance of this concept, English jurisprudence propelled it further forward. This new legal concept of individual rights created a fundamental principle of Anglo-American law, "without which there would have been no United States Bill of Rights". [145]

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132. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Common Law and The Magna Carta, Pgs. 60-61.

133. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Common Law and The Magna Carta, Pgs. 60-61.

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137. Richard Tuck, Natural Rights Theories: Their Origin and Development, (Cambridge University Press, New York, 1981), The First Rights Theories, Pgs 20-29.

138. Richard Tuck, Natural Rights Theories: Their Origin and Development, (Cambridge University Press, New York, 1981), The First Rights Theories, Pgs 20-29; and Brian Tierney, The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law (Eerdmans Publishing Co., Grand Rapids 1997), Origins, Pgs. 13-18.

139. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Common Law and The Magna Carta, Pg. 61, and Richard Tuck, Natural Rights Theories: Their Origin and Development, (Cambridge University Press, New York, 1981), The First Rights Theories, Pgs 20-29.

140. Thomas F. Tout, The History of England: From Henry III to Edward III, (Longmans, Green & Co., New York, 1905), The Latter Years of Edward III, Pgs. 425-426.

141. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Common Law and The Magna Carta, Pgs. 60-61.

142. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Common Law and The Magna Carta, Pgs. 60-61.

143. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Common Law and The Magna Carta, Pgs. 60-61.

144. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 71.

145. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 63.

II. The Social Contract Theory

This emphasis on the individual in natural law gave rise to the 'social contract' theory of civil society. [146] Under this theory, there exists a contract between the citizen and their government. Such contract implies equality of individuals, and the choice of entering into mutual obligations, that exist by virtue of natural law. [147] It further implies, the bartering of the natural rights of individuals, in exchange for achieving political and social organization. [148] This idea of the social contract, was the way that natural rights of an individual, under natural law, could be deemed consistent within the framework of the state. [149]

As English jurisprudence began to absorb the social contract theory, it also began to comprehend that natural law could be "invoked to support the claim that human beings are individuals capable of making their own judgments and acting in their own behalf". [150] This concept was activated through the recognition that every individual has rights, that such rights are inviolate and inherent to their humanity, and that it is the duty of the state to protect such rights. Under the social contract theory, the individual contracted to be a dutiful citizen of the state, while the state contracted to protect the rights and liberties of every individual. [151]

Through this social contract theory, natural law was transformed. Where previously it was seen as the basic order in the universe, determined by God's sovereign will, it was now viewed as a guarantee of individual rights and a basis for political equality. [152] Commented on by such legal scholars as John Locke, Thomas Hobbes, Jacques Rousseau, Montesquieu (Charles-Louis de Secondat), Adam Smith, David Hume, James Mill, and Edmund Burke, this issue of inviolate, individual rights, derived from natural law, became the topic of the day, throughout the course of the Enlightenment. [153] English jurisprudence and the English people readily accepted this framework as a part of their culture, leading them to believe that they were protected individuals, and endowed citizens, possessing the "Rights of Englishmen".

III. The Definition of Right

When the legal concept of right became recognized under English jurisprudence, what exactly did they mean by the term "right"? How could this idea, this term, be defined?

According to William Blackstone, author of the famous Commentaries on the Law of England, a treatise often referred to as "the Bible of the Law", the legal definition of the word "Right" represents the closest English translation of the Latin term "jus" (from which the term justice is derived), and essentially means "the abstract sense of law". [154]

Black's Law Dictionary, the quintessential gold standard for legal definitions, defines the term"Right" to mean:

> ***"Powers of free action…a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others; or***
>
> ***"A power, privilege or immunity guaranteed under a constitution, statutes or decisional law, or claimed as a result of long usage.***" [155]

For our purposes, however, perhaps the best and most effective understanding of what the term "Right" actually means, can be seen from the writings of the Scottish philosopher and legal commentator, James Mill. Mill saw "rights" in terms of a claim based upon a legally justified expectation (which explains how rights progressed from the Rules of Roman law, to the public expectations produced from Common law decisions and the pronouncement of the Magna Carta, and then through the individualist centered citizenship of the clerical-legal philosophers). [156] From Mill's writings, a corresponding definition of the term "Right", can accordingly be derived to be:

> ***"The legally recognized ability to exercise power and control over an action or object"***. [157]

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146. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 71.

147. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 71.

148. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 71.

149. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 71.

150. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 72.

151. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 72-73.

152. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 72-73.

153. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 72-76.

154. William Blackstone, Commentaries on the Laws of England, Edited and Assembled by William Lewis (Rees, Welsh & Co., Philadelphia 1902, Book I, Of the Nature of Law, Pg. 28.

155. Henry C. Black, Black's Law Dictionary, Fifth Edition, edited and assembled by Publishers Editorial Staff, (West Publishing Co., St. Paul 1979), Pg 1189.

156. James Mill, Political Writings, Edited and Assembled by Terence Ball, (Cambridge University Press, New York 1992), Jurisprudence, Pgs. 45-50.

157. James Mill, Political Writings, Edited and Assembled by Terence Ball, (Cambridge University Press, New York 1992), Jurisprudence, Pgs. 45-50.

IV. John Locke and the Pronouncement of Property Rights

With the legal concept of individual, in violate, "right", established under English jurisprudence, its intellectual linkage to the concept of property, created one of the greatest benefits to mankind that the world has ever seen. For this linkage made possible, every organized benefit of a capitalistic society, as well as giving tangible meaning, to the very liberties that the legal concept of right promised. This linkage was first expressed through the brilliance of John Locke.

The Scottish philosopher and theologian, Lord Thomas Erskine, referred to John Locke as:

"the man, next to Sir Isaac Newton, of the greatest strength of understanding, that England, perhaps, ever had" [158]

John Locke, was an intellectual giant of legal and political thought. Born in Somerset, England, in 1632, he was the son of John Locke (a liberal, Puritan attorney) and Agnes Keene (the daughter of a prosperous tanner). [159] His parents gave their son "the values of simplicity, temperance and tolerance". [160] After earning a bachelor and masters degree at Oxford, he was employed by the University as a professor. [161] Upon his death in 1704, at age 72, he had earned a reputation as one of England's greatest scholars and philosophical thinkers, amassing a large volume of written works (including his *Essay Concerning Human Understanding, Two Treatises on Government, Letters on Toleration, Some Thoughts Concerning Education*, and *Reasonableness of Christianity*) and providing vast and prominent public service in a great number of high public offices. [162]

A scholar of languages (Greek, Latin, Hebrew and Arabic), political systems, and science (including physics and medicine), Locke was adverse to innate ideas, scholastic philosophy, intellectual intolerance. [163] Well traveled and well read, John Locke was personally known to many leading thinkers of the day, and commented extensively on both the contemporary and foreseeable issues facing his society. [164] Known for his practicality, sensibility and intellectual elegance, John Locke believed deeply in the rights of man, the value of every individual person, the importance of education, and the need to oversee government to insure that it serves the people and protects their natural rights. [165] A devotee of natural law, with a practical twist, his commentaries have proved both timeless and enduring. [166] He despised authoritarianism, and believed in the power reason to oppose it, through the use of empirical ideas. [167]

In 1690, John Locke published his masterpiece *Two Treatises on Government*. [168] The comprehensive 277 page tome, has been referred to as: "the most influential work on natural law ever written". [169] In this book, Locke emphasized the link between natural law and natural rights, that arise from the belief in human reason, as attached to the rule of law. [170] For Locke, the function of natural law, and the state itself, is to establish as inalienable, the rights of the individual. [171]

Expounding on the social contract theory, John Locke strongly asserted in his famous work, that natural equality is the basis of the doctrine of consent to government. [172] His pronouncement that the fundamental rights of life, liberty and property, provide the basis for free government [173], dramatically transformed political thinking, and offered a concept of human dignity and meaningful rights, that established the inspiration for the United States, and its system of free, and practical, self government. [174] Locke held as fundamental, that the primary purpose of government is to protect and preserve rights. Moreover, he held that among the most fundamental all rights, is the right to property.

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158. Thomas Eskine, The Speeches of Lord Thomas Eskine, Edited and Assembled by James Ridgeway - Two Volumes (Eastburn, Kirk & Co. Pub., New York, 1813), Vol. II, Pg. 292.

159. John Locke, An Essay Concerning Human Understanding, Oxford World Classics, (Oxford University Press, New York, 2008), Introduction, Pg I.

160. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 76.

161. John Locke, An Essay Concerning Human Understanding, Oxford World Classics, (Oxford University Press, New York, 2008), Introduction, Pg I.

162. John Locke, An Essay Concerning Human Understanding, Oxford World Classics, (Oxford University Press, New York, 2008), Introduction, Pg I.

163. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 76-80.

164. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 76-80.

165. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 76-80.

166. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 76-80.

167. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 76-80.

168. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book I, Title Page.

169. Paul E. Sigmund, Natural Law and Political Thought (Winthrop Publishers, Cambridge, MA, 1971), From Medieval to Modern Natural Law, Pg. 81.

170. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 79.

171. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 79.

172. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 80.

173. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Of Civil Government, Pg 179.

174. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 76-80.

When John Locke asserted that private property was a fundamental right of natural law, he created a landmark basis for modern government and the freedom of man. For the first time in history, under Locke's analysis, property was placed under the power, dominion and control of the individual, and that it was such person's fundamental right, and not the state's, to do with it as they pleased. This belief that property was a fundamental, individual, inviolate right, created a workable political theory, that for the first time, established a practical solution to the dilemma of private property. [175] Indeed, by "incorporating a doctrine of private ownership into natural rights theory, he achieved a pragmatic synthesis that avoided the extremes of communitarianism and greed". [176] Locke's theory, now in practice under United States law for over two centuries, has stood the test of time, and has helped to build the strongest economy, and most prosperous and free society, that the world has ever seen.

When John Locke equated and linked the right of property, with the fundamental rights of life and liberty, he differed from earlier theorists. [177] From Aristotle to Hobbes, previous commentators had been ambivalent about private property. [178] In his brilliance and practical understanding, however, Locke asserted that property rights are "an integral part of the human condition and a fundamental characteristic of human activity". [179]

In his historic *Two Treatises*, Locke devotes an entire section to a discussion of property rights and their critical importance in the fulfillment of liberty. [180] In this section, John Locke fervently asserts that mankind works in and with nature, in a desire to make it our own. [181] He further contends that not only is this pursuit of property the fulfillment of human liberty (to work and enjoy the fruits of our labor), but that such a pursuit, is in fact the very essence of humanity, and makes us who we are. [182]

John Locke's arguments empower every person to seek and achieve their material dreams. But his arguments are not materialistic. For Locke's theory argues that it is the *pursuit* of property, and not the material item itself, that is linked to life and liberty. [183] Moreover, his assertions have been characterized to hold that the "enjoyment of the fruits of one's labors is not the sin of acquisitiveness but the ability to fulfill the Christian duty of liberality and charity". [184]

To Locke, property rights represent the true essence of freedom. [185] He understood that a person's material needs and wants, inspire and drive the individual to work, and motivate them to pursue goals that will beneficial all society. [186] The fundamental argument that Locke makes, is that it is only through the freedom of people to pursue their material dreams, and exercise their property rights, that the human spirit can be fulfilled, and a true meaning of life and liberty can be enjoyed. [187]

What John Locke could not have known at the time of his authorship of the *Two Treatises on Government*, is that his views of life, liberty and property as fundamental, inviolate and sacred legal rights, would have been so readily accepted and inculcated into the foundations and beliefs of Anglo-American law. Adopted by the framers of American Government, as well as within the precepts of English common law, today the Lockean concept of the sacredity of property rights, forms one of the most deeply held beliefs of every citizen of both America and England. Enumerated and echoed in the Declaration of Independence, and the Constitution, as well as through out the laws of Great Britain, John Locke's trio of the inseparable foundational rights of life, liberty and property, have become axiomatic, and have gained wholesale and virtual unquestioned acceptance.

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175. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 80.

176. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 80-81.

177. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 81.

178. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 81.

179. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 81.

180. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Chapter 4: Of Property, Pages 140 - 158.

181. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Chapter 4: Of Property, Pages 140 - 158, and Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 81.

182. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Chapter 4: Of Property, Pages 140 - 158, and Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 81.

183. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Chapter 4: Of Property, Pages 140 - 158, and Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 82-83.

184. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pg. 83.

185. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Chapter 4: Of Property, Pages 140 - 158.

186. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Chapter 4: Of Property, Pages 140 - 158, and Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 80-83.

187. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Chapter 4: Of Property, Pages 140 - 158, and Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 80-83.

B. Why Look at Property in Terms of Rights?

The fundamental question that our first postulate begs, is why look at property as a collection of rights, as opposed to a collection of things.

As we have seen, John Locke viewed property in terms of rights, and viewed "rights" through the prism of God given protections. He held that the state was required, through the social contract, to protect three fundamental, individual based, inviolate rights. These were the rights of life, liberty, and the pursuit of property. They were all linked and inseparable.[188]

Locke believed, that because property was one of these fundamental rights, that individual persons had the God-given and state protected power to exercise control over the property they owned. He further believed that through this right, to the pursuit of property, that people could exclude, possess, use and transfer their private property, as they saw fit, generally without interference from the state. Indeed, he argued, it was the state's duty to protect an individual's, inviolate property rights.

The entire system of capitalism now employed by western civilization, and our entire Angelo-American legal system, has accepted this Lockean legal concept of a right to the pursuit of property. Accordingly, viewing property in terms of a fundamental, individual, inviolate right, has become a pillar of free government everywhere, and a foundation of the most successful and prosperous economic system, that the world has ever seen. It has been inculcated in the American psyche, and forms a core part of our national belief system.

As a result, if a modern legal philosopher was asked why should we view property as a collection of rights, as opposed to a collection of things, the simplest answer might be, because Americans see it that way inherently, and because it works.

In his famous book *The Right of Private Property,* the legal scholar, Jeremy Waldron, arguing in favor of viewing property in terms of a collection of rights, holds that:

> ***"private property has a great moralizing effect on the individual owner. It promotes virtues and responsibility, prudence and self-reliance; it gives him a place to stand in the world, a place where he can be confident that his freedom will be recognized and respected; and it affords him control of at least a minimum of those natural resources access to which is a necessary condition of his agency."*** [189]

Waldron further continues that we should view property in terms of rights because:

> ***"individuals have a right to the conditions necessary for the full development of their autonomy, their ethical personality, and their capacity for responsible agency. Mere negative freedom is not enough: we must look, at least in the abstract, of the quality of choice which it is open to individuals to exercise, otherwise we risk attracting the accusation that we do not after all take the issue of human freedom seriously."*** [190]

Accordingly, it is through this view of property as a collection of rights that we truly gain an understanding of what property really is and means.

Moreover, as aforementioned previously, viewing property as a collection of rights, rather than a collection of things, also serves two other purposes in the advancement of our legal understanding.

First, we have seen that a definition of the term "right" is "the legally recognized ability to exercise power and control over an action or object". Since the essential element which gives property its value, is not the item itself, but rather the ability to control the item, then understanding this issue of control, is best reflected by an analysis of rights.

Second, in order to develop a more comprehensive understanding of property, which includes many of the more abstract property interests of great value to modern society, we need to broaden our concept of what property actually is.

Concepts such as intellectual property, future interests, and non possessory interests, do not lend themselves to be easily considered as "tangible items". This understanding can be best performed through a perspective of rights. As a result, by employing this "rights" perspective, a more inclusive and accurate picture of what property actually is and means can be truly had.

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188. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Chapter 4: Of Property, Pages 140 - 158, and Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 76-85.

189. Jeremy Waldon, The Right to Private Property, (Oxford University Press, New York 1988), Introduction, Pg. 22.

190. Jeremy Waldon, The Right to Private Property, (Oxford University Press, New York 1988), Introduction, Pg. 23.

C. Types of Property Rights

Property Rights have traditionally been classified into three principal types: Rights in Land, Rights in Objects and Rights in Ideas. [191] These classifications are known as Real Property, Personal Property and Intellectual Property. [192]

I. Rights in Land - Real Property

Rights in Land, commonly known as real property, consist of interests in land and anything attached to land (e.g., buildings, fixtures, signs, fences, or trees).[193] These interests can include ownership interests, leaseholds, easements, life estates and future interests.[194] These interests further include rights in the land surface, the subsurface (including minerals and groundwater), and the airspace above the surface. [195]

Historically, property law was almost exclusively concerned with real property. [196] For land, as the source of food (where crops and animals are raised), clothing (where material for cloth is harvested) and housing (where buildings for shelter are constructed and maintained), has traditionally been the ultimate source of wealth, status and sustenance, as well as, social, political, and economic power. [197]

Control over land provided the basis for political sovereignty, and disputes concerning real property were historically resolved in the king's courts.[198] Indeed, disputes over real property traditionally made up the bulk of all litigation.

Even today, a person's real estate holdings typically make up their most important and most valuable asset. Accordingly, rights in land remain the single most important resource for human existence, and as our population increases and environmental concerns continue, disputes about property rights, in our finite land supply, will continue to make this a very important legal right. [199]

II. Rights in Objects - Personal Property

Rights in Objects or Items, commonly known as personal property or chattels, consist of interests in items or objects of tangible, visible, personal property, such as automobiles, clothing, jewelry, money, domesticated animals and books. [200]

Traditionally, personal property was viewed by the law as comparatively unimportant, and as such, when a person died, the distribution of his personal property was supervised by church courts. [201] In contrast, today personal property can be highly valuable, and is the subject of vast amounts of litigation disputes.

Under present law, virtually every movable thing is a deemed to be personal property owned by someone, but there are exceptions. [202] The law views wild animals, in their natural habitats, as unowned. [203] Additionally, pursuant to public policy, although certain body parts such as kidneys and hearts, may be characterized as "tangible, visible things," most courts and legislatures have proven reluctant to extend property rights these items. [204] As such, these items have been classified as "market inalienable" personal property. [205]

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191. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs 7.-9.

192. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs 7.-9.

193. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 8.

194. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "Estates in Land", Pgs 89.-144.

195. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 8.

196. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 8

197. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 8.

198. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 8.

199. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 8.

200. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 9.

201. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 9.

202. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 9.

203. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 9.

204. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 9.

205. Margaret Radin, Market Inalienability, (Harvard Law Review, Vol 100, No. 8, 1987), Pgs. 1849-1937.

III. Rights in Ideas - Intellectual Property

Rights in Ideas, commonly known as intellectual property, consist of interests in patents, trademarks and copyrights. [206] These items, were not afforded a high level of property right protection historically under Common law, and are recognized today pursuant to federal statutes. [207]

Patents are ideas for products or processes, trademarks are ideas for logos, identifications or distinctions, and copyrights are written or performed works. [208] They each occupy today a valuable and important property right concept.

The importance of intellectual property has skyrocketed during the twentieth century, and now into the twenty-first, posing new challenges that our property law system was previously poorly equipped to handle. [209] For particularly in our electronic age, where so much of our work product can be converted into intangible electronic format, this area of property law will be becoming more and more active and important.

D. Why Have Property Rights?

As many theories as have been presented on how to properly examine property rights, an equal amount of debate has transpired as to why property rights should exist. Scholars have essentially categorized these reasons into five main areas. The answer they present to this question is important, because just as in other areas of the law, the justification for private property rights, will necessarily affect the substance of property law.

Accordingly, scholars have rationalized private property rights for the following reasons:

I. First in Time, First in Right

The first in time, first in right theory (sometimes referred to as the first occupancy theory) reflects the familiar concept that the first person to take occupancy or possession of something owns it. This theory seeks to explain how rights of private property arise in unowned property or unclaimed natural resources. [210] A fundamental part of American property law today, this theory is often blended together with other theories, particularly utilitarianism and the labor theory. [211]

Particularly influential during nineteenth century America, this theory was used to allocate property rights in land races on the frontier, and for such diverse resources as wild animals, fish, oil, natural gas, and surface water. [212] Even today, First in Time, First in Right is still the basic rule for determining the respective priority of competing title claims to real property. [213]

II. Labor

The Labor theory reflects the principle that people should be entitled to fruits of their labor. Originally advanced by John Locke, this theory asserts that it encourages industry and hard work in people, and merely reflects the way people actually act. [214] Used particularly with respect to unowned property, or the conversion of raw materials into useful products, this theory remains in active use today, under the doctrines of accession, adverse possession and with respect to intellectual property. [215]

III. Liberty and Personhood

The Liberty and Personhood theory asserts that private property is essential to the development of a free society as a whole and to individuals personally. This theory argues that it supports both self government and the full development of the individual person. [216]

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206. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 9.

207. For Patents, see Title 35 - United States Code, et. seq., for Trade marks see Title 37 - United States Code, et. seq., and for Copyrights see Title 17 - United States Code, et. seq.

208. For Patents, see Title 35 - United States Code, et. seq., for Trade marks see Title 37 - United States Code, et. seq., and for Copyrights see Title 17 - United States Code, et. seq.

209. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 9.

210. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 13.

211. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 13.

212. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 13.

213. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 13.

214. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 15.

215. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 15.

216. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs 20-21.

IV. Utilitarianism

The Utilitarianism theory contends that private property exists in order to maximize the overall happiness and utility of all citizens. It argues that people respond to incentives. Utilitarian theory views property "as a means to means to an end", and is considered by many legal scholars to be by far the most dominant theory underlying American property law. [217] Under this approach, property rights are allocated and defined in the manner that best promotes the general welfare of society. [218]

V. Economics

The Economic theory declares that private property exists to maximize the overall wealth of society. This theory contends that society as a whole responds to incentives. While traditional utilitarianism theory defines human happiness in rather vague terms, the economics theory essentially assumes that happiness may be measured in dollars, and under this view, private property exists in order to maximize the overall wealth of society. [219] This theory has been quite influential in recent decades, in areas ranging from tenants' rights to land use law. [220]

E. Theories of Property Rights

As property rights are so central to our society and so meaningful to our individual lives, it is not surprising that legal scholars have debated what property rights are and should be, since the time they were first pronounced by John Locke. Accordingly, there are almost as many theories on property rights and their applications as there are legal scholars who specialize in property.

- In 1690, John Locke, the originator of property rights, viewed property as essentially the product of one's labor. [221]
- Exactly a century later, in 1790, Jeremy Bentham, conceived of property rights in light of one's settled expectations. [222]
- Contemporaneous to Bentham, Georg Hegel declared property rights to be the extension of one's will. [223]
- In 1923, Wesley Hohfeld, developed a theory that categorized property rights in terms of its relationships, stating that they constitute a complex web of legally enforceable duties. [224]
- In 1968, Harold Demsetz wrote on how property rights need to be seen as a product of externalities. [225]
- In 1985, Jeremy Waldron expressed the view that property rights need to be considered as "a system of rules governing access to and control of scarce material resources". [226]
- In 1985, Jeremy Waldron expressed the view that property rights need to be considered as "a system of rules governing access to and control of scarce material resources". [227]
- In 1990, Stephen Munzer, outlined a pluralistic view of utility and efficiency, justice and equality, and lastly, desert based on labor. [228]

Each of these perspectives have merit and have added to the intellectual understanding of property. For, like anything of importance, property rights can be viewed from many directions, and have its many impacts, analyzed in a vast array of ways.

The analysis presented that an understanding of property rights can be had through the perspective of the four postulates (that property must be viewed as a collection of rights not a collection of things; that property rights are those recognized by law, the law evolved from property rights, and they are intertwined; that property rights are inherent to our humanity; and that property rights include the rights of exclusion, possession, use and transfer) seeks to add this perspective to the other theories advanced since Locke, and provide another helpful tool, for the examination of this important and meaningful topic.

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217. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 16.

218. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 16.

219. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 18.

220. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 19.

221. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Chapter 4: Of Property, Pages 140 - 158.

222. Jeremy Bentham, Theory of Legislation, Fourth Edition (Trubner & Co., London 1882), Part First: Objects of the Civil Law, Chapter VIII - Of Property, Pgs 111-113.

223. G. W. F. Hegel, Philosophy of Right, translated by S. W. Dyde, A Reprint of the original 1821 publication, (Batoche Books, Kitchner, ON 2001), Pgs 55-76.

224. Wesley Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, Edited and Assembled by Walter Cook (Yale U. Press, New Haven, 1923)

225. Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347-357 (Pap. & Proc. 1967), reprinted in Property, by Jesse Dukeminier and James Krier, Fourth Edition, (Aspen Publishers. New York 1998), Pgs 40-47.

226. Jeremy Waldron, What is Private Property?, (5 Oxford Journal of Legal Studies 313, 1985), Pg. 318.

227. Jeremy Waldron, What is Private Property?, (5 Oxford Journal of Legal Studies 313, 1985), Pg. 318.

228. Stephen Munzer, A Theory of Property (Cambridge University Press, New York 1990), Property, Justification and Evaluation, Section 1.2 A Solution, Pgs. 3-9.

2. That Property Rights are those Recognized by Law, the Law evolved from Property Rights, and they are Intertwined

In this postulate the interrelationship between the law and property rights will be examined. Through the prism of what the law is, of the reflections that it has upon property rights, and that property rights has upon it, as well as the circular protective relationship that the law and property rights have, a more inclusive and complete understanding of what property actually is, and means, is sought.

A. The Interrelationship Between Law and Property Rights

I. Natural Law vs. Legal Positivism

For generations those scholars who support the natural law theory have clashed with those who support the positivist theory of the law.

Those who subscribe to the natural law theory hold that law is derived from nature, in that there is a higher, morality based law in which truth, morality and justice can be found. [229] Natural law is philosophical, general, aspirational and seeks to find the best possible motives of mankind.

Those who subscribe to legal positivism assert than law is derived from man, in that societal needs and solutions create the basis for creating law in which practicality, utility and rules govern. [230] Positive law is specific, practical, logical and responsive to the needs of the governed.

But it is asserted, that especially in the federal system that the United States possesses, that these two theories of law can, and indeed do, coexist. Reality need not be all one thing, or all the other. For these theories are merely a means of looking at the law, and not the law itself. Our law is made by people, and people are complex, sometimes contradictory, beings. The fact that both the natural law theory and the legal positivism theory have existed together for hundreds of years, provides empirical evidence that they do co-exist, and each have some merit to offer legal philosophers.

In our system of federal government where we have a Declaration of Independence and Constitution which are clearly based in natural law, which are undoubtedly philosophical, general, aspirational and seek to find the best possible motives of mankind, together with statutes and case law, which are clearly specific, practical, logical and responsive to the needs of the governed, a strong argument can be made, that we enjoy a somewhat schizophrenic, dual natural law and positivist system, where both theories of law exist simultaneously, on different, non intersecting levels,

Similarly, it can also be argued, that natural law and positivism can coexist together, because of their inherent principles. Natural law focuses on the motives and foundation of the law, whereas positivism focuses on the application and practical effect the law has. These are two different directions, and it can be asserted, that they need not necessarily bisect or conflict.

Whether or not these two legal theories can in actuality simultaneously co-exist, and work together, at the same time, however, need not be decided. For it is without question, that a legal analysis, using both theories, to look at the same issue, does of course have merit. This is because there is value in each perspective, and legal understanding to be gained from each view. That is why these two theories have indeed existed for so long together.

It is with this in mind that we will use a legal positivist view, in the second postulate, to gain a better understanding of what property is and means. For although property rights are an outgrowth of natural law, as was seen in the analysis of the first postulate, a full understanding can only be had, from looking at property rights from all directions, including positivism.

II. The Property Perspectives of Jeremy Bentham

Jeremy Bentham was a rather strange but brilliant man. An unabashed utilitarian and disciple of legal positivism, he believed that natural law was "nonsense", and that the law was established to serve the needs of man. [231] An English legal scholar and jurist (1746-1842), he was well known for advocating a purely positivist philosophy of the law. [232] In his landmark work, *Theory of Legislation*, Bentham wrote:

> ***"Property and Law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases."*** [233]

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229. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 3.

230. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pg 2.

231. Jeremy Bentham, The Works of Jeremy Bentham, Volume II, edited and assembled by John Bowring, his executor (Simpkin, Marshal & Co., London 1843), A Critical Examination of The Declaration of Rights, Pg. 501.

232. Julius Stone, Human Law and Human Justice, (Standford University Press, Stanford, CA 1965), The Life and Character of Jeremy Bentham, Pgs. 105- 108.

233. Jeremy Bentham, Theory of Legislation, Fourth Edition (Trubner & Co., London 1908), Part First: Objects of the Civil Law, Chapter VIII - Of Property, Pg 113.

What Jeremy Bentham was expressing in this viewpoint, of the interrelationship between property and law, was the summation of his positivist conception of property rights. For it was his belief that :

> ***"there is no such thing as natural property, and that it is entirely the work of law. Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it. There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind."*** [234]

One need not accept Bentham's entire philosophical perspective, that the law has no basis under natural law, however, to recognize his truth, that law and property do indeed have an interrelationship. This is for two reasons.

First, as aforementioned, it can be argued that property is a concept in the law that is both consistent with natural law and legal positivism at the same time. For the foundations of property rights are clearly based in natural law. Justified by nature and a higher law, morality concept, these foundations are general, aspirational and seek to find the best possible motives of mankind. Concurrently, the application of property rights can be seen as positivist. For the use of property is the very definition of utility. Such use is derived from the needs of man, in an effort to achieve a practical solution, and serves as a specific, practical, logical and responsive act to such need. Accordingly, pursuant to this view, property rights can have elements of both natural law and positivism concurrently.

Second, even if the traditional view of natural law being completely the polar opposite of legal positivism is asserted, as in being flip sides of the same coin, looking at one legal concept (such as property rights) through more than one philosophical perspective, can still indeed build a deeper understanding. For like the master portrait artist that captures the essence of his vision upon a two dimensional canvass, he still examines his subject from every three dimensional angle, in order to paint his masterpiece. An understanding of the law is no different, and at times, an examination of an area of the law through multiple perspectives, can certainly help to build such a true understanding of what the that area of the law is and means.

To this degree, it is proper to follow the road of the interrelationship between law and property. Empirical evidence does indicate that such an interrelationship does indeed exist. For there does seem to be support for the idea that property and the law did in fact grow up together, that they are a reflection of each other, that the law does recognize property rights, that the law did evolve from the need to protect property rights, and that in the end, there is a deep and lasting interrelationship between the two.

In order to build an understanding of this idea, we must first review what the law is defined to be under Anglo-American jurisprudence, and then examine where the law came from, and how it evolved and developed.

III. The Definition of Law

Under Anglo-American English jurisprudence, what exactly is meant by the term "law"? How could this idea, this term, be defined?

William Blackstone, in his heralded Commentaries on the Law of England, provided the following definition of the term "Law":

> ***"Law, in its most general and comprehensive, sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey. ... But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of human action or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free-will, is commanded to make use of those faculties in the general regulation of his behavior."*** [235]

Additionally, Black's Law Dictionary, once again the quintessential gold standard for legal definitions, defines the term "law" to mean:

> ***"That which is laid down, ordained, or established.***
>
> ***A rule or method according to which a phenomena or actions co-exist or follow each other.***
>
> ***Law, in its generic sense, is a body of rules of action or conduct proscribed by controlling authority, and having binding legal force. …***
>
> ***Law is a solemn expression of the will of the supreme power of the state."*** [236]

With this in mind, a syntheses of these definitions, yields a basic, simple description of the Law, as follows:

> ***"Law is the Rules by which civilization is ordered."***

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234. Jeremy Bentham, Theory of Legislation, Fourth Edition (Trubner & Co., London 1908), Part First: Objects of the Civil Law, Chapter VIII - Of Property, Pg 111-112.

235. William Blackstone, Commentaries on the Laws of England, Edited and Assembled by William Lewis (Rees, Welsh & Co., Philadelphia 1902, Book I, Of the Nature of Law, Pgs. 27-28.

236. Henry C. Black, Black's Law Dictionary, Fifth Edition, edited and assembled by Publishers Editorial Staff, (West Publishing Co., St. Paul 1979), Pgs. 795-796.

IV The Evolution and Development of the Law with Property Rights

Property is one of the oldest concepts which exists in the law. [237] As we have seen, however, the legal recognition of property in ancient times, was not the legal standing of individual ownership, nor the acknowledgment of individual property rights. [238] These legal concepts came later, and are a much more recent development of mature legal systems. [239]

Ancient Law saw property and people as associations, as being in proximity to the land or object. [240] Indeed, Roman law had no actual word for "ownership", and the word does not appear in English Common law until 1583. [241]

But that does not mean that the property was not a fundamental concept of the earliest legal systems. People have been concerned with property, and its uses, and their law has recognized its importance and value, since man came down from the trees. [242] Accordingly, in the earliest societies, their concept of property, can best be understood, through the perspective of a Hohfeldian analysis, whereby property is seen as an object in connection with a complex web of social relations, with these relations establishing a limiting and defined relationship between the person and the object. [243]

As a result, in the interrelationship between law and property, it can be seen that one of the reasons law was developed in the first place, was to protect property rights and resolve property disputes. [244] It is to this understanding that Bentham speaks when he says, "Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases." To Bentham's point, we can see from ancient law, that the need to protect property gave rise to the development of legal rules to do so. Concurrently, if those rules were taken away, the property would not be protected, and would accordingly be lost. It was pursuant to this need, that the rules of ancient property law were crafted. [245]

It is this reciprocal nature of property and law, that the second postulate seeks to illuminate. That the law was developed to protect property, and that without the law, which was so crafted to protect property, the property itself would not continue to exist. It is this interrelationship that makes the development of property laws so special.

a. Roman Law

In 451 B.C. the governing Assembly of Rome, enacted as a statute, and openly published on stone tablets at the Forum, the famous Twelve Tables, which established a the first code of Roman law. [246] This statute, codified several legal principles regarding the legal concept of property, but such concept was well established in Rome, even before the enactment of the Twelve Tables statute. [247] For prior to their codification in the Twelve Tables, the concept of property was already a part of Roman law by custom and practice. [248]

This legal recognition of private property under Roman law, through both the Twelve Tables and through custom and practice beforehand, was evidence of the fact that property and the law grew up together, and are intertwined. For such legal recognition was in responsive in nature. The need to protect property was important to Roman citizens, and their society, and Roman law acted in response to this need.

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237. Arthur S. Diamond, Primitive Law (Longmans, Green and Co. Pub., New York - Reprint 1998), Chapter XXII, Property, Pgs. 260-266.

238. Arthur S. Diamond, Primitive Law (Longmans, Green and Co. Pub., New York - Reprint 1998), Chapter XXII, Property, Pgs. 260-266.

239. Arthur S. Diamond, Primitive Law (Longmans, Green and Co. Pub., New York - Reprint 1998), Chapter XXII, Property, Pgs. 260-266.

240. Arthur S. Diamond, Primitive Law (Longmans, Green and Co. Pub., New York - Reprint 1998), Chapter XXII, Property, Pgs. 260-266.

241. Arthur S. Diamond, Primitive Law (Longmans, Green and Co. Pub., New York - Reprint 1998), Chapter XXII, Property, Pgs. 260-266.

242. Arthur S. Diamond, Primitive Law (Longmans, Green and Co. Pub., New York - Reprint 1998), Chapter XXII, Property, Pgs. 260-276, and Henry Maine, Ancient Law, Tenth Edition (Hazel, Watson and Vinny, Ltd., London, 1907), Chapter VIII, The Early History of Property, Pgs. 258-318.

243. Edward Hoebel, The Law of Primitive Man, (Harvard University Press, Cambridge, MA 1964), Fundamental Legal Concepts, Pgs. 57-59.

244. Arthur S. Diamond, Primitive Law (Longmans, Green and Co. Pub., New York - Reprint 1998), Chapter XXII, Property, Pgs. 266-267.

245. Arthur S. Diamond, Primitive Law (Longmans, Green and Co. Pub., New York - Reprint 1998), Chapter XXII, Property, Pgs. 260-276, and Henry Maine, Ancient Law, Tenth Edition (Hazel, Watson and Vinny, Ltd., London, 1907), Chapter VIII, The Early History of Property, Pgs. 258-318.

246. Michael Grant, The History of Rome (Charles Scribner's Sons Pub., New York 1978), II The Unity of Italy and Rome, Pg. 75.

247. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Amendment IV Search and Seizure, Pg. 147.

248. Frederick Walton, Historical Introduction to the Law of Rome, Fourth Edition, (WMW Gaunt & Sons Pub. Holmes Beach, FL 1994), The Early Law of Property and Wills, Pg 151..

Property was perhaps the greatest single focus of Roman law. [249] Conversely, property was also the strongest catalyst for its legal development. [250] Romans understood that the exercise of control over property, would provide the avenue to wealth and the engine of economic activity. They used this knowledge to advance both their economy and their law.

Romans structured their real property interests through families, and not through the individual. [251] When families were in the nomad stage, no private property in land was necessary or legally recognized. [252] When families settled down in definite territory, however, the law responded to the need to protect this family based private property. [253] Accordingly, private property rights started to be recognized under Roman law, in such lands, upon the societal and individual needs for the families who resided on, and used them. [254] Once again, this is but another example of how property shaped the law, and the law shaped property.

The Roman empire, which was based upon land, commerce, trade and its military, used its law as a tool to help promote both property rights and civilization across the then known world. [255] Roman law was responsive to the needs of its people to control property, and addressed those practical needs, so that its empire could run effectively, grow and prosper.

Under Roman law, these legally protected property rights allowed the Roman economy to flourish, businesses to develop, and trade to dominate all other nations and peoples. [256] From commerce and trade, to real property and agriculture, to personal property and common property, Roman law, advanced the reciprocal relationship between law and property, by responding to needs. [257] They used their law in innovative ways, through the recognition of real property in families, the acknowledgment of contractual agreements, the invention of corporations, the establishment of trade standards, and punishment of those who did not respect property rights. [258]

In these ways, it can be seen, that under the first major civilized legal system, property and the law had reciprocal influences. Property rights enjoyed by Roman citizens were those that were recognized by Roman law. That the Roman law evolved from the need to provide property rights to Roman citizens. These two concepts, Roman law and property, were indeed, intertwined.

b. English Law

Under English jurisprudence, the law and property can also be seen to be interrelated through out the course of history. From the practice of feudalism, to operation of the Common law, to the signing of the Magna Carta at Runnymede, property interests, and their effect in the law, can be seen at the center of English society. Perhaps this is why, Jeremy Bentham, an Englishman, pronounced his theory on the interrelationship between the law and property. Perhaps it is why John Locke, another Englishman, pronounced his theory on property rights.

In England, after William the Conqueror brought feudalism to the country, the law had to respond to a need to create complex legal relationships in real property. The terms of feudalism required the establishment of private property interests, in law, for both a land owner and a tenant. [259] In order for feudalism to be effective, it required mutual oaths, as well as the legal recognition of these two distinct property interests. [260] English law met this need by recognizing these property rights, which in turn, created an entire economic and social system, feudalism, lasting for nearly 500 years after the Norman conquest. [261]

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249. John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), Property, Pg. 139.

250. John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), Property and Commerce, Pgs.. 139-249

251. Frederick Walton, Historical Introduction to the Law of Rome, Fourth Edition, (WMW Gaunt & Sons Pub. Holmes Beach, FL 1994), The Early Law of Property and Wills, Pgs 151-153; and William H. Kelke, A Primer of Roman Law, (WMW Gaunt & Sons Pub, Holmes Beach, FL 1994), Law, Pg 10.

252. Frederick Walton, Historical Introduction to the Law of Rome, Fourth Edition, (WMW Gaunt & Sons Pub. Holmes Beach, FL 1994), The Early Law of Property and Wills, Pg 151.

253. Frederick Walton, Historical Introduction to the Law of Rome, Fourth Edition, (WMW Gaunt & Sons Pub. Holmes Beach, FL 1994), The Early Law of Property and Wills, Pg 151.

254. Frederick Walton, Historical Introduction to the Law of Rome, Fourth Edition, (WMW Gaunt & Sons Pub. Holmes Beach, FL 1994), The Early Law of Property and Wills, Pgs 151-153; and William H. Kelke, A Primer of Roman Law, (WMW Gaunt & Sons Pub, Holmes Beach, FL 1994), Law, Pg 10.

255. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), The Origins: Greek Philosophy and Roman Law, Pgs 17-20; and John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), Commerce, Pgs.. 206-249.

256. John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), Property and Commerce, Pgs.. 139-249.

257. John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), Property and Commerce, Pgs.. 139-249, Frederick Walton, Historical Introduction to the Law of Rome, Fourth Edition, (WMW Gaunt & Sons Pub. Holmes Beach, FL 1994), The Early Law of Property and Wills, Pgs 151-153; and William H. Kelke, A Primer of Roman Law, (WMW Gaunt & Sons Pub, Holmes Beach, FL 1994), Law, Pg 10

258. John A. Crook, Law and Life of Rome, (Cornell University Press, Ithaca, NY 1984), Property and Commerce, Pgs.. 139-249, Frederick Walton, Historical Introduction to the Law of Rome, Fourth Edition, (WMW Gaunt & Sons Pub. Holmes Beach, FL 1994), The Early Law of Property and Wills, Pgs 151-153; and William H. Kelke, A Primer of Roman Law, (WMW Gaunt & Sons Pub, Holmes Beach, FL 1994), Law, Pg 10

259. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Common Law and the Magna Carta, Pgs 52-53.

260. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Common Law and the Magna Carta, Pgs 52-53.

261. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Common Law and the Magna Carta, Pgs 52-53.

By its very nature, the English Common law was responsive to the needs of the governed. Constructed from custom and precedent, the Common law reflected solutions to problems, and looked for practical, realistic outcomes, [262] Accordingly, when the need to recognize private property interests arose, on an island with finite land resources, the Common law responded, [263] and produced a legal acknowledgment of those interests. [264] Additionally, the flexibility and moldability, of a law based on custom and precedent, is custom made for responding to the needs of the people and their private property. [265]

As aforementioned, under English Common law, local judges ruled on cases of disputes between parties (very often property disputes) and then following precedent of past decided cases (stare decisis), issued decisions to resolve controversies. [266] This practice began to give those who could ask the courts to resolve their disputes (usually those who owned real property) an expectation that they could gain a just and predictable result under the law, based upon custom and practicality. [267]

Because property at the height of Common law England, meant wealth, power and prestige, those who had property interests were the primary litigators in English Courts. Not surprisingly, the vast majority of the civil cases in controversy before these Common law courts involved disputes of property interests.

With so many of these disputes before the Courts in England involving property interests, the law which became precedent, began to become dominated by the property issues and their legal solutions. Accordingly, it can be seen how property and the law influenced the development of each other. Under this Common law system, the law and property proved their reciprocal nature.

But if this were not enough evidence that property and the law of England are intertwined, one need only look to the Magna Carta. The Magna Carta, which was originally called the Charter of Liberties, was the first fundamental constitutional document of English law. [268] As seen previously, the Magna Carta, came about because of a battle for property rights.

For the 1215 Magna Carta came about because the landed barons of England, the people of property, desperate to protect their interests, suffering from high taxation, were fearful that they were going to be dispossessed from their lands (and thereby become impoverished). [269] On June 15, 1215, when these Barons forced King John to put his seal on the Magna Carta, it was done to protect their property rights. [270]

The Magna Carta established one of the foremost foundations of modern British law. The United States Constitution and its Amendments (the Bill of Rights) used it as a guiding document for the further expansion of the rights and liberties of the people and the limitation of the power of government. [271] Among its principal provisions were guarantees of property rights. [272]

Upon the signing of the Magna Carta, the Common law began to recognize as custom and practice, the ability of the property owners to assert their rights. [273] Accordingly, "the individual's safety, freedom and property were declared inviolate" and "were removed from arbitrary interference". [274] All of this was caused by a desire of landowners to protect their property. [275]

As a result, once again, it can be seen that the property rights enjoyed by English citizens were those that were recognized by Common law. It can also be seen how the English Common law evolved from the need to resolve property disputes between English citizens. As a result, these two concepts, Common law and property, are also intertwined.

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262. George M. Trevelyan, History of England, Volume I, Anchor Books Edition, (Longmans, Green and Co., Ltd., New York 1953), Origin of the Common Law, Pgs 213-218.

263. George M. Trevelyan, History of England, Volume I, Anchor Books Edition, (Longmans, Green and Co., Ltd., New York 1953), Origin of the Common Law, Pgs 213-218.

264. George M. Trevelyan, History of England, Volume I, Anchor Books Edition, (Longmans, Green and Co., Ltd., New York 1953), Origin of the Common Law, Pgs 213-218.

265. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Common Law and the Magna Carta, Pgs 53-55 and C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 148-163.

266. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pgs. 53-55; and C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 149-151; and Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), Reception of Roman Law, Pgs. 197-198.

267. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pgs. 53-55; and C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 149-151; and Hans J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, OK 1978), Reception of Roman Law, Pgs. 197-198.

268. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pgs. 56-60, and C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pgs. 173-176.

269. C. Warren Hollister, The Making of England, 55 B.C. to 1399, Sixth Edition (D.C. Heath & Co., Lexington, MA 1992), Henry II and Sons, Pg.s. 173-176..

270. Geoffrey Hindley, A Brief History of the Magna Carta: The Story of the Origins of Liberty, (Running Press, London 2008), Timetable of a Crisis, Pgs 203-207.

271. Geoffrey Hindley, A Brief History of the Magna Carta: The Story of the Origins of Liberty, (Running Press, London 2008), Appendix - The Magna Carta, Pgs 311-324.

272. Geoffrey Hindley, A Brief History of the Magna Carta: The Story of the Origins of Liberty, (Running Press, London 2008), Appendix - The Magna Carta, Pgs 311-324

273. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pg. 56

274. Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), English Beginnings. Common Law and the Magna Carta, Pgs. 58.

275. Danny Danziger and John Gillingham, 1215: The Year of the Magna Carta (Simon and Schuster Pub., New York 2005), Myth, Pgs. 267-274.

C. American Law

The law of early America is based largely upon the law of England. We were, of course prior to the Revolution, English subjects. Our founders initially spoke of redressing their grievances under a format of the "Rights of Englishmen".

In Colonial America, there was very little statutory law, and even after the development of the United States, and the State Constitutions, most law was still based upon English Court precedent under English Common law. [276] Indeed statutes were looked upon with a skeptical eye. For it should be remembered that the Quartering Act, Stamp Act and the Townsend Acts (all acts which effected property rights) were all statutes, and an igniting cause for the Revolution. [277]

Early Americans were practical, independent sorts. They wanted the Government to deliver the mail, defend the shores, protect their property rights, and stay the heck out of their life.

Their new system of law reflected this mentality. That is why most of the early statutes, and the vast majority of case law decisions, were about property. [278] Back in England, property was power. As we have seen previously, it was the property class that litigated, about their property rights, and it was these disputes that made the law. So too in America. Although land was much more plentiful in the United States than back in England (one of the main reasons for immigration) property (especially land) still meant life. [279] We were an agrarian society, where land translated into food, shelter and wealth. [280]

In 1765, Sir William Blackstone, a jurist and professor, produced the historical and analytic treatise on the law known as Commentaries on the Law of England. [281] A baseline "Bible of the law" of its time, these famous Commentaries proved an important source on classical views of the English Common law and its principles. [282] Used not only through out England, but through out the United States as well, they focused heavily on Property Rights. [283]

Over time, the United States, through its State and Federal Courts, began to build its own substantial body of law. Just like under English Common law, this new American law was reported and memorialized through published decisions of judges, following the concept of precedent. [284] Using the Commentaries of Blackstone, as well as the previous case decisions of Judges, Courts found a bench mark to decide new ones. [285] Again, just as in England, a significant number of these decisions, dealt with the issue of property rights. [286]

Both British and American law depended heavily upon custom as well as precedent to decide cases. [287] What was customary, necessary, practical and popular found its way into the law by way of reported court decisions. [288] With elected judges and empaneled juries, this reflection of society came to be placed in its law, especially in the area of property rights. Indeed, until the later part of the 20th century, litigation was rare and utilized almost exclusively, by the wealthy, over serious disputes, most often concerning issues of property. [289]

As a result, as in Rome and England, in the United States, property rights decided the law, shaped the law, and were shaped and formed by it. Therefore, it can easily be seen, that property and the law evolved together and are intertwined, here as well.

This circular relationship, of property rights flowing from the law, and the law evolving from property rights, helps us understand the fact, that we need to see property in a new light, in terms of its relationship to the law, and in terms as its operation as a collection of rights. For this circular, protective nature of property rights and the law, has helped to keep these rights as one of the most important and sacred of all principles within American Jurisprudence.

This fact is fundamental to understanding the concept of Property Rights.

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276. Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xi-xx.

277. Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xi-xx., Part I Pgs. 3-61, and Part II Pgs. 63-104, 120-249.

278. Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xi-xx., Part I Pgs. 3-61, and Part II Pgs. 63-104, 120-249.

279. Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xi-xx., Part I Pgs. 3-61, and Part II Pgs. 63-104, 120-249.

280. Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xi-xx., Part I Pgs. 3-61, and Part II Pgs. 63-104, 120-249.

281. William Blackstone, Commentaries on the Laws of England, Edited and Assembled by William Lewis (Rees, Welsh & Co., Philadelphia 1902), Books I-IV; and Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xiii-xiv.

282. Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xiii-xiv.

283. William Blackstone, Commentaries on the Laws of England, Edited and Assembled by William Lewis (Rees, Welsh & Co., Philadelphia 1902), Books I-IV; and Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xiii-xiv.

284. Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xi-xx., Part I Pgs. 3-61, and Part II Pgs. 63-104, 120-249.

285. William Blackstone, Commentaries on the Laws of England, Edited and Assembled by William Lewis (Rees, Welsh & Co., Philadelphia 1902), Books I-IV; and Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xiii-xiv.

286. Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xi-xx., Part I Pgs. 3-61, and Part II Pgs. 63-104, 120-249.

287. Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xi-xx., Part I Pgs. 3-61, and Part II Pgs. 63-104, 120-249.

288. Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue, Pgs. xi-xx., Part I Pgs. 3-61, and Part II Pgs. 63-104, 120-249.

289. Lawrence Friedman, A History of the American Law, Third Edition (Simon and Schuster Pub., New York 2005), Prologue,Pgs. xi-xx., Part I Pgs. 3-61, and Part II Pgs. 63-104, 120-249.

3. That Property Rights are inherent to our Humanity

From a time even before the Declaration of Independence, the fact that Americans held property rights to be individual, inviolate, rights, that are inherent to our humanity, was intrinsically understood as a fundamental part of our national mind set. Americans believed then, and still do today, that property rights are the very foundation of a free government.

Since the time of our founding, property rights have held the highest place of our beliefs as a free people. This fact was expressed throughout our founding documents, including the Declaration of Independence, the Constitution, and the Bill of Rights. Property rights, together with life and liberty, form the three inviolate rights, which according to Locke, and our forefathers, are natural, inalienable rights, which come from God. This idea is among the founding principles which we, as Americans, hold dearest, and most meaningful, in the establishment of our system of law, government and society.

In this third postulate, this concept, that under our American system of law, that property rights are deemed to be inherent to our humanity, will be examined. Through the prism of property rights, being protected by government, and not awarded from government, a more inclusive and complete understanding of what property actually is, and means, is sought.

A. Property Rights as a Natural Right

As we have seen, since they were first recognized and pronounced by John Locke, property rights have been viewed as a natural right, which draws its justification from a higher, moral authority.[290] As such, property rights have always been viewed, under American law, as the same as the other individual, inviolate rights of life and liberty.[291] All of these individual, inviolate rights are legally deemed as coming from God, by virtue of our humanity.[292] Accordingly, as a natural right, that is not given to mankind by the government, property rights can not be taken away from mankind by the government, and must be protected by the government.[293]

B. Locke, Jefferson and the Declaration of Independence

The deepest linkage of property rights as an inviolate right protected under American Law comes from the Declaration of Independence.[294] Indeed, the Declaration of Independence has been characterized as “the high water mark of natural law theory in the United States.”[295]

The Declaration of Independence was a legislative resolution of the second Continental Congress, which met in Philadelphia in 1776.[296] Thomas Jefferson, John Adams and Benjamin Franklin were all delegates to the Congress from their respective states (Virginia, Massachusetts, and Pennsylvania, respectively).[297] During its session on June 11, 1776, a committee (consisting of Jefferson - as Chairman, Franklin, Adams, Robert Livingston of New York and Roger Sherman of Connecticut) was chosen by Congress to prepare a draft of a Declaration of Independence.[298] As Chairman, Jefferson was selected to personally prepare a draft of the Declaration.[299]

Jefferson was particularly qualified to write this document. Known to be an astute lawyer, a skillful parliamentarian, renowned writer, and accomplished graduate of the College of William and Mary, he was a student of the classics, and was known to have made a careful study of the legal issues between the Colonies and England.[300] An outspoken proponent of liberty and natural rights, and espouser of the views of John Locke, Francis Hutcheson, Jean Jacques Rousseau, Jefferson expressed mature and respected views of both natural law and free government.[301]

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290. John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Chapter 4: Of Property, Pages 140 - 158, and Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 76-85.

291. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 78-144, and Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Amendments IX and X, Pg. 169.

292. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 78-144.

293. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 78-144, John Locke, Two Treatises on Government 1690, A New Edition, (Printed for C & J Rivington, London 1824), 2 volumes, Book II, Chapter 4: Of Property, Pages 140 - 158, and Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, (University of Oklahoma Press, Norman, OK 1992), Enlightenment: Humanism and New Thought, Pgs. 76-85..

294. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 78-144; Julius Stone, Human Law and Human Justice, (Standford University Press, Stanford, CA 1965), Natural Rights in the Declaration of Independence and Bill of Rights, Pgs. 89- 91; and John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: “What is Property”, Pg 3.

295. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: “What is Property”, Pg 3.

296. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

297. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

298. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

299. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

300. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

301. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

As he went to work, Jefferson understood his very important mission. He was charged with the responsibility of putting down on paper, in a declaratory document, the legal rights that Americans enjoyed, and their justifications for commencing down a path of self government. By Jefferson's own admission, his writings in the Declaration, set forth no original ideas, but contained instead:

> ***"a statement of sentiments widely shared by supporters of the American Revolution".*** [302]

Indeed, when he was asked, at the time of its drafting, how he prepared the Declaration, Jefferson was quoted, that he wrote:

> ***"from the fullness of his mind, without consulting one book."*** [303]

Thomas Jefferson maintained this assertion throughout his life. In a statement, made just before his death, for the 50th anniversary of the Declaration's signing, Jefferson recalled that:

> ***"Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion."*** [304]

Upon Jefferson's completion of the Declaration, he offered it up for comments to his Committee, and after some minor revisions by members Adams and Franklin, it was reported from the Committee to Congress. [305] Upon its report, a spirited debate ensued on the floor of Congress, which lasted for three days. [306] During this time, Jefferson remained seated and did not utter a word. [307] After the debate, Congress made two substantive changes to the draft, redacting passages which conveyed censures on the people of England, and that reprobated the enslaving of inhabitants of Africa, leaving the remaining text pretty much unchanged. [308]

On July 4, 1776, the final text of the Declaration was approved by Congress, and sent to the printer for publication. Containing some of the greatest pronouncements of the natural rights of man, the Declaration provides:

> ***"When, in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which THE LAWS OF NATURE and of NATURE'S GOD entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are ENDOWED BY THEIR CREATOR with certain UNALIENABLE RIGHTS, that among these are LIFE, LIBERTY and THE PURSUIT OF HAPPINESS. That to secure these rights, governments are instituted among men, DERIVING THEIR JUST POWERS FROM THE CONSENT OF THE GOVERNED. ... And for the support of this declaration, with a firm reliance on the protection of DIVINE PROVIDENCE, we mutually pledge to each other our LIVES, OUR FORTUNES and OUR SACRED HONOR.***" [emphasis added] [309]

Through the Declaration of Independence, Jefferson's text put into words, the mind set of America. Expressing fundamental Lockean principles, and parroting much from Locke's Two Treatises on Government, Jefferson authored a document that outlined:

- The ultimate sovereignty of the people,
- The need to restrain the exercise of arbitrary governmental power, and
- The innate ability of people to revoke the social contract when such power has been arbitrarily used against them. [310]

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302. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

303. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

304. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

305. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

306. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

307. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

308. Lillian Rhodes, The Story of Philadelphia, (American Book Company, New York 1900), The Declaration of Independence, 163-185.

309. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 88-91

310. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 88-91

When reviewed in depth, it can be clearly seen, that Jefferson's Declaration of Independence is a derivational statement of Locke's core ideas, and a national pronouncement of natural law and inviolate, individual rights. [311] Included within these rights are the individual, inviolate, property rights, that Americans hold so dear. [312]

Consequently, within this pronouncement of its natural law theories, the Declaration, expressly sets forth the American legal commitment to the individual, inviolate right of "the pursuit of property". In doing so, the Declaration declares and restates the trio of Lockean rights, through its language of "Life, Liberty and the Pursuit of Happiness." [313]

Although some scholars have argued that the term "pursuit of happiness", used by Jefferson, was an intentional departure by him away from the Lockean *Two Treatises* concept of "pursuit of property", these arguments, are without historical basis or merit, and do not conform to either Jefferson's intent, nor to the legal principles he sought to express through the Declaration.

If that is so, why then, did Thomas Jefferson substitute John Locke's *Two Treatises* phrase "pursuit of property" with the phrase "pursuit of happiness", if he was intentionally referring to property rights?

According to property scholar, Gottfried Dietze, it was because Jefferson understood Locke, and his *Two Treatises,* so exceedingly well. [314] In examining Jefferson's intent in writing the Declaration of Independence, Dietze holds that Thomas Jefferson relied very heavily on Locke's *Two Treatises* to form its underlying principles and meaning. [315] According to Dietz, Jefferson was a disciple of John Locke's argument in the *Two Treatises,* that an individual's happiness was intrinsically linked to their "pursuit of property". [316] As a result, Deitz asserts, that with respect to Jefferson's understanding of Locke's *Two Treatises*:

> ***"He simply read it carefully enough to know the protection of property is the major prerequisite of, and perhaps even identical with, happiness. His phrase 'pursuit of happiness' is thus nothing but a mere summary statement of the various Lockean ideas on the ethical purposes of private property. It strengthens rather than weakens the case for property."*** [317]

This understanding was confirmed by Jefferson himself. For Jefferson made it clear, according to Dietze, that the phrase "pursuit of happiness" was language that was intended to summarize the Lockean ideas on the ethical purposes of private property. [318]

In using the phrase "pursuit of happiness", Jefferson said he was not seeking to convey a new or stirring idea, but rather, express the idea of the complete value of private property. [319] The phrase "pursuit of happiness", according to Jefferson, was "intended as an expression of the American mind", and reflected a common sense, American belief in the protection of property rights. [320]

Indeed, perhaps another reason for Jefferson's phraseology substitution, may have been an attempt to merely be consistent with his home state of Virginia, when it adopted a Bill of Rights, just a month earlier on June 7, 1776. The very first section of this Bill of Rights, provides a very similar Lockean restatement of property rights, when it said:

> ***"That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety".*** [321]

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311. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 88-91

312. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pgs. 31-32.

313. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 88-91

314. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pgs. 31-32.

315. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pgs. 31-32.

316. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pgs. 31-32.

317. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pgs. 31-32.

318. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pg. 32.

319. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pg. 32.

320. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pg. 32.

321. James McClellan, Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government, third edition (Liberty Fund, Inc. Publishing - Indianapolis 2008), Appendix F: Reprint of the Virginia Bill of Rights (A Declaration of Rights - June 12th 1776), pg 188, and Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pg. 32.

Consequently, it is virtually unquestioned, that Jefferson saw the security of private property as one of the foundational reasons for the Revolution. [322] He believed the English were not doing enough to protect this all important right. [323] Moreover, as evidence to his commitment to the concept of property rights in the Declaration, in his famous 1781 *Notes on Virginia,* Jefferson chided his own state for not doing enough to protect property rights, and quoting Locke, declared such to be one of the three, fundamental, inalienable rights that Americans enjoy. [324]

In fact, in Jefferson's mind, the pursuit of happiness and the pursuit of property, were interchangeable concepts, where one could not have the first without the second. [325] But Jefferson was not alone. Indeed, all the founders maintained a clear grasp of the connection between liberty, freedom and property. [326]

This concept would be continued as America, transformed by the Revolution, drafted, ratified and amended its Constitution.

C. James Madison, the Constitution and the Bill of Rights

The Constitution of the United States was written in Philadelphia during the summer of 1787, in the same room the Declaration of Independence was debated, eleven years before. [327] Its principle author was a 36 year old Virginia lawyer, James Madison. A political protegee, and great admirer of Thomas Jefferson, Madison, who later went on to support its ratification as one of the authors of the Federalist papers (together with Hamilton and Jay), is known today as the "Father of the Constitution". [328] In regular correspondence with Jefferson, who was serving as American Ambassador to France during the Constitutional Convention, Madison shared Jefferson's commitment to property rights, and their protection as an inviolate, natural right. [329]

After the ratification of the Constitution, accomplished in large part due to Madison's influence in the Federalist papers, a Bill of Rights was proposed in the new Congress of the United States. [330] This bill, which provided for Amendments to the new Constitution, was drafted, sponsored and pushed through Congress by none other than James Madison, who by 1789, was a member of the House of Representatives. [331] One of his partners in this effort, was the new Vice President, and President of the Senate, John Adams. [332] Both these men were devoted to the preservation and protection of property rights.

Of the ten Amendments in the Bill of Rights, three are devoted to the preservation of property rights. Indeed in the Fifth Amendment, John Locke's language is tracked directly when it states:

> ***"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of LIFE, LIBERTY, OR PROPERTY, without due process of law; nor shall PRIVATE PROPERTY be taken for public use, without just compensation."*** [Emphasis Added] [333]

This provision of the United States Constitution expressly declared "Property" (without the code word "Happiness") to be an inviolate, individual right, that government must protect. For in two places within this Amendment, it acknowledges the critical importance of property rights, and government's obligations to respect them. In this Amendment, the progression from Locke's Two Treatises, to Jefferson's Declaration, to Madison's Bill of Rights, is formalized in legal concrete, and expressly confirms American law's devotion to our rights in private property. A right that is inherent to our humanity.

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322. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pg. 33.

323. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pg. 30-34

324. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pg. 33.

325. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pg. 30-34

326. Gottfried Dietz, In Defense of Property, (John Hopkins Press, Baltimore 1971), Property and the Enlightenment, Pg. 30-34.

327. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 109-120, and John A. Garraty, The American Nation, A History of the United States to 1877, 4th Edition, (Harper Row Publishers, New York 1979), The Philadelphia Convention, Pgs 118-127.

328. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 109-120, and John A. Garraty, The American Nation, A History of the United States to 1877, 4th Edition, (Harper Row Publishers, New York 1979), The Philadelphia Convention, Pgs 118-127.

329. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 109-120, and John A. Garraty, The American Nation, A History of the United States to 1877, 4th Edition, (Harper Row Publishers, New York 1979), The Philadelphia Convention, Pgs 118-127.

330. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 124-125, and John A. Garraty, The American Nation, A History of the United States to 1877, 4th Edition, (Harper Row Publishers, New York 1979), The Philadelphia Convention, Pgs 118-127.

331. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 124-125, and John A. Garraty, The American Nation, A History of the United States to 1877, 4th Edition, (Harper Row Publishers, New York 1979), The Philadelphia Convention, Pgs 118-127.

332. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 124-125, and John A. Garraty, The American Nation, A History of the United States to 1877, 4th Edition, (Harper Row Publishers, New York 1979), The Philadelphia Convention, Pgs 118-127.

333. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Appendix: United States Constitution, Amendments, Pg. 685.

The Fifth Amendment, however was not the only section of the Bill of Rights that set forth American law's dedication to property rights. Both the Ninth and Tenth Amendments also take measures to protect people's property rights, when they state:

> ***Amendment IX -"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"***
>
> ***Amendment X –"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"*** [334]

Through these Amendments, Madison sought to protect the rights of life, liberty and the pursuit of property.

The Ninth Amendment, is a direct acknowledgment of natural law, and expressly states that the Constitution will neither "deny" nor "disparage" individual, inviolate rights (such as property rights). In stating such, this Amendment makes the implicit promise to protect such natural rights, and to prevent their denial and disparagement.

The Tenth Amendment too is also an acknowledgment of natural law, and the rights that flow therefrom. By its terms, this Amendment reserves such rights, and the power to protect them, to the state common law, and to the people themselves. By reserving such powers to the states, and the people themselves, this Amendment, recognizes that the Anglo-American Common law (which resides in states) has a tradition and precedent of protecting the inviolate, individual rights of life, liberty and the pursuit of property, and expressly declares that the power to protect such rights can not ever be deemed as prohibited by the Constitution.

After the ratification of the Bill of Rights, in 1792, Madison placed a capstone on his intent to protect property rights, by writing his famous legal essay for the National Gazette, entitled "Property". [335] In this essay, Madison expressed his belief that property rights were inseparable from liberty and human freedom. [336] Under American law, he argued, such rights were inviolate, individual rights that government was required to protect. [337]

In this essay, Madison declared:

> ***"Property. This term in its particular application means 'that dominion which one man claims and exercises over external things in the world, in exclusion of every other individual'. In its larger and juster meaning, it embraces everything to which a man may attach a value and have a right ... In a word, as a man is said to have a right to his property, he may equally be said to have a property in his rights. ... Government is instituted to protect property of every sort ... If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights"*** [338]

Legal commentators from that time to today, have remarked, how Madison's view of property in this essay was both enlightening and prophetic, reflecting on its interrelationships with Courts and Lawyers, that have proven correct from his time to the present. [339] Madison's reflections on the importance of the individual, inviolate right of the pursuit of property, has offered an eternal look into the importance of this fundamental right. [340] This coming from the "Father of the Constitution" is pretty good authority.

As if the Declaration and Bill of Rights restatement of the inherent nature of property rights, was not enough, after the American Civil War, the Constitution was further amended to add the Fourteen Amendment to further declare the importance of property rights under American law. [341] Section One of this Amendment expressly expounds once again on the critical link between liberty and property rights, and their need for protection, when it states:

> ***"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of LIFE, LIBERTY, OR PROPERTY, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"*** [Emphasis Added]. [342]

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334. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Appendix: United States Constitution, Amendments, Pg. 686.

335. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 126-127.

336. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 126-127.

337. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 126-127.

338. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 126-127.

339. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 126-127.

340. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Chapter 2: Law in a Republican Revolution 1760-1815, Pgs. 126-127.

341. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Appendix: United States Constitution, Amendments, Pg. 687.

342. Kermit Hall, American Legal History, Cases and Materials, 3rd Edition, (Oxford University Press, New York 2005), Appendix: United States Constitution, Amendments, Pg. 687.

D. Modern Perspectives

From the founding of our nation, to today, the American law has recognized the truth of the third postulate, that property rights are inherent to our humanity. This concept has become ingrained in the American Psyche, and serves as a fundamental truth in our law.

One need only look at the national uproar that occurred from the Supreme Court's decision in the Kelo case [343] to understand America's continued commitment to private property rights, and the belief that these inherently possessed rights should not be violated by government. [344] For even when Constitutional constraints are followed, Americans find these rights sacrosanct.

In the Kelo case, a Connecticut coastal city sought to take certain private property, which some viewed as blighted and slum, for the purposes of economic development. [345] After the Supreme Court ruled that this case constituted a "public purpose" under the Fifth Amendment (which would permit such a taking), legal commentators, in reaffirming the legal and social importance of inherent, inviolate property rights, declared:

> ***"Nonetheless, ensuring heightened procedural review when inoffensive property is being condemned seems, if nothing else, to be promoted by the Fourteenth Amendment's Due Process Clause and Lockean principles"*** [346]

All over the nation, after the Kelo decision was handed down, citizens began decrying their federal and governments, not to step on their rights of private property. [347] Accordingly, even when the law may allow for the qualified piercing of property rights, to support what it feels is in the public interest, and even when such action is performed under the protections of compensation as proscribed by the Fifth Amendment takings clause, Americans continue to hold such a firm devotion to the inherent nature of property rights, that they will invariably demand that their governments tread more lightly.

American law has and will continue to respond to this view. After Kelo, state legislatures all across the nation, have begun to restrict the ability of state and local governments to take property by eminent domain. [348] Elected legislators, and elected judges, both understand that their constituents hold their individual, inviolate property rights as precious, and believe that such are their inherent birthright. [349] Indeed, as might be the ultimate test to the strength of this feeling in America, the very project that the Kelo case authorized, has not proceeded, despite its technical authorization, due in large part to the public's concern that inviolate, private property rights were not given as deep a level of respect as they should be.

The response to Kelo case clearly demonstrates, that still today, the spirit of Locke, Jefferson, and Madison, and their commitment to the individual American's inviolate right to the unfettered pursuit of property, remains alive and well throughout our nation. It is a concept still solidly embraced in our law and in society.

As a result, the doctrine of the third postulate, that property rights should be viewed as inherent to our humanity, has a firm basis in American law. From the time before our founding, to the present, this concept, adds value and understanding to property law, and the rights that flow from it. It is a useful and important analysis that allows this perspective to add a more inclusive and complete understanding of what property actually is, and means.

4. That Property Rights Include the Rights of Exclusion, Possession, Use and Transfer

For generations, those who have engaged in a legal analysis of property, have examined it in terms of a "Bundle of Rights". Indeed, even the United States Supreme Court has employed this view, when it examines property issues in its cases, asking whether an "owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property". [350]

In this postulate the nature of property rights as a bundle of rights, including the rights to exclude, possess, use and transfer will be examined. Through this prism, of these bundle of rights, a more inclusive and complete understanding of what property actually is, and means, is sought.

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343. Kelo v. City of New London, 545 U.S. 469 (2005).

344. Eric Rutkow, Kelo v. City of New London, Harvard Environmental Law Review, (Vol 30, No. 1, 2006), Pgs. 261-279.

345. Eric Rutkow, Kelo v. City of New London, Harvard Environmental Law Review, (Vol 30, No. 1, 2006), Pgs. 261-279.

346. Eric Rutkow, Kelo v. City of New London, Harvard Environmental Law Review, (Vol 30, No. 1, 2006), Pg. 276.

347. Eric Rutkow, Kelo v. City of New London, Harvard Environmental Law Review, (Vol 30, No. 1, 2006), Pgs. 261-279.

348. Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, Selected Works, George Mason University School of Law (2008), Pgs. 1-64.

349. Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, Selected Works, George Mason University School of Law (2008), Pgs. 1-64.

350. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

A. The Collection of Rights - The Rights of Exclusion, Possession, Use and Transfer

When Americans exercise their property rights they do it in four ways, signified by the acronym E-PUT. These include

1. The Right to Exclude;

2. The Right to Possess;

3. The Right to Use; and

4. The Right to Transfer. [351]

According to the property scholar Thomas Grey, in his famous essay *The Disintegration of Property*, "the theory of property rights held by the modern specialist tends to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things. The specialist fragments the robust unitary conception of ownership into a more shadowy 'bundle of rights'." [352]

So why then, focus not on the issue of ownership and instead on a collection of rights?

For, as aforementioned, if one only thinks of what constitutes "property", as 'items" or "things", or as the ownership of those items or things, the true concept of property, and its rights, will not appear.

To view property through this limited vision, however, causes one to miss a very valuable element: "control". For property can be owned by more than one person, and sometimes property need not even be owned at all by a person in order for such person to legally exercise control over such item or thing.

Accordingly, since it is only through the perspective of control, that one can truly understand the full nature of property, it is essential to think of property in terms of "a collection of rights". For it is only through that perspective, a merger of item with control, that a true legal understanding can be had. As a result, the law needs to view property, not in terms of a collection of items or things, but in terms of a collection of rights.

Perhaps this is why Thomas Grey commented:

> ***"[T]he basic need to teach lawyers the technical tools of their trade would suggest if not require some movement toward a bundle- of-rights formulation of property, as against the historical and popular thing-ownership conception."*** [353]

So just what are these property rights that make up this "metaphorical bundle"? They can be described as follows:

1. The Right to Exclude:

The first right in "the metaphorical bundle of property rights" is the right to exclude. This right has often been described as the most important of all the property rights. [354] Exclusion is the ultimate expression of control over an item, where all others are prevented from the use or occupancy of the particular "thing." [355] For nothing commands power and control more than the ability to exclude. Of course, like many rights, the right to exclude is not absolute. For example, police officers may enter the in pursuit of fleeing criminals; and can not bar entry to emergency medical staff who would treat an injured person on the basis of public policy.

2. The Right to Possess:

The second right in "the metaphorical bundle of property rights" is the right to possess. Possession demonstrates control by the means of holding, keeping and/or retaining the particular "thing." [356] Simply put, the right to possess is the right to hold, control or enjoy. Black's law dictionary defines "possession" as:"

> ***"1. The fact of having or holding property in one's power; the exercise of dominion over property;***
>
> ***2. The right under which one may exercise control over something to the exclusion of overs; the continuing exercise of a claim of exclusive use of a material object;***
>
> ***3. Something that a person owns or controls; or***
>
> ***4. The detention and control, or the manual or ideal custody, of anything which maybe the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name."*** [357]

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351. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs. 4-7.

352. Thomas Grey, The Disintegration of Property, Property: Edited and Assembled by J. Roland Pennock, (New York University Press, New York, 1980), Pg. 69.

353. Thomas Grey, The Disintegration of Property, Property: Edited and Assembled by J. Roland Pennock, (New York University Press, New York, 1980), Pg. 76.

354. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

355. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs. 4-7.

356. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs. 4-7.

357. Henry C. Black, Black's Law Dictionary, Seventh Edition, edited and assembled by Publishers Editorial Staff, (West Publishing Co., St. Paul 1999), Pg 1183.

3. The Right to Use:

The third right in the "metaphorical bundle of property rights" is the right to use. The law usually gives broad discretion to determine how someone will use "their" property. [358] With a house, you can live in the house, plant a garden in the back yard, play tag on the front lawn, install a satellite dish on the roof, and host parties for your friends. [359] With an apple, you can eat it, bake it, place it in a bowl for decoration, or simply let it rot. [360]

The right to use is perhaps the most important property right for society. For the use and productivity of material things tends to be important for the public good, supportive of overall productivity and promoting of the collective wealth and benefits. It must be remembered again, like all rights, this right is also not absolute, for it has long been held that a use may be limited when it interferes with the free use of another's property (i.e. nuisance). [361]

4.The Right to Transfer:

The fourth right in the "metaphorical bundle of property rights" is the right to transfer. Through this right, the law recognizes broad power to transfer items either during lifetime or at death. [362] Such transfers can be made by intervivos sale or gift, or through a will or by means of statutes that govern intestate distributions. [363]

Like the other rights within this bundle, the law does impose various restrictions on this right. For example, a person could not transfer title to their home for the purpose of avoiding creditors' claims, or impose an unreasonable condition incident to the transfer; such as a conveyance "to my daughter on condition that she never sell the land". [364] Also some types of property are market inalienable, due to public policy, in that they can not be sold at all (such as human body organs), [365] while other types of property can not be transferred after death (such as a life estate). [366]

B. The Examination of Property Through the Collection of the Rights of Exclusion, Possession, Use and Transfer

The examination of property through the prism of the collection of the rights of exclusion, possession, use and transfer offers a more in depth understanding of the meaning of property and how it relates and functions under the law. It enables each element of property rights to be thoroughly considered, and reflected upon. It is in this light that a truer understanding of property can be obtained, and a more thorough grasp of its meaning can be had.

Although some legal commentators argue that property can not be adequately understood by an analysis of its component parts through a "bundle of rights" [367], this perspective overwhelmingly fails on the basis of their contention that property can only be seen under the law as a physical thing, and to do otherwise, is merely a legal fiction. [368] Their claim that examining property through the perspective of a collection of rights, disassociates the law from the actual item, [369] and causes property to "lose its meaning", [370] is a myopic view, that fails to recognize, that the value of property to people, is not the item itself, but rather, one's ability to control that item.

The a full understanding and operation of the law requires us, in a free society, to look at numerous things, through numerous perspectives. A rights based perspective for property, enables the law to not only understand the important element of control that is critical to understanding property, but also provides it with the tool to expand the scope of property to areas that are of critical importance to society (such as intellectual property, future interests, and non possessory interests) which have no tangential physicality. Merely breaking this rights based perspective into its component parts only enhances that understanding

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358. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs. 4-7.

359. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs. 4-7.

360. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs. 4-7.

361. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs. 4-7.

362. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs. 4-7.

363. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs. 4-7.

364. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs. 4-7.

365. Margaret Radin, Market Inalienability, (Harvard Law Review, Vol 100, No. 8, 1987), Pgs. 1849-1937; it should also be noted that although certain transfers, such as bodily organs are considered "Market Inalienable" for purpose of sale, public policy and the law do not prohibit their "transfer" by gift. Additionally, as technology progresses, and with human body parts starting to be able to either be manufactured synthetically, or grown in a laboratory with a minimal donation from the human host (such as a DNA sample), this public policy, and the law which enforces it, may well see a significant change.

366. John Sprankling, Understanding Property Law, 2d Edition, (Lexis Nexis Publishing, Albany, New York, 2007), Chapter 1: "What is Property", Pgs. 4-7.

367. Jeanne Schroeder, Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property, Michigan Law Review, (Vol 93, No. 2, 2006), Pgs. 238-319.

368. Jeanne Schroeder, Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property, Michigan Law Review, (Vol 93, No. 2, 2006), Pgs. 239-244.

369. Jeanne Schroeder, Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property, Michigan Law Review, (Vol 93, No. 2, 2006), Pgs. 238-319.

370. Jeanne Schroeder, Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property, Michigan Law Review, (Vol 93, No. 2, 2006), Pg. 242..

Accordingly, viewing property as a collection of rights, rather than a collection of things, and breaking down those rights into their component parts, serves three purposes in the advancement of legal understanding of property.

First, we have seen that a definition of the term "right" is "the legally recognized ability to exercise power and control over an action or object". Since the essential element which gives property its value, is not the item itself, but rather the ability to control the item, then understanding this issue of control, is best reflected by an analysis of rights.

Second, in order to develop a more comprehensive understanding of property, which includes many of the more abstract property interests of great value to modern society, we need to broaden our concept of what property actually is.

Concepts such as intellectual property, future interests, and non possessory interests, do not lend themselves to be easily considered as "tangible items". This understanding can be best performed through a perspective of rights.

Third, by viewing and analyzing property rights through their component parts, a more complete and in depth understanding can be had of property rights and how they function under the law.

As a result, by employing this "collection of rights" perspective, a more inclusive and accurate picture of what property actually is, and means, can be truly had.

Part Three: Conclusion

In the attempt to discover the meaning of property rights under our American legal system, four postulates have been devised to provide perspective and enlightenment. Examining property rights through the prism of these four postulates allows for a understanding of the legal foundations of property rights as well as their evolution.

Property is a concept we all can understand. It is both a foundational basis in the law as well as a reflection of it. It is unquestionably linked to society and to its needs.

In an attempt to gain a true understanding of property, we have examined it through the prism of four postulates. These postulates help us to define property law. They help us to gain a perspective of its meaning, and an understanding of its application. Each of these postulates work with each other to develop a global appreciation of modern property law.

These postulates:

1. **That Property Must be Viewed as a Collection of Rights not a Collection of Things;**
2. **That Property Rights are those Recognized by Law, the Law evolved from Property Rights, and they are intertwined;**
3. **That Property Rights are Inherent to our Humanity; and**
4. **That Property Rights Include the Rights of Exclusion, Possession, Use and Transfer;**

help us to put into perspective the true nature and legal significance of property.

They help us to understand that property is among the oldest and most fundamental of all legal concepts, and how it has influenced relations among people and their societies.

They help us to understand that property is a critical element of every person's existence, and represents so much of what is necessary for the preservation and quality of human life.

They help us comprehend that it is the right to exercise control over property, and not the item itself, that gives property its value, and that property is most usefully viewed in terms of a collection of "rights", and not in terms of a collection of "things".

They help us appreciate, that with people's concerns, and society's demands, focused on property, the ever present need to protect property rights has led to the development of the law itself. They help us understand that reciprocally, the development of the law, has shaped our concept of property. Accordingly, they bring enlightenment to the fact that a great deal of the law is derived from, and devoted to, property, its protection, and the rights surrounding it.

These postulates allow us to comprehend the recognition of property rights under natural law. They permit us to understand that our society, and its laws, view property rights, not as privileges granted by the state, but instead, as rights that are intrinsic to our very existence as human beings. Accordingly, they give appreciation to the fact that under our American system of laws, private property rights are inherent to our humanity, and it is government's sacred duty to respect and protect them. Government recognizes these rights, but it did not give them, and it can not take them away.

They provide us with a perspective that allows us to see that our societal respect for the value of private property rights, and their accepted recognition under law, have helped the western world in general, and America in particular, to grow and prosper to the highest status in human history. They help us to discover that the very nature of private property rights is reflective in one's ability to excise those rights through the element of control. That control is the fundamental element of a property right.

Perhaps most importantly, however, these postulates help us to understand the overall legal concept of property. That having the right to control property, by exclusion, possession, use and transfer, has become a fundamental pillar of modern civilization.