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The Interwoven Fabric of Anglo-American Law: A Bibliographic View from Alabama^{† ††}

PAUL PRUITT, JR.*

I. INTRODUCTION

Our topic is the impact of English common law on American law. Our thesis is that the impact was considerable, mutual, and long-running; also that it will be possible to demonstrate the connectedness of Anglo and American variants chiefly by using bibliographic methods. For this purpose, we shall make use of the collections of the Bounds Law Library of the University of Alabama—though the collections of many well-established state law schools would equally suffice. In addition, we can call upon the vast amount of bibliographic information available online through WorldCat¹ and related databases.

Before tackling the question of interconnectedness, we should define what we mean by “common law.” In its classical sense, the term refers to judge-made law, applied with a strong sense of reverence to custom and precedent, and with at least a lurking sense that some few (at least) principles of natural law lurk behind the rules of law. This vision of common law had

[†] © 2012 Pruitt.

^{††} Based on a lecture delivered at the University of Alabama, January 12, 2012 to visiting students from the Australian National University.

* Special Collections/Collection Development Librarian, Bounds law Library, University of Alabama. The author thanks Professor William L. Andreen for the kind invitation to speak. He thanks Dean Kenneth C. Randall and Professor James B. Leonard for generous support and encouragement of his research projects. Thanks to David Durham and Penelope Calhoun Gibson for many acts of assistance and good advice, and to Adam Eason for productive research assistance.

¹ WorldCat is a product of OCLC, the union catalog and “bibliographic utility” that, through its ties with the Library of Congress, furnishes cataloging and interlibrary loan information. For information on the nature and scope of these agencies, see Jason Vaughn, “OCLC WorldCat Local,” in *LIBRARY TECHNOLOGY REPORTS*, 47 (January 2011), at 12-13. For further context see Margalit Fox, “Frederick G. Kilgour, Innovative Librarian, Dies at 92,” *NEW YORK TIMES*, August 6, 2006.

its origins as early as the reign of Henry II (1154-1189), whose itinerant justices traveled the shires of England, dispensing a blend of royal and customary law.²

A number of the states of the United States officially adopted or “received” elements of England’s common law system.³ From an early date, however, American legislatures had freely modified common law doctrines by means of statutes. By the mid-nineteenth century, American states increasingly were codifying their statutes, a process usually accompanied by further rationalization of court rules and procedures, even doctrines of law.⁴ These are commonplace developments; but Americans were not alone in deviating from patterns of judge-made law. For centuries, English law was fragmented into rival systems (common law, chancery, church courts, the law merchant); moreover, the very foundations of English case law were shaped by documents, such as Magna Carta, that today we should call statutes or constitutions.

A better definition of our common law heritage may be as follows: that it is anything derived from the traditional legal system of England, notably its case law and the rules of law derived from it; also its great constitutional documents; but above all its frame of mind and basic approaches to law. For Americans may have modified or dispensed with British rules and precedents—moreover, our fragmented legal system may accommodate judicial, legislative, and administrative lawmaking functions,

² See Theodore F.T. Plucknett, *A CONCISE HISTORY OF THE COMMON LAW*, 5th edition (Boston: Little, Brown and Company, 1956), 20-26, 144-150.

³ For example, a statute dating to Mississippi Territorial times, but still in effect in Alabama in the 1830’s, declared that “every other felony, misdemeanor, or offense whatsoever” not covered by an act of the legislature “shall be punished as heretofore by the common law.” See Harry Toulmin, *A DIGEST OF THE LAWS OF THE STATE OF ALABAMA, CONTAINING THE STATUTES AND RESOLUTIONS IN FORCE AT THE END OF THE GENERAL ASSEMBLY IN JANUARY, 1823* (New York: J. & J. Harper, Printers, 1823), 214 (sec. 45); and John G. Aikin, *A DIGEST OF THE LAWS OF THE STATE OF ALABAMA, CONTAINING ALL THE STATUTES OF A PUBLIC AND GENERAL NATURE, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY, IN JANUARY, 1833* (Philadelphia, Pennsylvania: Alexander Towar, 1833), 107 (sec. 35), 107 n. 1. See also Toulmin, *DIGEST*, 453-487, for entries under the heading “Judicial Proceedings at Common Law.”

⁴ Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW*, 2nd edition (New York: Simon & Schuster, 1985), 21-29, 403-406. Alabama’s first example of codified law is John J. Ormond, Arthur P. Bagby, and George Goldthwaite, *THE CODE OF ALABAMA*, head notes and index by Henry C. Semple (Montgomery: Brittan and de Wolf, 1852).

each of which is further muddled by the simultaneous exercise of these powers by federal, state, and local governments—yet we still retain a key element of the common law approach to jurisprudence. Namely, that we give judges the power to interpret or rule upon all areas of our law! It is a practice that has been with us since the first decade of the nineteenth century when, in the words of the brilliant gadfly Fred Rodell, “John Marshall boldly annexed for the Court a top political spot in the running of the nation.”⁵

Rodell would agree that American federal judges, with their arsenal of interpretive, law-making, and statute-killing powers, are even more powerful than their transatlantic counterparts. In the last analysis, we share with the British a respectful attitude toward judges and jurisprudence, which means that, like it or not, we have to be mindful of tradition and precedents. That in turn leads many American lawyers into what is called the “common law mind,”⁶ of which more below.

II. PUBLISHING HISTORY AND THE BOUNDS COLLECTION

It is our purpose to explore Anglo-American legal relations primarily from a bibliographical (not a doctrinal) standpoint, using so far as possible materials and services to be found at the University of Alabama’s Bounds Law Library. Founded in the 1880s, this library has grown through purchases and gifts from attorneys; it is an ideal location from which to gauge the evolution of legal literature in Alabama and the southeast.⁷ If one searches the stacks for English reporters and statute books, which after all contain the primary building blocks of common law rulings, we find at least forty-three titles, consisting together of nearly four thousand volumes, including a number of continuing subscriptions.⁸ That is a forest indeed, especially if we consider the pine trees sacrificed to bring it into being!

I wish I could say that the American Bar Association requires law libraries like Bounds to have a substantial collection of English sources, but

⁵ Fred Rodell, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES FROM 1790 TO 1955* (New York: Vintage Books, 1955), 19.

⁶ For the “common law mentality” see below at n. 53 and n. 54.

⁷ See Paul M. Pruitt, Jr., and Penny Calhoun Gibson, “John Payne’s Dream: A Brief History of the University of Alabama School of Law Library,” *JOURNAL OF THE LEGAL PROFESSION*, 15 (1990), 5-25. The School of Law Library was renamed the Bounds Law Library in 1998.

⁸ Count made in December 2008 by Research Assistant Adam Eason, of court reporters and statutory compilations in the KD ranges (Library of Congress classification), main stacks, Bounds Law Library..

such is not the case.⁹ Instead, the Bounds library owns these works because the legal academics who built the collection thought that the study of common law opinions was important to the development of legal minds. Professor John C. Payne, for whom the Bounds Special Collections facility is named, believed that the law was, peculiarly, a biblio-centric profession; our English law books were his particular obsession.¹⁰ The image of a law student poring over a book may be merely quaint at a time when legal professionals find case law via computerized services, or search through treatises by means of the thousands of English and American titles available in Gale's "Making of Modern Law."¹¹ Still, for much of this nation's history, the close study of books was vital to students and master practitioners alike. To enter a law library in the nineteenth or twentieth century was to travel to the nexus of practice and theory—of commercial ventures and high intellectual endeavor. Certainly, the law books involved reflected an interwoven, transatlantic web of ideas.

In his seminal study, *Legal Publishing in Antebellum America*, historian Michael Hoeflich divides the history of early national legal publishing into periods, the first being a proto-national era (roughly from 1770 to 1820) in which most American law books were local manuals or official works such as acts of legislatures. Scholarly attorneys and students reading law looked to English books for authoritative guidance; most of the latter were imported through the major Atlantic ports. The defining event of

⁹ American Bar Association [Council of the Section of Legal Education and Admissions to the Bar and of the Accreditation Committee], *Standards for Approval of Law Schools: Rules of Procedure for Approval of Law Schools* (Chicago: American Bar Association, 1987), "Annex II: Core Collection Library Schedule," n.p.; and subsequent editions.

¹⁰ Pruitt and Gibson, "John Payne's Dream," 12.

¹¹ For the initial treatise section of Making of Modern Law, see the description at http://gdc.gale.com/products/the-making-of-modern-law-legal-treatises-1800-1926/?searched=making+of+modern+law&advsearch=oneword&highlight=ajaxSearch_highlight+ajaxSearch_highlight1+ajaxSearch_highlight2+ajaxSearch_highlight3+ajaxSearch_highlight4. For an earlier collection, high-tech for its time, consider the "Yale Blackstone," an assemblage in microfiche of more than two hundred editions of William Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND, initially collected by Yale graduate Macgrane Coxe and donated by him to Yale's law library in 1909—more than a century ago. The set is a tribute both to the energy and intelligence of twentieth-century Yale librarians; that many academic law libraries have purchased the set is a tribute to Blackstone's ubiquitous appeal. See Catherine Spicer Eller, THE WILLIAM BLACKSTONE COLLECTION IN THE YALE LAW LIBRARY: A BIBLIOGRAPHICAL CATALOGUE [Yale Law Library Publications No. 6, June 1938] (New Haven: Yale Law Library, 1938), ix

this phase was the 1770 advertisement by Robert Bell of Philadelphia of an American edition of Blackstone's COMMENTARIES. This edition found more than 1500 purchasers throughout the North American colonies, demonstrating the existence of a broad market for such publications,¹² and presaging a growing market for published treatments of common law subjects produced on either side of the Atlantic.

Hoeflich demonstrates that the years from 1820 to 1851 saw the birth of a genuinely American legal tradition, in terms both of intellectual content and business practices. During this "golden age," a group of elite lawyers based in the northeast, including the great "federalist" law writers Joseph Story (1779-1845; U.S. Supreme Court, 1811-1845) and James Kent (1763-1847), envisioned an American Common Law, scientifically derived and unifying, whose principles would underlie "the local variations seen in the case law of the different states."¹³ Kent wrote and published several editions of his COMMENTARIES ON AMERICAN LAW.¹⁴ Story produced an impressive oeuvre of treatises and commentaries on United States law;¹⁵ his pioneering treatise (1834) on the conflict of laws "quickly became the definitive work [on the subject] . . . in Anglo-American literature."¹⁶

¹² M.H. Hoeflich, LEGAL PUBLISHING IN ANTEBELLUM AMERICA (New York: Cambridge University Press, 2010), 26, 132-133.

¹³ *Ibid.*, 22-29, and *passim*. As Hoeflich states, this thesis was earlier set forth by Daniel Hulsebosch, in his CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD (Chapel Hill: university of North Carolina Press, 2005). For law as a "science of reason," see William P. LaPiana, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (New York: Oxford University Press, 1994).

¹⁴ See, for example, James Kent, COMMENTARIES ON AMERICAN LAW, 4 volumes (New York: O/ Halsted, 1826-1830). For a comparison of Kent and the later English legal scholar Sir Frederick Pollock (1845-1937), see Neil Duxbury, FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION (Oxford: Oxford University Press, 2004), 297 n.78. For Pollock and Oliver Wendell Holmes, see below.

¹⁵ See (among many possibilities) Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, 3 volumes (Boston: Hilliard, Gray, and Company, 1833).

¹⁶ Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (Boston: Hilliard, Gray and Company, 1834); for quoted passage see William R. Leslie, "The Influence of Joseph Story's Theory of the Conflict of Laws on Constitutional

At roughly the same time, David Hoffman (1784-1854) of Baltimore was writing prescient works of legal education.¹⁷ By mid-century several factors—improved postal regulations, developments in transportation, and surprisingly modern techniques of advertising—paved the way for the triumph of national publishing houses such as Gould, Banks of New York and Little, Brown of Boston.¹⁸ A bit later (1872) came the West Publishing Company of St. Paul, destined (though only clairvoyants could know it at the time) to dominate the American legal publishing world of the twentieth century. A glance along the shelves of any well-established twentieth-century law library will reveal the serried ranks of West reporters, codes, casebooks, and treatises.¹⁹

Yet even as American legal literature achieved its full measure of intellectual independence, many lawyers still kept current with trends in England,²⁰ often via American editions. The nineteenth century was a golden age of specialized legal writing (readers who doubt this should examine Justice Story's "Atticus"²¹ entries); it is not surprising that law students in Alabama²² and other states should have occasion to consult English treatises, typically adapted or amended for American audiences.

From a bibliographic standpoint, this transatlantic consciousness led to some wondrously overpopulated title pages. Consider the three-volume

Nationalism," *MISSISSIPPI VALLEY HISTORICAL REVIEW*, 35 (September 1948), 203. For foreign editions of Story's works, see below.

¹⁷ See David Hoffman, *A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY*, 2nd edition; 2 volumes (Baltimore: J. Neal, 1836).

¹⁸ Hoeflich, *LEGAL PUBLISHING IN ANTEBELLUM AMERICA*, 27-28, 36-41, 42-43, 74-104; and

¹⁹ See Erwin C. Surrency, *A HISTORY OF AMERICAN LAW PUBLISHING* (New York: Oceana Publications, 1990), 237-242, for the origins of the West Publishing Company (founded in 1872).

²⁰ For Kent's role in encouraging Americans along these lines, see James Kent, et al., *OUTLINE OF A COURSE OF ENGLISH READING, BASED ON THAT PREPARED FOR THE MERCANTILE LIBRARY ASSOCIATION OF THE CITY OF NEW YORK* (New York: G.P. Putnam and Co., 1853); this posthumous edition was based on Kent's *A COURSE OF READING, DRAWN UP BY THE HON. JAMES KENT. . . FOR THE USE OF THE MEMBERS OF THE MERCANTILE LIBRARY ASSOCIATION* (New York: Wiley and Putnam, 1840).

²¹ "Atticus" is the online catalog of the Bounds Law Library. A January 14, 2011 search found 163 entries under Story's name, on specific topics that included Agency; Bailments; Bills of Exchange; Constitutional Law; Equity; Partnerships; and Promissory Notes. To carry out a search, see <http://atticus.law.ua.edu/>.

²² Works cited below in notes 23, 25, 26, 27, and 28, are all from the collections of the Bounds Law Library.

TREATISE ON THE PARTIES TO ACTIONS, AND ON PLEADING, the work of those industrious English kinsmen Joseph and Thomas Chitty, published in 1840 by G. and C. Merriam of Springfield, Massachusetts. In addition to other items of a promotional and informative nature, the Merriams saw fit to tell purchasers that theirs was the eighth American edition, taken “from the sixth London edition, corrected and enlarged.” Yet there is more—this treatise also contains “notes and additions” by John A. Dunlap, not to mention even *more* notes with “references to later decisions,” by E.D. Ingraham.²³

A search in WorldCat reveals that Dunlap (1793-1858) and Ingraham (1793-1854) were industrious American law writers,²⁴ who (like their transatlantic counterparts, the Chittys) were perhaps more remarkable for persistence than brilliance. Other American editions, however, reveal that some of this country’s most notable jurists were willing to annotate British texts. One such work exemplifies the world-spanning nature of the common law: namely, the 1845 Philadelphia edition of A TREATISE ON CRIMES AND MISDEMEANORS, authored by Sir William Oldnall Russell (“late Chief Justice of Bengal”) and Charles Sprengel Greaves, a Lincoln’s Inn barrister. This work boasted three American annotators, one of whom was the Pennsylvania jurist and legal ethicist George Sharswood (1810-1883).²⁵ A similar in-print relationship between even more august judges can be seen the 1854 Boston edition of A TREATISE OF THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN, IN FIVE PARTS. This book’s primary author was Charles, Lord

²³ Joseph Chitty and Thomas Chitty, A TREATISE ON THE PARTIES TO ACTIONS, AND ON PLEADING, WITH SECOND AND THIRD VOLUMES CONTAINING PRECEDENTS OF PLEADINGS AND COPIOUS DIRECTORY NOTES, in 3 volumes, 8th American edition from 6th London edition (Springfield, MA: G. and C. Merriam, 1840). “Atticus” lists 135 entries for Joseph Chitty (1776-1841) and 19 entries for Thomas Chitty (1802-1878). The Chitty name has survived to the present day; the Bounds Law Library recently cataloged H.G. Beale, editor, *Chitty on Contracts*, 30th edition (London: Sweet & Maxwell, 2008).

²⁴ A June 10, 2011 WorldCat search revealed that Dunlap’s name is associated with as many as 118 holdings, in various media, of WorldCat libraries; Ingraham’s name is associated with as many as 202 holdings in various media.

²⁵ William Oldnall Russell and Charles Sprengel Greaves, A TREATISE ON CRIMES AND MISDEMEANORS, in two volumes, 5th American edition from 3rd London edition (Philadelphia: T. and J.W. Johnson, Law Booksellers), 1845. The work lists Daniel Davis and Theron Metcalf annotators of “former American editions,” as well as “additional notes and references, by George Sharswood.” Sharswood’s name is printed in larger type. See Sharswood, AN ESSAY ON PROFESSIONAL ETHICS, 2nd edition (Philadelphia: T. and J.W. Johnson, 1860).

Tenterden (“late Chief Justice of England”); one of the book’s annotators was Joseph Story.²⁶

Imitation may be the sincerest form of flattery, but adaptation surely comes in a close second. On that score, most American law writers were ready to acknowledge their intellectual debts. Albert Hart, in the front matter of the 1871 San Francisco edition of R.A. Fishers’s *DIGEST OF THE REPORTED CASES . . . RELATING TO CRIMINAL LAW* noted that the book was a “complete compendium of the English Law of Crimes and Punishments, upon which our American Criminal Law is founded.”²⁷ H.G. Wood, in the preface to the 1877 New York edition of FOLKARD’S *STARKIE ON SLANDER AND LIBEL*, says that “no excuse is deemed necessary” for an American edition of a book whose merit “is generally conceded, and has often been recognized by the courts.”²⁸

On the other hand, some American books captured a British audience. This was true of Story’s works, notably his treatise on conflicts, which went through several English editions and attracted attention on the Continent as well.²⁹ Kent’s works were of less interest to English practitioners, but

²⁶ Charles, Lord Tenterden and William Shee, *A TREATISE ON THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN, IN FIVE PARTS*, 8th edition; 7th American edition (Boston: Little, Brown and Company, 1854). The work was published “with the Notes of Mr. Justice Story, and Additional Annotations by J.C. Perkins.”

²⁷ Robert Alexander Fisher, Albert Hart, and S.B. Harrison, *A DIGEST OF THE REPORTED CASES (FROM 1756 TO 1870, INCLUSIVE,) RELATING TO CRIMINAL LAW, CRIMINAL INFORMATION, AND EXTRADITION* (San Francisco: S. Whitney & Co., 1871), [i].

²⁸ Henry Coleman Folkard, *FOLKARD’S STARKIE ON SLANDER AND LIBEL, INCLUDING PLEADING AND EVIDENCE, CIVIL AND CRIMINAL*, 4th English edition (New York: Banks and Brothers, Law Publishers, 1877), i.

²⁹ See, for example, Joseph Story, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC: IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS*, 3rd edition, revised (Boston: Little, Brown; London: A. Maxwell and Son, 1846); and Joseph Story and Edmund H. Bennett, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC: IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS*, 7th edition (London: Stevens and Haynes, 1872). For further examples, see (1) Joseph Story, *COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE, FOREIGN AND INLAND, AS ADMINISTERED IN ENGLAND AND AMERICA, WITH OCCASIONAL ILLUSTRATIONS FROM THE COMMERCIAL LAW OF NATIONS OF CONTINENTAL EUROPE* (Boston: Little, Brown, 1843) [WorldCat’s copy contained

WorldCat shows an Edinburgh edition of his treatise on maritime law as well as a Cambridge (England) edition of his commentary on international law.³⁰ Kent was fortunate posthumously, in that the brilliant scholar and future Supreme Court Justice, Oliver Wendell Holmes, Jr. (1841-1932), served as editor of his COMMENTARIES ON AMERICAN LAW through several editions.³¹ Holmes' masterpiece THE COMMON LAW (1881) attracted readers in England and on the Continent,³² but even purely academic works found a readership abroad. In 1871, for example, a British publisher issued C.C. Langdell's A SELECTION OF CASES ON THE LAW OF CONTRACTS. The edition is now scarce, yet (presumably) English legal academics were interested in the "case method," by which Langdell was revolutionizing legal education at Harvard.³³

notes on booksellers in cities including Boston, London, Edinburgh, Dublin, and Cambridge]; (2) Joseph Story, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA, 5th edition, revised (Boston: C.C. Little & J. Brown; London: V. & R. Stevens and G.S. Norton, 1849); and (3) Joseph Story and Frederick Thomas Pratt, NOTES ON THE PRINCIPLES AND PRACTICES OF PRIZE COURTS: WITH A SELECTION OF DOCUMENTS AND FORMS AS USED IN THE HIGH COURT OF ADMIRALTY OF ENGLAND (London: Benning, Law Booksellers, 1854). Among other foreign treatments of Story's work, the most remarkable is a two-volume manuscript creation of *circa* 1841, "written in five distinct hands," and titled COMMENTARJ SUL CONFLITTO DELLE LEGGI STRANIERE E DOMESTICHE IN ORDINE AI CONTRATTI, in the Harvard law School Library; apparently it is based on the Boston 2nd edition (1841) of Story's conflicts treatise.

³⁰ James Kent, A PRACTICAL TREATISE ON COMMERCIAL AND MARITIME LAW: WITH A CHAPTER ON INCORPOREAL HEREDITAMENTS, EMBRACING AQUATIC RIGHTS, RIGHTS OF COMMON, ETC. (Edinburgh: T. Clark, 1837); and James Kent and J.T. Abdy, KENT'S COMMENTARY ON INTERNATIONAL LAW, REVISED WITH NOTES AND CASES BROUGHT DOWN TO THE PRESENT TIME (Cambridge: Deighton, Bell, and Co., 1866).

³¹ See among other editions, James Kent, COMMENTARIES ON AMERICAN LAW, 12th edition, edited by O.W. Holmes, Jr. (Boston: Little, Brown, and Company, 1873).

³² Oliver Wendell Holmes, THE COMMON LAW (London: Macmillan & Co., 1881). There were also late nineteenth or early twentieth-century editions of THE COMMON LAW in German and Italian. Oliver Wendell Holmes and Rudolf Leonhard, DAS GEMEINE RECHT ENGLANDS UND NORDAMERIKAS (Leipzig: Verlag von Duncker & Humblot, 1912).

³³ C.C. Langdell, A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS (London: Stevens and Haynes, 1871). For evidence of British interest in Langdell, see Mark DeWolfe Howe, editor, HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 (Cambridge: Harvard University Press, 1946), I: 80, 91.

III. DESCENDING TO CASES

To complete this exercise in literature-overkill, let us consider aspects of our English heritage as revealed in state and federal case law. To examine paper copies of case reports, we would need to visit the stacks of any good law library, where the publications of West Publishing Company and its rivals,³⁴ including federal reporters, state appellate decisions assembled by “region,”³⁵ and stand-alone state reporters are shelved, range upon range. To make matters easy—and to prove that this inquiry stands with one foot, at least, in the brave new world of legal research—we will perform a computerized search of Alabama and “combined” state, federal, and U.S. Supreme Court databases via LexisNexis, using broad search terms to find citations of classic British documents and treatises.³⁶

Asking the computer for cites and mentions of Magna Carta yielded only nine instances among Alabama appellate cases, compared to 1285 “hits” among state, federal, and U.S. Supreme Court cases. Searching for likely mentions of “Coke Upon Littleton”³⁷ found a modest 39 references in Alabama case law, a small fraction of the 1139 hits found in the federal

³⁴ West’s chief rival was the Lawyer’s Cooperative Publishing Company founded in 1882; see Surrency, *HISTORY OF AMERICAN LAW PUBLISHING*, 242-245. The two companies (or their corporate descendants) have produced parallel series of reporters since the late nineteenth century. These descendants are Thomson Legal (owner of West Publishing; <http://west.thomson.com/about/history/>) and LexisNexis (<http://www.lexisnexis.com/lawschool/>). Both are better known to law students through their impressive and all-embracing online products, respectively Westlaw and LexisNexis.

³⁵ This term is a reference to the “regional reporters” of West’s National Reporter System, designed to cover the appellate courts of all the states.

³⁶ For the searches summarized below, the Lexis databases utilized were, respectively “Combined Alabama Cases”; and “Federal and State Cases Combined,” the latter searched simultaneously with “U.S. Supreme Court Cases, Lawyer’s Edition.” Each search was a “proximity” search, using such search patterns as: Magna w/3 Carta. The various searches were carried out on January 12, 2009 (Alabama cases) and January 20, 2009 (federal and U.S. Supreme Court cases).

³⁷ “Coke Upon Littleton” is a old-fashioned abbreviation for Sir Edward Coke’s *FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: OR, A COMMENTARY UPON LITTLETON*, 1st American from the 16th European edition, in 3 volumes (Philadelphia: Johnson and Warner, and Samuel R. Fisher, Jr., 1812). This American edition of Coke’s classic 1628 treatise contained additional notes and commentary by Francis Hargrave and Charles Butler, as well as “the notes of Lord Chief Justice Hale and Lord Chancellor Nottingham, and an analysis of Littleton, written by an unknown hand in 1658-9,” with yet more explanatory material by Thomas Day.

databases. Moving toward citations of somewhat more modern jurists, the Alabama decisions made reference to Blackstone's COMMENTARIES³⁸ in 86 instances and mentioned or cited the opinions of Lord Mansfield³⁹ (Blackstone's notable contemporary) 163 times. Applied in the federal databases, the latter searches yielded in each instance a polite but insistent declaration that the search had turned up more than 3000 hits!

Given that Alabama case law weighs in at some tens of thousands of decisions, it is safe to declare that the above classic sources of common law make only occasional appearances in court. Or do they? British and American authorities have long considered Magna Carta, cited by name in only nine Alabama cases, as the foundation of many rights—specifically to the right of due process, and abstractly but vitally, to the right of rebellion in the face of tyranny.⁴⁰ While it may only occasionally be cited directly, Magna Carta hovers in the background of many issues (legal, constitutional, and political) in Alabama and the nation.

But there is a small intellectual mystery attached to the actual invocation of Magna Carta by Alabama lawyers and judges. Of the nine citations retrieved by LexisNexis, seven date from the last two decades; and

³⁸ The most readily obtained edition of this 18th-Century restatement of law is the modern facsimile reprint of the first edition (1765-1769), i.e., Sir William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 4 volumes (Chicago: University of Chicago Press, 1979). Among many American editions, the most interesting may be St. George Tucker, editor, BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTIONS AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA, 5 volumes (Philadelphia: William Young Birch, and Abraham Small, 1803), with additional notes by Edward Christian.

³⁹ Born in Scotland and educated at Oxford, William Murray, the First Earl of Mansfield (1705-1793), was a respected member of parliament in the 1740s and 1750, and Chief Justice of the King's Bench from 1756 until his retirement from the bench in 1788. A scholar of Roman and civil law, his opinions reshaped the British law merchant and helped facilitate British commerce. See Theodore F.T. Plucknett, *A CONCISE HISTORY OF THE COMMON LAW*, 5th edition (Boston: Little Brown & Co., 1956), 248-251.

⁴⁰ Among passages of the United States Constitution that echo Magna Carta, see Art. III, Sec. 2, Clause 3; Amendment 1; Amendment 5; Amendment 6; Amendment 7; and Amendment 8. For Alabama instances see, *inter alia*, Toulmin, DIGEST, 915-916, 1819 Constitution of Alabama, Article I, Declaration of Rights (especially secs. 10-17); and CODE OF ALABAMA 1975, Volume 1, Constitution of Alabama of 1901, Declaration of Rights, 84 (Sec. 5), 96-97 (Sec. 6), 166 (Sec. 7), 172 (Sec. 9), 186 (Sec. 11), 198 (Sec. 13), 235 (Sec. 15), and 243 (Sec. 17).

only one derives from a nineteenth-century suit. Why should this be so? Significant constitutional issues are always with us; but in the last fifteen years, Magna Carta has appeared in the decisions of Alabama cases pertaining to punitive damages, the tenure of university trustees, retiree benefits, a court's jurisdiction over an election of deacons and trustees in a Primitive Baptist Church, and the legality of a forcible entry by police.⁴¹ Touched by the operatic "culture wars" of the 1990's, perhaps some members of the state's bench and bar may have reached for Magna Carta in the same way a prosecutor in a Scott Turow novel "reaches for the nuclear bomb"—reaching, in other words, for the most powerful weapon without regard for nuance or consequence.⁴² If that is so, then it is another indication of the fact that our common law documentary heritage is flexible as well as muscular.

But what about another aspect of our engagement with common law—are we willing to reject British precedent? One might expect a great deal of such activity in legislatures and courts during the decades following the American Revolution. An excellent late example comes from the December 1886 term of the Alabama Supreme Court. During that term, Associate Justice Henderson Somerville (founding professor of the UA School of Law) wrote the Court's opinion in *Parsons v. State*, a case involving a homicide committed by Joe and Nancy Parsons, the latter of whom was allegedly insane.

The trial court had applied the commonly used doctrine, the *M'Naghten* rule. The latter, as Somerville noted, held that no mental illness or delusion could destroy a person's "power of self-control—his liberty of will and action—provided only he retains a mental consciousness of right and wrong." Somerville, who had knowledge of the research and treatment employed at Alabama's state insane asylum (located about a mile from his Tuscaloosa office), asserted that an insanity defense was "sufficient if the insane delusion . . . sincerely exists at the time of committing the alleged crime," and the accused "is so influenced by it as either to render him

⁴¹ For these cases, see 627 So. 2d 878 (1993) and 684 So. 2d 685 (1996) (punitive damages); 695 So. 2d 1158 (1997) (university trustee); 735 So. 2d 1172 (1999) (retiree benefits); 847 So. 2d 331 (2002) (election of deacons and trustees); and 895 So. 2d 366 (2004) (forcible entry). For other mentions of Magna Carta see cases at 66 Alabama reports 87 (1880) (conflict between a widow and a "judgment creditor" over homestead lands); 248 So. 2s 148 (1970) (dispute over who should sign a complaint concerning violation of a municipal ordinance); and 713 So. 2d 869 (1997) (discretion of court concerning a school funding plan).

⁴² See Scott Turow, *PRESUMED INNOCENT* (New York: Farrar, Straus, Giroux, 1987), 372.

incapable of perceiving the true nature and quality of the act done” or it “so subverts his will as to destroy his free agency by rendering him powerless to resist by reason of *the duress of the disease*.” Somerville’s decision allowed the principles of psychology into Alabama courtrooms; in the process he overturned a significant rule of English law.⁴³ By doing so, he was quite unwittingly demonstrating the depths of the connection between the British and American jurisprudence; namely, that more than a century after American independence, judges were still making decisions with English precedents in mind.

IV. PROFESSIONAL DIVERGENCE, CONVERGENCE

Institutions, like individuals, can be connected, mutually supportive, without either slavish imitation or dominance of one over the other. Consider the many differences between the English and American legal education, particularly in the nineteenth and early twentieth centuries! To begin at the professional beginning, an English law student affiliated with one of the Inns of Court, pursuing a course of lectures, readings and court attendance. His American counterpart “read” law in an attorney’s office or attended a law school; by the early twentieth century most American law students attended university-based law schools influenced by Harvard’s Langdellian method, with its casebooks and its Socratic style of instruction.⁴⁴

Upon completion of his⁴⁵ studies, the English lawyer was prepared to enter a bifurcated profession, in which (prior to 1985) “solicitors” and “barristers” worked together on cases, but as members of separate firms or “chambers,” and at different levels of prestige. Among barristers there was a further distinction between the “junior” bar and those who had been appointed Queen’s (or King’s) Counsel. For court appearances, barristers wore a prescribed costume of gown and wig. A “Queen’s Counsel” or Q.C. was allowed to wear a silk gown; thus achievement of that status was known as

⁴³ For Somerville’s opinion see 81 Alabama Reports 577-597 (quoted passages at 587, 596).

⁴⁴ For the distinctive evolution of American legal studies see Robert B. Stevens, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (Chapel Hill: University of North Carolina Press, 1983); and William A. LaPiana, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (New York: Oxford University Press, 1994).

⁴⁵ Women students were seldom admitted to either the American or British bar in the early twentieth century; numerical parity of female and male students is a late twentieth century phenomenon. See n. 44, below.

“taking silk.”⁴⁶ The American legal community, in contrast, had no branches of the bar. American lawyers were officially segregated only by membership in state bars; unofficially they were segregated by residence within states (city versus country lawyers, for example), and increasingly, by a distinction between general practitioners and specialists.⁴⁷

Yet despite all this external divergence, there was often a resonance between British and American lawyers—an overriding likeness that led to many friendships and to a great many professional exchanges. In part, it was because they read the same books—or at least types or variants of the same books. Perhaps the similarity may have flowed from the tone set by law writers who had themselves achieved transatlantic celebrity.

To take examples from a former generation, consider first Sir James Bryce (1838-1922), a lawyer, legal academic, diplomat, and member of parliament. His American friends and correspondents included people from every walk of professional life; his magnum opus, *THE AMERICAN COMMONWEALTH* (1888), contains more than a thousand pages of analysis, including perceptive treatments of the American bench and bar.⁴⁸ An affable man by nature and by trade, Bryce was eager to carry his sympathetic vibrations across the Atlantic.⁴⁹ His American contemporary, Oliver Wendell

⁴⁶ See Penny Darbyshire and Keith James Eddy, *DARBYSHIRE ON THE ENGLISH LEGAL SYSTEM*, 8th edition (London: Sweet & Maxwell, 2005), 369-371, and (for women and minorities in law schools), 371. For a less succinct but more revealing look at status among English attorneys, see John Mortimer, *THE FIRST RUMPOLE OMNIBUS* (New York: Penguin Books, 1983).

⁴⁷ See Marc Galanter, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (Chicago: University of Chicago Press, 1991),

⁴⁸ This massive work, written self-consciously to rival Alexis de Tocqueville’s celebrated *DEMOCRACY IN AMERICA* (1835, 1840), went through many editions. The most accessible today is James Bryce, *THE AMERICAN COMMONWEALTH*, 2 volumes, introduction by Gary L. McDowell (Indianapolis: Liberty Fund, 1995); for bar and bench, see II: 1283-1305. See also Paul M. Pruitt, Jr. “James Bryce,” in *ENCYCLOPEDIA OF THE UNITED STATES SUPREME COURT* (Detroit: Thomson Gale Group, 2008), I: 225-227.

⁴⁹ Sometimes affability traveled in the other direction. Consider Judah P. Benjamin (1811-1884), holder of multiple cabinet-level offices in the Confederate States government. After the fall of Richmond in 1865, Benjamin fled, coming to rest in England and (eventually) France. He practiced law in England, where he won appointment as Queen’s Counsel and was a highly successful legal author, notably of *BENJAMIN’S TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY: WITH REFERENCES TO THE AMERICAN DECISIONS*, 3rd English edition based on 4th American edition, 2 volumes (Jersey City: F.D. Linn & Company, 1884). For biographical

Holmes, was a more austere personality and more formidable intellectually. Even so, Holmes corresponded for years with British legal thinkers, writing with such energy and pith that two collections of his law-related letters have been published and widely distributed. One of these enshrines Holmes' fifty-year friendship with the British lawyer Frederick Pollock, who was notable for a long career as politician, legal historian, and academic. The second reveals Holmes' willingness to thrust and parry with the Fabian philosopher Harold Laski (1893-1950), more than fifty years his junior.⁵⁰

In recent years, much of the contact between American and English lawyers has been through the agency of academic exchanges and foreign study. The end results typically take the form of articles or books written by legal academics. Alabama's own Professor Harry Cohen (1927-2008) traveled extensively in England and studied the structure of the English legal profession, publishing articles comparing the British Legal Association with professional organizations in America—all the while pursuing interests in American laws of water resources, land-use management, mortgage law, and legal ethics.⁵¹ The noted scholar David F. Partlett, recently Dean of Emory

information, see Eli N. Evans, JUDAH P. BENJAMIN, *THE JEWISH CONFEDERATE* (New York: Free Press, 1988).

⁵⁰ Mark De Wolfe Howe, editor, *HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932* (SEE N. 31, SUPRA); AND MARK DE WOLFE HOWE, editor, *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935*, introduced by Felix Frankfurter (Cambridge: Harvard University Press, 1953). Other (less legal) collections of Holmes' correspondence have also been published; he was an indefatigable letter-writer, and he remained active into his nineties. Of course, not all transatlantic correspondence was carried out between equals. Alabama native Hannis Taylor (1851-1922) was a prolific legal writer whose works achieved respectable sales. Nonetheless, in two letters written to English historian J.B. Bury of Cambridge University (October 14 and November 25, 1908) Taylor takes a wheedling tone in promoting his book *THE SCIENCE OF JURISPRUDENCE: A TREATISE* (New York: Macmillan, 1908). After boasting about the reception his book received among "the great German doctors at Leipsic," Taylor adds: "If you great people at Oxford and Cambridge are as kind, I will have nothing more to ask." These letters are pasted to the end-sheets (from and back) of a copy of Taylor's *SCIENCE OF JURISPRUDENCE* held in the Special Collections Department of the Bounds Law Library.

⁵¹ See Penny Gibson and Bailey M. Harned, "Harry Cohen: A Bibliography of His Life's Work," in *JOURNAL OF THE LEGAL PROFESSION*, 32 (2008), vii-xii, especially x; and Steven H. Hobbs [untitled tribute] in *JOURNAL OF THE LEGAL PROFESSION*, 32 (2008), xiv-xxii, especially xvi-xvii.

University Law School, has enjoyed academic careers in both Australia and the United States, and has written on diverse topics.⁵²

Why, apart from historical interest and the joys of tourism, are the legal worlds of England and America so closely linked? Perhaps it is because the two bars (and their academic support groups) share a modern version of what has been called the “common law mind.”⁵³ This is a frame of mind that prefers to settle conflicts in an adversarial forum by means of agreed-upon procedures—rules and traditions (precedents) that operate within standards of fairness, whether the matter at issue is a matter of private contract or the larger social contract. Within this system, “due process” is an essential component.

But, a further presumption is that while government will serve as arbiter and enforcer, all the parties involved have certain civil rights—rights that in the last analysis may “trump” the powers of government. One scholar has argued that by the late eighteenth century a “rights daemon” presided over the American legal mentality, fueling a “rights-obsessed, common-law constitutionalism,” itself informed by the published theories of seventeenth-century English Whigs.⁵⁴ But out of these shifting mazes of ideology and precedent emerged an attitude embraced by lawyers on both sides of the Atlantic. This is the persistent, unabashed, ultimately principled willingness to do battle for one’s client—the mannered ferocity that fictional lawyer, Horace Rumpole, calls simply “the courage of an advocate.”⁵⁵

⁵² See, for example, David F. Partlett, *PROFESSIONAL NEGLIGENCE* (Sydney: Law Book Company, 1985); and Barry Nurcombe and David F. Partlett, *CHILD MENTAL HEALTH AND THE LAW* (New York: Free Press, 1994).

⁵³ J.W. Tubbs, *THE COMMON LAW MIND: MEDIEVAL AND EARLY MODERN CONCEPTIONS* (Baltimore: Johns Hopkins University Press, 2000); see also J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (New York: Cambridge University Press, 1987).

⁵⁴ Stephen A. Conrad, “Review: The Constitutionalism of the Common Law Mind,” *LAW AND SOCIAL INQUIRY*, 13 (Summer 1988), 619-636, especially 628-629. See also Beverly Zweiben, *HOW BLACKSTONE LOST THE COLONIES: ENGLISH LAW, COLONIAL LAWYERS, AND THE AMERICAN REVOLUTION* (New York: Garland Press, 1990).

⁵⁵ Mortimer, *RUMPOLE OMNIBUS*, 166 (in the story “Rumpole and the Learned Friends”).