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Liberty, Community, and the Free Man in Magna Carta

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LIBERTY, COMMUNITY, AND THE FREE MAN IN MAGNA CARTA

A Dissertation

Submitted to the Graduate Faculty of the
Louisiana State University and
Agricultural and Mechanical College
in partial fulfillment of the
requirements for the degree of
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The Department of Political Science

by

Benjamin L. Mabry

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To my wife, without whose endless patience this work would not be possible

And to my children, for whom this was written, in hope that the memory and spirit of liberty will remain in their hearts, and in their own children's, until these words, too, are relegated to time immemorial

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Abstract

This dissertation is an overview of the concept of liberty and community in Magna Carta. The central point is the ethical understanding of liberty which Salisbury calls the *habitus* of liberty. Liberty is an ethical condition of the individual which exists in tension and parallel to the social status of *Liber Homo*. This dual characterization of liberty is the causal factor behind the understanding of Magna Carta as both document and event in constitutional history in the related History literature on this topic.

Because Liberty is understood in Magna Carta as a *habitus*, the particular behaviors associated with liberty, referred to in the modern parlance as rights, take on a significance that is distinct from their modern understanding. The practice of rights contributes to liberty but is not constitutive of liberty, as rights are exterior manifestations of an interior state of freedom. Insofar as the practice of free behaviors aid in the formation of personal character, they are helpful and good, but the deprivation of these behaviors, even by force, does not deprive the individual of liberty. Liberty, as a characteristic of personality, can only be lost when the individual voluntarily surrenders to servility. The medieval writers links this to Christian liberty of the soul; freedom is to virtue as slavishness is to sin. The characteristic of liberty is identified with the redeemed Christian soul and the transformative element of *habitus* in Aristotelian ethics is identified with the Pauline *renovatio* of the soul through the Holy Spirit.

The elements of the *vita libertatis*, presented here as a refinement and completion of the ancient *vita activa*, are identified as a particular understanding of community as a multidimensionality of relationships which intersect on the individual upon diverging ontological, temporal, and relational axes, and are expressed through the typical life of a free individual. The 12th Century *Liber Homo* lived as a warrior, a landholder, a friend, a Christian, a judge, and a leader. Like the understanding of rights, these roles are not constitutive of the free life, but contribute to it. The challenge is to examine our own lives through this foil.

Introduction

Few words have caught the imagination of the ages like the *Liber Homo* of Magna Carta. There are numerous uses of this phrase throughout the document, as well as hundreds of years of commentary on the nature of this freedom and free man throughout the English-language tradition of politics. It would not be excessive to say that 1215 began an era in politics which would reverberate through the centuries up until the present day, and that all modern English-speaking peoples are deeply indebted to the authors of Magna Carta in their present legal and political systems.

That being said, the great problem of studying Magna Carta is indeed its popularity throughout the ages. What men like Archbishop Langton meant by *Liber Homo* has been obscured by hundreds of years of commentaries, interpretations, and modern reinventions of the document, not to mention the changes in the English language itself and the problems of having a document which is understood in English but written in Latin. When one reads books on Magna Carta, the natural question arises: is this Magna Carta Langton's, Coke's, Selden's, Blackstone's, Jefferson's, Mill's, or simply a product of modern academic legerdemain? For this reason, a set of parameters must be laid out, so that the scope of this study of Magna Carta's Free Man may be clearly understood for what it is, and for what it is not.

First, *Liber Homo* must be understood as both a concrete social class in 13th Century England defined by their property, legal standing, and social role, as well as an aspirational model similar to the Miles Christi of St. Bernard or the ideal monk of St. Benedict. A study which neglects either side of the *Liber Homo* will get an incomplete picture of what Magna Carta means, either through ignoring the significance of liberty as a central organizing symbol of Anglophone politics or through forgetting that the rights and liberties of Magna Carta are not an early manifestation of universal liberal Rights of Man, but an expression of particular social and political circumstances which arose under the Angevin kings and settled a practical dispute between living actors no more abstract than modern political disputes.

Second, the scope of this project is limited by the reigns of William I and Henry III, with greatest focus on the reign of Henry II. Edward I reformed the government in ways that changed the meaning of Magna Carta for future generations, especially having to do with the role of the House of Commons. The Conquest is no longer a limit to historical study, thanks to the work of many Anglo-Saxonists in the 20th Century, but the role of Anglo-Saxon ideas and institutions in post-Conquest England is a topic complex enough to require a full treatment of its own, rather than the cursory glance which this work can afford it. The vast bulk of this text will examine the great minds and politicians of the generation of Henry II, because this is the period where the origins of Magna Carta primarily begin to bud.

Lastly, the treatment of liberty must reject modern ideas which color Magna Carta in a way to obscure the earlier understandings of the topic. Liberty must undergo a process of de-reification to undo the 18th and 19th Century's transmutation of the concept, and to restore the broader meaning of liberty as it was understood by medieval thinkers. It must be restored to the context in which liberty existed before the Commercial Revolution of the Renaissance; Magna Carta has numerous other clauses relating to liberty that modern thinkers tend to separate and thereby lose the depth of meaning which liberty had to men like Langton. As an example, Article 1 states, "*In primis concessisse Deo... in perpetuum quod Anglicana ecclesia libera sit, et habeat jura sua integra, et libertates suas illesas*¹." There are five uses of the word "liber" in Article 1, including the first usage of *Liber Homo*, and yet few studies of Magna Carta describe the role of Article 1 in understanding the meaning of liberty within the document.

In conclusion, the goal of this dissertation is to capture a small piece of the spirit or experience of the *Liber Homo* within the context of 12th Century English society as it is displayed within Magna Carta. The means to this end will include the study of legal documents antecedent to Magna Carta, the

¹ At the beginning we conceded to God... that the English Church be perpetually free and have her justice in its entirety, and her liberties inviolate.

great social, political, and religious writers of Henry II's reign, and a survey of the secondary literature about both of these. Throughout this study, there will be three major themes which will help illuminate the way that Magna Carta is unique in its understanding of liberty and in the role of the Free Man. These themes are the nature of Liberty as a Way of Life rather than an object that can be possessed, Liberty within the context of a Free Society rather than an attribute of atomistic individualism, and the relationship of the Free Man with his Free Church.

Defining the Liber Homo

Under a harsh prince and in evil times, one must be bold in order to be good.
– Martial

As mentioned before, the *Liber Homo* must be understood as a two-sided symbol, of both a social class within 12th Century England and as an emerging ideal of English liberty. It is only by addressing both that Magna Carta begins to reveal its meaning in its full interpretation. Without the former, Magna Carta becomes a kind of Rorschach Test which takes on the dominant meaning of the scholar's own age, be it the Whig Liberalism of the 17th Century or modern democratic theory. Without the latter, Magna Carta is an obsolete document about feudal tenures which has little relevance to modernity. Only when both are understood together can Magna Carta take its place as the foundational stone of the Anglo-American Constitutional order, anchored in its historical place while aspiring toward a higher ideal of liberty and a rightly-ordered society.

The primary problem of understanding the Free Man of Magna Carta by modern readers is the memetic decay of the philosophical symbol of liberty over the last eight hundred years. The symbol of *Liber Homo* in Magna Carta is the representation of an experience of a particular way of life in both its practical essence and its aspirational nature, meaning that the understanding of what *Liber Homo* means is driven by both the lives lived by free individuals and the ideals with which these people judged themselves and aspired toward. It is absolutely crucial that the particulars, or what one might today call

the “rights” of the 12th Century *Liber Homo* not be severed from the aspirational aspects of the symbol, as modern universalists often do, as the aspiration derives from the experience of practical life, rather than stemming from a void. In other words, the yearning for liberty is a product of a particular culture and pattern of life which values liberty as an abstract and ideal, and within which liberty is given a coherent meaning and finite boundaries. A stone-age hunter-gatherer society will not produce this outcome, for their way of life does not produce an experience which will conceptualize liberty, or produce a yearning for liberty as such, and therefore their language will probably not even have such a word to describe liberty as anything other than not-slave. Likewise, as English society moved away from the particulars which defined the Liberty-culture of Magna Carta, the experience of life deviated from that which produced the original symbol, changing its meaning in such a way that the unchanging form of the written document began to lose coherence and eventually meaning, as occurred in the “Dark Ages of Magna Carta” from the beginning of the Wars of the Roses until the beginning of the Stuart Constitutional Crisis (Holdsworth 1936, 287).

This decay has taken the form of the reification of liberty under Enlightenment and Modern political philosophy until it became a special kind of property or object belonging to an individual, shorn of metaphysical or philosophical content and thus made subject to the laws governing economic rationality rather than the higher law of the classical and medieval world. As liberty is understood by modernity as an object rather than a state of being, in short, it is regulated, litigated, and understood as a property in a specific kind of action. Freedom of speech is a property in the action of public expression, whose limits are defined economically, in the terms of a limited public good of access to the means of public speech, and which is redressed by economic sanction on those who infringe upon said property of speech rights. Furthermore, the loss of the philosophical content of liberty removed its telic properties, thus depriving liberty of its essential purpose and its social character as a principle of just social order. Rather than the medieval understanding of freedom of speech as arising from an

obligation to give good counsel to one's liege, modern freedom of speech has no overriding purpose other than the incidental goods associated with its practice.

The paradigm of this memetic decay can be found in Hobbes's *Leviathan*, which is the first work to explicitly turn the Free Man into a possessor of a property in "rights" and transforms the medieval "*ius*," meaning justice as a state of proper civil order, into a set of actions which belong to the individual as personal possessions. The entire Social Contract theory capitalizes on this transformation, which forms the root of the classical liberal notion of "Natural Law" as a concrete set of axioms bestowing a property in specific actions to all individuals. It is utilitarianism of the kind espoused by Mill, however, which forms the basis of the modern understanding of liberty in the Anglophone world, which completes the process of reification by placing liberty under the rule of economic law, such that the nature of an individual's property in liberty is subject to such economic laws as cost-benefit analysis and the minimax theorem with the assumption of an equal and opposite property in liberty possessed by others. Hence, all modern English-language definitions of liberty are understood within this context of utilitarian contract and property law, which causes documents like Magna Carta and other documents written before the Commercial Revolution to take on meanings which bear no relation to the original understanding and either distorts the understanding of the document, or makes it altogether nonsensical; Jenks's accusations regarding Magna Carta highlight both of these tendencies simultaneously. When he states that *villeins* were unable to actualize the right to travel, or that "real" liberty would have meant freedom from feudal obligations of toll and labor for the cottager, Jenks is nearly speaking a different language from that of John of Salisbury or Archbishop Langton (Holt 1972, 25). Jenks's understanding of liberty is wholly composed of materiel goods and financial products; to be free for Jenks is to have things. This is what is meant by the modern reification of Liberty.

This is not to say that the understanding of Liberty in Magna Carta was completely lost within the Anglo-American tradition, but that it fell out of the mainstream and remained solely within certain subcultures and political movements. Certainly, the Parliamentarians of the 17th Century and American Founders in the 18th drew upon elements of Magna Carta in their respective conflicts against the English Crown, and this is not to deny that Magna Carta influenced their ideas and objectives. However, neither of these groups is representative of Magna Carta itself, but of their own particular ideology formed around their own experience of existing within the context of societies vastly different than that of the Baronial Party in the early 13th Century. Langton's Liberty is not Coke's, which is not Jefferson's, and while there are resemblances, the latter two bear the imprint of the Commercial Revolution and the Enlightenment, respectively, which colors the way they understand the crucial symbols surrounding their movements. Nevertheless, these writers and others serve as vessels of symbolic meaning by transmitting elements of their predecessors within their own work, like a kind of memetic genetic ancestry, and so forming a long tradition of a particular understanding of liberty that one might compare to a "memory" of liberty within a culture (Sandoz 1993, 4; Smith 1985, 9). These vessels can be practices, institutions, ideologies, governments, faiths, or any other manifestation of culture, all of which are certainly mortal, but grant longevity to the political symbols they bear by passing their ideas on to new carriers, albeit often in a mutated form. Central carriers of the symbol of liberty in Magna Carta were the document itself, the English government, English national identity, and especially the Christian churches, as will be discussed later.

To truly understand Magna Carta, then, means to shed oneself of the centuries of decay surrounding the original symbol of liberty as it was understood and experienced by the men of the 12th Century and to take on with fresh eyes the earlier understanding of the nature of liberty and the qualities which define the Free Man. For example, John of Salisbury calls liberty a "*habitus*," which can be translated as condition, disposition, or nature, and this understanding of liberty is probably drawn

from Cicero's *De Inventione*, which was one of Cicero's early works on Aristotle, as "*habitus*" is Cicero's Latin translation of the Aristotelian concept of "*hexis*," or the second nature formed by the internalization of virtuous actions into a characteristic of the soul (Nederman 1983, 207). The result of understanding Liberty in this context is that it ultimately changes the nature of a free society, so that Magna Carta does not make England free but simply states the pre-existing fact that England is a free nation. As a Common Law nation, the laws are understood to be the written reflection of a pre-existing unwritten order, such that law is not made, but found (Sandoz 1993, 21; Stoner 1992, 3). Likewise, Magna Carta does not make the nation free, but identifies the predominant national character of liberty found within the people: the *habitus* of liberty as displayed through cultural characteristics which a modern observer might call "rights".

In the *Categories* and the *Ethics*, Aristotle defines this idea of "*hexis*" which becomes *habitus* in Latin. Ostwald translates the word as characteristic in the *Ethics*, and Aristotle describes two major features of the virtuous characteristic. A virtuous *hexis* is the "excellence" of a thing which makes it good, as well as causing it to perform its function well (Oswald 1999, 41). If Liberty is a virtue as John of Salisbury states, it is a characteristic of the soul, it makes men perform their roles well, and most importantly, it creates an identity between the Good Man and the Free Man. This single innovation defines Liberty as something that cannot be divorced from ethics or religion within the context of Magna Carta: to be Good makes one Free, to be Free means to be Good. The wicked cannot be Free, and the Free who are wicked are no longer Free. This principle undergirds English Law in the 11th and 12th Centuries, wherein justice is a joint concern of the King and the bishops, and the lines between ecclesiastical and lay jurisprudence blur where crime and sin are hard to distinguish.

Therefore, for the purposes of politics, liberty is understood and exhibited as a way of life within the context of a free community defined by particular cultural traits. Liberty itself is a state of being that

has a single essence; liberty is one, as the Norman lawyers so keenly pointed out against the old Anglo-Saxon practice of the “half-free” man (Pollock and Maitland 1898, 407). However, liberty is not a universal trait but is deeply tied to the particular characteristics of the Free Man within the context of English culture and society. The many freedoms or rights which are attributed to the Free Man do not constitute liberty, such that the sum of the many freedoms form liberty itself, for as Aristotle argued with virtue, there is a transformative component that takes the particulars of virtuous or free actions and reconstitutes them into a new nature within the soul. It is the practice of a Free Man’s way of life, defined by the particulars of English culture, which form the *habitus* of liberty, like courageous actions form a *habitus* of courage, and although the final end, the second nature or characteristic of the soul which one calls liberty or courage, is another thing entirely from the actions which endowed the soul with its new nature, nevertheless they are intrinsically linked, as progenitor to offspring. Though the philosopher makes this distinction, however, the perennial question of “liberties” versus “Liberty” is deemed to be a meaningless question. As Holt says, for the purposes of Magna Carta and practical political exercise, there is no real difference because the latter flows out from the former (Holt 1972, 8). The one who practices the rights is assumed to be the one who is Free, and vice versa, for without a mirror into the soul of the individual, how is one to distinguish the truly free from the one merely acting? Like Aristotle says, whether a man is truly virtuous in his heart, or if he is merely acting virtuous, is not the concern of the lawgiver, whose goal is to create virtuous behavior, or ethos, which inevitably creates those very *hexeis* within their actor (Oswald 1999, 33). Hence, Magna Carta must look at Liberty as a way of life, or a manner in which individuals act within society, for this is the only proxy by which to approach Liberty as *habitus* from the starting point of the legislator. To borrow from the Gospel: “Ye shall know them by their fruits” (Matthew 7:16), and as Aristotle demonstrates, in times of adversity, the truly virtuous will distinguish themselves from the truly vicious, or in this case, the free from the unfree (Oswald 1999, 175).

The ideal of liberty as *habitus* then links to the practical element of the Free Man as a social class through the medium of the Common Law, which exists both as the royal law to which all free men are entitled to claim, as well as a proxy for the Natural Law itself. As Stoner says, legal reason within the Common Law is the sum of all wisdom and experience of every generation of English kings and judges, composed not of axiomatic statements but particular rulings on the exigencies of individual cases (Stoner 1992, 23). This means that Common Law sets forth an understanding of justice within the particular institutions, way of life, and cultural circumstances of the English Free Man, and is therefore an expression of Liberty as a particularly English ideal rather than a universal human ideal. Law, when vested with the authority of a regime or republic, shares in the mortality of that regime or republic. In such a way, the Twelve Tables of Rome lost all power to propagate the ideals and political symbols of Rome's founders when the Republic failed. On the other hand, law when vested with the authority of a people survives as long as that people themselves survive, being rooted in pre-history and therefore being timeless (Smith 1985, 9). This is the ultimate difference between the United States Constitution, for example, and Magna Carta; the American Constitution stands on the continued existence of the United States Government and passes away when the Republic fails, while Magna Carta stood on the existence of the English people, rooted in a culture of a people who did not dissolve before the Norman Conquest, but rather absorbed their invaders. The Common Law, when placed within this dichotomy, clearly resembles the latter, as its authority lay in usage rather than the enactment of any particular King, and its continuance relies on the presence and influence of a culturally English society, who saw the origins of the Law reaching back into their fabled past.

For the Common Law thinker, all law is by nature heuristic, even (or especially) natural law: limited rather than universal and subject to contingency and irrelevancy. The focus in Common Law on precedent, derived from countless iterations of judicial reasoning on particular cases rather than universal statements of law, demonstrates the centrality of the particulars of culture to the nature of

liberty and the Free Man. There is no great law within Magna Carta declaring men free like Article 1 of the 1789 Declaration of the Rights of Man, because such a declaration would be meaningless under Common Law. Liberty is a condition, wherein something either is, or is not free, and which is determined (practically, not philosophically) by the cultural context of society, not by law. Law describes the privileges and characteristics of liberty, but is powerless to make a single person free or unfree. Instead, the Common Law has a dual role: to provide a pattern of imitation and education to aid in the creation of the *habitus* of the Free Man in each individual, and to in turn reflect the particular characteristics of Free Men in the age through the creation of new precedent. This Janus-like character of the Common Law, looking back at examples of liberty in the past and forward at the evolving customs and practices of free men, is an example of the commonly-stated timeless-yet-evolving nature of Common Law, as it is expressed through the Law's account of the Free Man.

Liber Homo and *Tocius communia terre*

Having turned about, he began to implore his faithful ones to resist and defend himself with his hands, often calling out that he was a free man in a free country.

– The death of Dumnorix of the Aedui, from *Commentarii de Bello Gallico* Book 5 Chapter 7

Another consequence of the reification of liberty in modern political thought is that the notion, in becoming property, has also become private. Reified liberty follows the transformation of property in the latter Middle Ages from a concept rooted in community to a possession of individuals alone. Modern discussions of liberty take the form of measuring the liberties of some individuals against the liberties of other individuals, with an emphasis on equality that only makes sense within the context of a reified liberty which had the characteristics of being essentially private and exclusive, rather than social and communal. The attack on Magna Carta's feudal character, therefore, proceeds from a modern set of assumptions about the nature of liberty and equality that simply do not make any sense within the context of Magna Carta's philosophical background and cultural milieu. If liberty is understood as a characteristic of a person which is formed through the specific social and cultural contexts of a particular

nation, namely England, then applying Rawlsian-type standards of equality before the veil of ignorance to Magna Carta is patently absurd. The meaning and content of the Free Man's life is formed by pre-existing cultural and social characteristics; society as it exists makes Men free, not the other way around, as it is envisioned by Social Contract theorists. Standing on the assumptions that form the foundation of Magna Carta, criticizing the document for unequal freedoms makes as much sense as criticizing modern political thought for unequal SAT scores or unequal height.

The removal of the telic content of liberty by Enlightenment and utilitarian thinkers also contributed to the privatization and reification of liberty by removing the underlying purpose of political liberty, namely the creation of a social order conducive to the pursuit of a highest good, which in the time of Magna Carta was defined as eternal felicity in Christ. While this provided the basis for the centrality of the Church to the political order, which will be discussed in another passage, in the more abstract sense removing the *telos* of liberty from the construction of the symbol created a void in its meaning. If liberty no longer has a purpose, its social character dissolves and liberty sinks to the level of personal preferences, as it lacks a reason to choose any one set of ends over another. As mentioned before, Liberty is defined as a characteristic of the soul which is displayed through a particular way of life; without the guidance of purpose, no one set of behaviors is better than another, and the *habitus* breaks down under the influence of behaviors promoting servitude. The root of the *villein* class, according to Stubbs, may just lie in a similar situation, where a significant proportion of the commons may have voluntarily surrendered their liberty in order to be free of the obligations of freeholder status, including taxes and military duty (Stubbs 1979, 41). Whether this is a truth or a product of Stubbs's speculation, it does serve as an illustration as to how a loss in the telic properties of liberty make it unsustainable; while "free" of military service and the Danegeld, the *villeins* are by their very definition unfree. The social elements of the Free Man's way of life, such as court attendance and military duties, derive from the fact that Liberty was understood to have a purpose, and part of that purpose was to

fulfill a role within society rather than seeking personal gain by avoiding the liabilities of freedom.

Liberty was not understood as the mere pursuit of personal preference within the sphere of activities left unregulated by the Sovereign.

Therefore, it is central to the project of this dissertation that the relationship of liberty to community be clearly demarked and demonstrated to set Magna Carta within the proper framework for understanding its philosophy of the Free Man as one who bears a *habitus* of Liberty. Since *Habitus* is deeply intertwined with culture and way of life, the fact that the Free Man's way of life is deeply social must be emphasized against the utilitarian impetus to privatize and atomize liberty into the sphere of the personal. The fulcrum of the relationship of liberty to community is the notion of social and political obligation which underlies position held by the Free Man in 13th Century England. The experience of a well-ordered society is inseparable from the obligation to maintain that order when the individual understands themselves as a participant rather than merely a passenger within that society (Sandoz 2001, 27) and given that Liberty is the essential value which undergirds Magna Carta's argument about the nature of political society, the Free Man especially holds a position at the center of that order.

With the rise of the feudal contract as the basis of political order, replacing or overshadowing previous understandings of theocratic rule by a king as vicegerent of God, the free person understood as all men excluding *villeins* took on a role that seemed similar to the Aristotelian citizen but developed independently and upon a different basis, namely that the Free Man was simultaneously *dominus* and *vassalus*, or governor and governed (Holt 1992, 48; Ullmann 1961, 163; Ullmann 1966, 31). This derives from the nature of the feudal contract, wherein every man was vassal to the King, if not to another Lord, while also being Lord to another, for each free man, if nothing else, was in the Anglo-Saxon legal language a *husbond*, or master of a household, and exercised powers of dominion on the land where he settled over members of an extended family including a spouse, children, tenants, and servants (Stanley

2009, 37). This notion of governor and governed does seem to parallel with the classical notion, which is recognized even in that time, but the feudal relation embodied in this ideal is in no way related to Aristotelian ideas of citizenship due to the complete abandonment of the ideal of consent in favor of a central organizing principle of loyalty (*fidelitas*). Writers up until the age of Fortescue do often cite Aristotle, but their citation is opportunistic appropriation of an authority rather than any adherence to the principles of *The Politics* (Ullmann 1961, 192; Ullmann 1966, 80). The response of the nation to successive conquests by Cnut, William of Normandy, and Henry FitzEmpress, all Kings who were foreigners as well, demonstrate the vast difference in understanding of the role of King and the obligations of vassals. None of these men are contemporaneously declared tyrants because the measure of a good King relies more on his fidelity to his vassals than any consent-based notions of legitimacy. William I received less opprobrium from historians than his son and successor, due largely to the fact that the father was a powerful ruler who kept faith with his vassals, while the son had a great reputation for abusing both his vassals and the servants of the Church, who, as it could be said, bought ink by the barrel in their own day.

In addition to the role that the Free Man played as both Lord and Vassal, the Free Man within the context of society was defined as a judge; until the closing of the bar by Edward I, every free person participated in litigation and judging within the courts of the hundreds and the Shires (Downer 1972, 103; Holdsworth 1936, 229). The particular litigiousness that Holt finds among the freeholder class in England is a product of their intimate familiarity with the court system and their involvement in every level of its operation, from the hundreds all the way up to the Royal courts (Holt 1985,189). According to the *Leges Henrici Primi*, any person may be called to be a judge in the King's court with the exception of the unfree *villeins* and cottagers (Downer 1972, 131). The local justice system inherited by the Normans from the Anglo-Saxons was remarkably open to participation by all levels of free society, such that participating in this would have been a perennial feature of life and the details of the operation of

the court was such common knowledge that Edward I banned all use of English in the court in his attempt to close to bar to all but those trained at the Inns of the Court (Holdsworth 1936, 229). Given the central argument above, that Liberty is a kind of virtue and that the *habitus* of Liberty is a state wherein virtue becomes a permanent element of the soul, the role of judge becomes the natural role of the Free Man within society, as the Good Man, who is the Free Man, is the one fit to give judgment on matters of justice and right. In the courts, the judge is called upon to describe the laws and customs of the place, often being described as *sapientes* in texts like the *Leges Edwardi Confessoris* (O'Brien 1999, 158). It is in this role as "wise judge" that the Free Man takes on many elements similar to the Stoic understanding of Liberty, where Free, Wise, and Good are all synonymous and coexistent.

The social characteristic of Liberty in Magna Carta must also take into account the nature of community as an organic bond of the individual to kith, kin, and country in a way that precedes and trumps all other political associations, wherein personal homage alone is the only political bond capable of rivaling this loyalty. The Free Man of Magna Carta was not a member of the burgesses, but a man of the soil: if not a farmer himself, at least a landlord. With this connection came the characteristic legal, social, and cultural attachment to the land itself; the Free Man is not merely a landowner in the capitalist sense, but is bound on either side by obligations to the past and future in the form of his ancestors and descendants. The laws set numerous restrictions on the alienation of lands, along with numerous rights of the heir, which reflect a society that does not understand landholding as an economic function of an individual but as a social and political act of a steward drawn from a body of owners including the dead, living, and yet-to-be-born. The Free Man is a landowner in a sense, but his ownership is in equal part with his ancestors and descendants; it is here that the continuity of liberty and land are intertwined as a particularly English heritage and the link of liberty to English history become manifest in the experience of the individual. When called into question in a court of law, a man demonstrates his liberty by showing that his father, his grandfather, and his great-grandfather were free

(Downer 1972, 243). There is a real understanding in this culture that a person exists as more than an individual, but as a chain of individuals reaching back into antiquity and going forward into the indefinite future, so that the antiquity and ancient constitution of England is coterminous with the ancient right of the individual free person. Land, liberty, and ancestry are blurred together; the land itself is blood kin to the individual, as it bears the bones of the ancient fathers, while the liberty of the land is the liberty of the individual, and vice versa. This connection of the individual to ancestors and descendants through the land and the customs of the land forms the ultimate and final defense against tyranny, grounding the individual in a place, time, order, and relationship to his neighbors (Smith 1985, 163). This understanding of human nature is radically different from the materialist individualism of liberal thinkers like Hobbes and Locke which declares each person to be a radically autonomous atom, bound to one another only through commercial and political contract.

The result of such an understanding of human nature and attachment to the land is a view of history that conflicts sharply with the classical philosophic understanding, wherein the national symbolic history takes preeminence and the hero is the representative of the nation as a whole, while the “true” history becomes nothing but a distraction from the political and moral lesson taught by the national history (Smith 1985, 28). The English form of apocalypticism, however, is post-millennialist rather than the usual pre-millennialism of the more common gnostic thought. As such, it is much harder for English History I (national history) to be appropriated by “egoists” who use it to construct a “world-plan” leading to a final apocalyptic final stage of history where the English Empire and Christendom exist in essential union (Voegelin 2000, 255). The English “History I” gives meaning to the present through an illustration of the good to which the English aspire, without universalizing it to a good to which all men should aspire. Thus, they display elements of the delusional national mythologies which led to the collapse of what Voegelin calls the “cosmological-style” of historiography, and will lead to a collapse of the English understanding of history in the late 12th Century. England was seen as the possessor of a unique

relationship with God, through which a special covenantal relationship exists between the nation and Heaven through the person of the King, and why it is possible for England to have its own ecclesiastical history as described by writers like Bede, Wulfstan of York, and St. Aelred. Central symbols are heavily borrowed from Hebrew scripture, including that of the Davidic Monarchy, the Captivity, and restoration of the Kingdom, namely through the persons of St. Edward the Confessor and later Henry II.

Magna Carta, however, creates a new framework for the self-interpretation of the English and ends the long train of semi-sacred Kings whose laws are analogous to the Covenantal Law of Moses, and in the case of Alfred the Great, who even include the Mosaic Laws in his own Lawbook (Holdsworth 1936, 215). The chaotic events of the late 12th and early 13th Centuries, from the absenteeism of Richard I to the civil wars between King John of the Barons, force the abandonment of the Imperial civil theology of England as a covenantal nation and admit a new historical theory based on the centrality of law to English identity. Magna Carta firmly denies the nature of the King as mediator between God and the Nation, rejects the history of England as being a sacred history built upon the model of Israel, and replaces the King with the Law itself as the mediator between God and the Nation. The conflicts between Royal and Church power serve more than just a conflict of two powerful institutions over political influence and wealth but shape the way the English understand their place in history. The Conquest reorients England toward Rome and toward Christendom as a larger ecumenical territory than the Anglo-Saxon fixation on the British Isles, while the three-way struggle between the King, the Popes, and the Archbishops of Canterbury during the Investiture Crisis allow the Church to restore its independent status, or its freedom, from the Crown and thereby re-divide spiritual authority from secular.

It is this particular and parochial understanding of the community and history of English Liberty that is fundamental to understanding Magna Carta and its heritage, especially in showing how it

contrasts to the Enlightenment traditions like Jacobinism and Utilitarianism. Magna Carta is a manifestation of an English culture of Liberty which understands itself as bounded by its very Englishness. This cultural boundedness of English Liberty is one of the identifying characteristics of the Magna Carta tradition which sets it apart, even as late as Burke. In his *Letters on a Regicide Peace*, Burke identifies this boundedness as the difference between a true tradition of Liberty and a false tradition of Liberty. The universalism of Jacobinism combined with the power of the French civil state turned it into an “armed doctrine” which was impelled by its creed to “liberate” all other nations into its own image. The universalism of Jacobinism made it necessary to conquer the world, for if the Jacobin tradition of liberty is the truly human tradition, then any nations who failed to abide by it were enslaved. On the other hand, according to Burke, the English tradition was not universal but was bounded by the sphere of England’s people, hence his statement that the tyrannies in Algeria and Burma were, truly, not the concern of the English (Burke 1999, 145). There was no great Magna Carta crusade to liberate the Scottish from unreasonable reliefs and ameracements or to protect Irish freeman from being disseized without judgment of his peers, because Magna Carta’s understanding of Liberty is for the English alone, and it leaves to everyone else to find their own way of dealing with the question of a free community and a free people. Like Aristotle and John of Salisbury argue, the means by which a *habitus* is formed is through repetition of particular behaviors, that the median of virtue is relative to the individual or culture, and that universalism destroys the mean by enforcing an identical measure on dissimilar agents (Nederman 1986, 135). To put it another way, “Every man has a right to his own [people’s] law,” and the Common Law is the Law of the English (O’Brien 1999, 193; Pollock and Maitland 1898, 13; Wormald 1999, 31).

Liber Homo in a Free Church

Ye shall know the truth, and the truth shall make you free.
– John 8:32

As mentioned before, one of the most neglected aspects of the study of Magna Carta is the link between Liberty and the Church, a link deeply evident in all major legal and philosophical documents of the era. The first thing to understand is that Liberty is a religious ideal independent of and perhaps even preceding the secular ideal of political liberty. From the *Gospel of John* to Augustine's *City of God*, the theme of liberty is central to Christian theology. The notion of Liberty as a *habitus* may have first been described by John of Salisbury, but Augustine clearly describes Liberty in terms of virtue, as a gift of God to Man which can only be lost through sin (Dyson 1998, 942). Like the description of liberty given before, this understanding of Liberty in Augustine's writings is primarily concerned with moral character rather than the worldly manifestations of status or rights. The primary difference between the Aristotelian ideas of John of Salisbury and Augustine's liberty is the element of the grace of God; for Augustine, Man may not achieve the liberty from sin through his own earthly effort, as John describes the creation of the *habitus* of liberty from vice. The Grace of God is necessary to change the will of the individual from an enslaved will which is subject to the flesh into a free will which can see and thereby choose the good, which is love of God.

The great gulf between Aristotle and Augustine in these two accounts of Liberty is not in the nature of liberty; both for the philosopher and the Churchman of the Middle Ages, Liberty is a *habitus*, a characteristic of the soul, and it does function to make Man good and to help Man better fulfill his function, which is to seek blessedness. The gap is found in that Aristotle does not identify the transformative element which turns learned behavior into a permanent characteristic of the soul, while Augustine defines this element as the Grace of God, extended by the sacrifice of Christ on the Cross. It is not hard to take the step and argue that these conceptions of Liberty are essentially identical and

thereby closes the gap between the Christian and Philosophical understanding of Liberty in the Middle Ages, as was asserted by many Medieval writers themselves (Bolgar 1977, 3; Morris 1987, 15, 57). John of Salisbury never explicitly states this connection, but in his criticism of Classical Philosophy he claims that the ancients err by substituting personal virtue for the grace of God, and thereby should accept the good from philosophy while abandoning the error (Nederman 1990, 148). For this reason, it is entirely rational to treat medieval writers as coming to the same conclusion about this identity between Aristotle and Augustine, and for the rest of this dissertation, the underlying assumption will remain that Aristotle and Augustine, hence the secular and religious definitions of liberty, are essentially identical in regards to this question.

Secondly, the character of the Church within the context of society deserves mention, especially with regard to the Free Man. The Church was defined as the whole body of believers, and in this way was a corporate body, unlike the state which was defined through the feudal relationship as a *foedus* or federated association. Granted Augustine's acknowledgement that not all members of the earthly Church were also members of the True Church, the spiritual body of Christ, it was the Church that formed the bond of true association between all men; equality before heavenly justice spurred equality before earthly justice, and it is in ecclesiastical writings on law that equality before the law becomes a major theme of English jurisprudence, that equality being one of the prerequisites for a free society built on the foundation of a broad class of Free Men. Just as there is neither "bond nor free... in Christ" (Gal. 3:28), one of the great maxims of the Common Law in the wake of Magna Carta is that there is no unfree before the Law, but free and equal Men, whose private obligations of labor or villeinage were extralegal and therefore irrelevant before the court (Holdsworth 1936, 212; Pollock and Maitland 1898, 415).

One of the patterns to be demonstrated in this paper is indeed the decline of the validity of status before the Common Law in England, a process that began with the Conquest and was accelerated by Magna Carta and its argument that England was a society of Free Men. This decline in the legal qualities of status before the law had long been an objective of the Church in English politics, even from Anglo-Saxon times, and is demonstrated in many of the writings of the period. Because the Church was the corporate body of all Christians, wherein all were equal before God, the Law of Status was hard to justify, especially under the circumstances of England wherein a broad “middle” class of landowners straddled the line between nobility and the commons. Unlike in France, where feudalization occurred under the auspices of a relatively limited number of regional magnates, creating a system where status was highly nested, the Conquest created a feudal system defined by both its diversity and its highly flat hierarchy, wherein the King had numerous direct vassals whose relative influence was highly unequal, from the great Earls to the freeholder owing his own military service alone to the King, creating a society with a unique class which would later be known as the yeoman (Holdsworth 1936, 17; MacFarlane 1991, 176; Ullmann 1966, 85). In such a society where the Earl of Norfolk might find himself beside a knight holding five hides of land of the King in the assembly of the King’s vassals would certainly be more receptive to the clerical program of minimizing the laws of status.

The strongest allies of the Baronial Party during the wars surrounding Magna Carta were always the Clergy, despite even Pope Innocent III’s support of King John and his annulment of the 1215 Magna Carta. While both the bishops and the great lords shared a fear of a monarchy that could overwhelm their own liberties, despite the mythology it was not the great barons who were particularly concerned with things like the Ancient Constitution but rather they focused on particular grievances of their own in their conflict against the king; in fact it was the coalition of the clergy with the lower nobility, especially of the North, from whom the broad concern for rule of law and good government arose and it was likely Archbishop Langton who wrote the bulk of Magna Carta, giving it the character of these arguments

(Warren 1961, 180, 213, 229). For this and other reasons, a great portion of the particular characteristics of the rights which are associated with Magna Carta must be understood in the context as religious rights which have migrated into the sphere of the layman, first the great lords and then the lesser landholders under Common Law jurisprudence, in what Holt calls the “downward pressure of the legal system” and also the presumption of liberty in Sandoz’s *Roots of Liberty*, which tended to generalize liberties to broader groups as the precedent grew more distant (Holt 1997, 303; Sandoz 1993, 14).

The last reason to look at the centrality of a Free Church to the understanding of a Free Man is in the nature of Church as the primary vessel by which the Classical and early Christian symbols of Liberty were preserved and transmitted within Medieval English society. Certainly, English custom and the tradition of local governance in the Hundred and Shire Courts were significant to the preservation of ideals of liberty at the local level, but the written tradition was exclusively the domain of clerics for the greater portion of English history until the rise of the secular law profession in the late 12th Century. Any attempt to return to the myth and the experience of participation, as Voegelin describes means a return to the works of clerical writers, not lay (Voegelin 2002, 387). The source of the culture that creates that *habitus* of Liberty within the souls of its participants lay in the memory of Free Men of the past, through the silent work of custom and the spoken (or read) work of memory, which transmits the voices and deeds of the dead into the world of the living (Smith 1985, 21). Since Liberty is a *habitus* borne from the imitation of free actions and attitudes, in other words by the imitation of Free Men by successive generations, the source of this memory of the fathers, whether they are national or Church fathers, requires the utmost of attention.

Conclusion

The next three chapters will have these themes sown throughout their structure, as they expand different elements of the Free Man. The first chapter will describe the social structure of England and the place of the *Liber Homo* as a social class, focusing on the understanding one gets through the Common Law of the practical lives, obligations, and experiences of the people who fell within this legal and class category. The practical is important because of the notion of Liberty as *habitus*: if the *habitus* is formed by habituated behaviors being transformed into an element of personal character, then the details of the behaviors, the way of life of the *Liber Homo*, is of the utmost importance. It must be understood that the *Liber Homo* is not merely a construct of a clerical philosopher, dreaming of an ideal Man, but that the ideal arose from the experience of a particular and practical life lived by a great many men.

The second chapter will focus on the idealization of the Free Man in histories, philosophical works, and political writings. None of these elements exist in a vacuum; just as the practical lives of middle-wealth freeholders influence the creation of the *Liber Homo* as an ideal type, so too the philosophical works reflect back on the lives of their subjects. The ideals held by a society not only affect individuals, but are borne by the lawgivers and leaders of society, who influence the rest of society through the institutions they govern and the ideals they embed within their works. Certainly, the ideals of the Archbishops of Canterbury and the works done over the centuries by that institution are central to understanding Magna Carta, which in many ways is the culmination of the Archdiocese's work since St. Anselm.

The last chapter will conclude this work by looking at Liberty within the broader context of both lay and spiritual society. Just as the King is defined by his relationships with the Church and his vassals, the *Liber Homo* is best understood by his relationships with the classes and institutions within which he

is embedded, from the unfree *villeins* to the King himself. Important comparisons will be made to the class most often confused with the *Liber Homo*, namely the burgesses of the chartered cities, whose “rights” are confused for the liberty of the freeholder, and whose dominance beginning with the Commercial Revolution begins the memetic decay of the symbol of liberty toward its modern utilitarian state.

Chapter 1

One of the great errors in the study of feudal social structures throughout the last few centuries has been the insertion of Marxist or Capitalist language and ideas into a community that was wholly foreign to either ideological system. From Marx's understanding of the "bourgeoisie revolution" against the landholders in *Grundrisse* to Jenks's attempt to create a modern economic class out of the *Liber Homo* in his "Myth of Magna Carta," modernity struggles with the applying the principles of a "historical sense," that is to say the understanding that modern society is radically different than medieval community, to its understanding of feudal organization and order. One must not allow oneself to assume that medieval order must necessarily resemble modern order, or that mores, ideals, attitudes, and institutions must necessarily bear some similarity to their counterparts in other times. The Free Man of 1215 differed greatly from that of 1235, much less from modern conceptions of what it means for an individual to be free, even granted the ever-broadening context of liberty from landholding Englishmen to include women, non-landholders, and the non-English. It is especially the modern notions of an inherent and institutional struggle between the King and Parliament, or between the "classes" of King, Lords, and Commons, which often helps create a false narrative of the meaning of Magna Carta. Such a conflict did not exist in the minds of the men who wrote the document, whose understanding of society was based on interrelationship rather than class conflict (Holt 1985, 126; Maddicott 2010, 106). The goal of this chapter, therefore, is a clear understanding of the class described by Magna Carta as the Free Man, who is known collectively as the *liberos* in Glanvill, and whose descendants will be the yeomen of such writers as Harrington and Jefferson. This chapter will look at the class as it existed in the law and history, not as an ideal but in practice, so that the particular elements of *Liber Homo* as it was lived become clear.

If this dissertation is a study of Liberty, then why bother looking at the particulars of the Free Man as he existed at one moment, in the early 13th century? Shouldn't one instead look at the

universals of Liberty as they emerged to the surface in Magna Carta in such a way that is applicable to all humankind, rather than a narrow, parochial viewpoint of a tiny island in western Europe? Certainly, this is the fashionable way of studying philosophy, but as mentioned before, the conclusions from such a study fail to fully illuminate the understanding of Magna Carta because of the nature of medieval liberty as a *habitus*. While the *habitus* itself, like all virtues, belongs to the sphere of ideas which Aristotle describes as the universal as opposed to the particular, *habitus* is formed through the repetition of virtuous (or in this case, free) actions and ideals until they become a permanent element of the soul of the individual. Thus, it is the particulars, defined as the cultural, legal, and social elements of a free community, which are of central importance to the 12th and 13th Century understanding of Liberty, for to develop that “universal” characteristic of the soul called Liberty, one must live within a community that values Liberty as a higher ideal as well as promoting norms which esteem free individuals, participate in the legal system as a judge or juror, and take part in a way of life that discourages servility while nourishing the elements of the soul which cause one to be Free. All of these ideas refer to particular practices of communities and cultures, from legal institutions to the division of public honors. There is a reason that the philosopher arose in Athens and not in Babylon. A free community always predates the philosophical exploration of Liberty itself by the philosophers of that community; the practical and particular expression of freedom in the lives of individuals comes before any theoretical explanation (Voegelin 2002, 342).

The first thing to understand, then, in light of the previous statements, is that *Liber Homo* is not a class in the modern sense, meaning a grouping derived from occupation or wealth, but a legal jurisdiction, or a classification under law (Holt 1997, 297). What defines one as free as opposed to unfree is a particular jurisdiction in the courts. There is one problem with this definition, as is pointed out by many authors, which is that the term refers to a broad stratum of men from the high nobility to certain small farmers, and thereby it is useless as a term of socio-economic analysis. While this critique

is true, it is completely irrelevant to this study. Military relationships are the foremost concern of feudal states, where economic and productive relationships are incidental (Pocock 1987, 333). This means that any modern analysis which focuses on economic or productive activity as the central feature of its method will inevitably come to errant conclusions when applied to this type of social organization. Attempting to divide the *liberos* into groupings based on the size of their holdings, income, number of tenants, or any other similar criteria creates artificial differences where none existed in the 13th Century. As the state of English feudalism is best described as wildly diverse, the only real categorization can be that used during the period, that is to say, those summoned by personal writ were the *barones*, and those summoned by general writ were the *vassalus minores* (Stubbs 1979, 224). For the purposes of this dissertation, from this point on the greater lords will be specified using one of the terms contemporaneously applied to them in either Latin or English, while Free Man, *Liber Homo*, and *liberos* shall refer solely to the lesser vassals, as was commonly done in the laws, charters, and writs of the period.

To continue, the idealization of *Liber Homo* as the voice of the English nation is also an error to avoid; the works of Stubbs provides an example of this misunderstanding of the *liberos* as a kind of proto-national body of the Commons endowed with a sense of English identity and representing the nation as a corporate body. It is important to remember their existence as a concrete class with a very specific boundary; *Liber Homo* refers to one who holds land by military tenure, serjeanty, and possibly by certain forms of socage. The *liberos* are never a democratic bloc, but a group of landholding Englishmen in a realm that contained Welsh, Scots, Irish, and many Englishmen who held by unfree forms of tenure, not to mention women (Painter 1961, 248). The kind of 19th century nationalism espoused by Stubbs simply does not exist during the 13th century, and the very notion of the nation as a corporate body has not fully developed at the time of the writing of Magna Carta. *Liber Homo* does not include the burgesses, most importantly of all since this is the class which will claim that mantle over the

next few centuries; this distinction is central to the argument of this dissertation, and the relationship of the *liberos* to the burgesses will be expanded in a later chapter.

The essential characteristic of *Liber Homo* is that he is distinguished by being free to serve none but the Law (Painter 1961, 248). Where the villien is distinguished by his service to a landlord and the burgesses by their special dependent status on the King as patron of the borough, the *liberos* enter their feudal relationships by choice and maintain a kind of equity in service based on fidelity that does not exist for unfree vassals. The free vassal maintains the right to renounce a faithless (*infidelus*) lord with ultimately the resort to arms in the most extreme case; like most feudal rights, the right to arms stems from the obligation to military service, and thus the obligations of the *Liber Homo* are the exact inverse of the liberties ascribed to him. The understanding of Liberty as being a state of subjection to law alone required a distinction between the person of the King and the office of the Crown, which is first seen under the Angevin kings and later goes on to become the dual realm of Fortescue (Holt 1985, 67). It is for this reason that the *liberos* have the right to Common Law courts where the unfree have no such access; the ultimate lord of the Free Man is the Crown, and therefore he can only be judged in the courts of the Crown, while the ultimate lord of an unfree man is his liege, so he is subject to the manorial courts.

Feudalism and the Liber Homo

Feudalism, like many other words surrounding the Middle Ages, has a problem in that it tends to function more as a pejorative than a descriptor of a type of social relations organized around land tenure. Like the word fascist, both liberal and Marxist ideologues have used the term to demonize their opposition and thereby eroded any objective content to the term. As it now needs definition in order that it be used in a clear and intelligible fashion, let it be understood that feudalism has two primary meanings. First, it refers to the system of feudal tenure by which the land in England was distributed

after the Norman Conquest and more controversially, under the latter Anglo-Saxon kings. Secondly, it refers to the whole of political and social institutions of the “country” as opposed to the “court” (Painter 1961, 2). Legally speaking, feudal law can be defined as a legal system which denies the distinction between public law and private law (Pollock and Maitland 1898, 230). Feudalism, at its most broad interpretation, is the essence of the cultural, social, and political establishment of England from the rise of the Wessex dynasty until the ascension of King Henry VII. Returning to the problem of the distortion of the term, a historical understanding of feudalism relies on the rejection of ideological constructions which attempt to impose modern ideas on the past to find ancient justification for modern ideals. The idea of a free Anglo-Saxon peasant commonwealth which was subjugated by Norman imposition of feudal law was a product of Leveller thought which rejects the Common Law and the study of legal history (Pocock 1987, 125). A legitimate attempt to write a forensic history must confront the rise of feudal law without resort to romantic mythology of a post-millennialist political apocalypticism. The notion of the Ancient Constitution does not require that the government of Edward the Confessor be perfect or just by modern standards, nor does it require that Edward be interpreted as something other than a medieval feudal lord. The Ancient Constitution is a theory about the nature of order and justice in history, not a literal statement about the condition of the Common Law under the Anglo-Saxon monarchy, and is therefore not only fully compatible with the notion of a feudal state but largely a product of feudalism itself.

One of the problems in discussing the nature of the Free Man of Magna Carta in the context of feudal society and law is the nature of the Law of Status in post-Conquest England. The Law of Status is ill-defined after William I’s invasion of England. There were only two real categories that were well defined and clear in the wake of the Normans, and those were free and unfree. Among the free, the Commons refer to all free men with the exception of the barons, or those who are summoned to council by a personal writ rather than a general summons (Pollock and Maitland 1898, 407). Most scholars

agree that the failure to institute a clear and binding Law of Status on England was not due to a lack of trying, but the ultimate failure to enforce such a code was due to the strange and particular circumstances of England at the end of the 11th Century. Primarily, the heterogeneous nature of the English ruling classes after the Norman Conquest made organizing a uniform law of status impossible (O'Brien 1999, 11). England was still divided in the wake of the Viking Age and the Danish invasions between an Anglo-Saxon south and a Danish north, and while the ethnic differences were beginning to fade, the legal and institutional differences were still strong. To quote Pollock and Maitland, "The compiler of the *Leges Henrici* would willingly have given us a full law of ranks or estates of men; but the materials at his command were too heterogeneous: counts, barons, earls, thegns, Norman milites, English radknights, vidames, vavassors, sokemen, villeins, ceorls, serfs, two-hundred men, six-hundred men..." (Pollock and Maitland 1898, 409). In addition to the confusion engendered by the diversity of ranks and ethnicities of the ruling classes, the attempt to impose a law of status was confounded by the sheer number of small landholders left from the old Anglo-Saxon system of land tenure. This large body of Anglo-Saxon freeholders causes England to form a conception of rights based on military and political status rather than as the exclusive province of a small group of nobility of blood as arose in France (Painter 1961, 263).

The result of this strange mixture was the unusual form of feudalism that arose out of the Norman Conquest and still causes controversy among historians of medieval English politics. Maitland calls England the most feudalized country because of the universal application of military tenure to all land by William I, in comparison to the vestigial remnants of allodial landholdership in continental Europe. Ullmann calls it the least feudalized country because the feudal hierarchy in England is more flat than in any other country, with large numbers of vassals-in-chief of the King, while the hierarchies in France and Germany are highly nested with the King having few direct vassals. However one wishes to define feudalism and the level to which England was feudalized, what matters in this study is that

England was an outlier, a strange nation at the time of the Conquest and this strangeness becomes the origin of the peculiar English Constitution. The unique nature of English feudalism is most certainly due to the “bridging class” of small freeholders and vassals-in-chief who hold from the King by military tenure (MacFarlane 1991, 11; Stubbs 1979, 239). Both Maitland and Ullmann’s definitions of feudalism in England center around the nature of this class, the small military tenants, for either their smallness or their military rather than tribal tenure. These freeholders, called *vassalus minores* or *liberos*, are the core of the *Liber Homo* of Magna Carta and the center of the rural ruling class in the counties. As of the 1207 Cleveland Charter, *Liber Homo* is defined as extending to include all knights and freeholders rather than simply the vassals-in-chief of the King as in the earlier laws (Holt 1985, 200). The following sections will describe their role in society, rights, and obligations in an attempt to clarify the meaning of Magna Carta as both a legal document and as an event in history which illustrates the nature of liberty in English society.

Free Tenure

Where tenure is the means by which one holds land under a system of feudal law, free tenure refers to all the ways in which free men hold land. As mentioned before, the only binding Law of Status in England after the Norman Conquest was the division between free and unfree men, and therefore the first and most important division in the English laws of tenure is between free and unfree tenure. Other distinctions can be and are made, but they are all subject to a confusing panoply of local customs, particular agreements, and arbitrary divisions made by later scholars, but the division between free and unfree tenure is the only solid and clear law of status in English land law, as evidenced by the fact that disputes over liberty are automatically and immediately placed in Common Law court rather than manorial court. This original jurisdiction over suits of status stems from the way in which English tenure was organized after the Norman Conquest. Unlike in other countries, England alone is able to actualize the principle of feudal land law that all land is held of the King, and therefore in questions of tenure and

status, the King is the authority (Holdsworth 1936, 199; Pollock and Maitland 1898, 232). Whereas other nations in Europe contained vestigial elements of pre-feudal landownership in the form of tribal and allodial lands, William I's conquest of England allowed a uniform abolition of all forms of traditional land ownership and their replacement with feudal tenure. In other ways, however, he preserved Anglo-Saxon customs and laws with regards to the relationship of the Crown with land ownership. One of the unique elements of English feudalism is that all free men owed allegiance to the king, even if they were not vassals-in-chief (Warren 1973, 278). This stemmed from the Anglo-Saxon usage where the king's role retained Germanic elements of the tribal leader, as well as specific policies instituted by the latter Anglo-Saxon kings and Cnut the Great like the *friborg* or *plegio liberali*, the oath given by every man upon his majority to respect the King's Peace often translated as frankpledge (Downer 1972, 103; O'Brien 1999, 179; Warren 1977, 278). The frankpledge served as an early form of the personal loyalty owed by every free man to the king in his capacity as the natural leader of the *gens Anglorum*, which became synonymous with feudal homage either with the Salisbury oaths of 1086 or previously under Cnut the Great, depending on whether one accepts Blackstone's or Coke's interpretation of the origins of tenure. These conflicting ideas and institutions of government and society led to a dualism in English politics, wherein the individual was simultaneously subject of the Crown and citizen of the realm which existed in a state of tension between the two for dominance (Ullmann 1966, 5). Insofar as the king was a feudal lord, the free man was citizen of the realm, but as he was also the natural representative of the *gens Anglorum* and the vicegerent of God, the free man was a subject with an obligation to service with fidelity. This is the major difference between the free and unfree man in the English feudal Law of Status, then, wherein the free man partakes of both, the unfree person is only a subject.

Tenure is bestowed by the feudal oath, which is a mutual contract between lord and vassal conducted under conditions of voluntariness and friendship. Breach of the contract by the lord gives the vassal the option of repudiation, even to the point of recourse to arms; there is no high treason in this

relationship because the vassal is a contractee, not a subject of his feudal overlord (Hall 1965, 107; Painter 1961, 251; Ullmann 1961, 153; Ullmann 1966, 64). As mentioned, the nature of feudal law is found in the abolition of the distinction between public and private law, such that this contract is legally binding but does not involve the notion of state sovereignty because the actions of the king in bestowing land is an essentially private one; feudal oaths are personal, not to the office but the individual, such that the public functions of the office of the Crown are segregated from the feudal relationships between the person of the king and his vassals-in-chief (Ullmann 1966, 65; Warren 1973, 178). The personal nature of these relationships is one of the reasons that public law fades in significance during this period and that private contracts become the dominant legal paradigm of social order. Feudal oaths are not merely legal constructs, however. Homage and fealty had not only legal, but moral and religious dimensions as they were expressions not of proprietorship or mere political allegiance but a personal bond of friendship and fidelity between two men sanctified by the Church in the eyes of God. Both Glanvill and Bracton acknowledge its super-legal dimensions and the limitations this placed on the law's ability to deal with the breach of fealty (Pollock and Maitland 1898, 297). The law could order an act of *seisin* or *disseisin* but could not address the breach of personal relations, the sin inherent in breaking an oath before God, or the disruption of political order caused by discord among the great lords.

Because homage was primarily a personal relationship between two individuals rather than a political relationship between the state and an individual, any free man was able to give or receive homage from another, while the unfree could only give homage (Hall 1965, 106). This included situations where a person would swear oaths to multiple lords, each with differing terms. Such arrangements were not only allowed but were common and were addressed in the law by the distinction between homage and fealty, wherein fealty was the obligation incurred by tenure in land where homage was an act of personal loyalty which could only be performed to one individual. The

significance of these relationships is that personal oaths and loyalties served as the crux of medieval society, tying together the realm through an interrelated web of obligations and fidelity (Morris 1987, 36). The central force in social relations was that of *fidelitas*, or loyalty to the other members of society, and the fulfillment of the functions of the feudal oath was a product of that fidelity. Under the earlier conceptions of feudalism, only personal service could fulfill the terms of the contract, such that the vassal must demonstrate his loyalty through his own efforts rather than simply supply military aid to his lord. This obligation formed the basis of a feudal ethic that put emphasis on the superiority of deeds done altruistically and faithfully over those done for private gain. The theme of personal trust centers the relationship of lord and vassal. The rise of “bastard feudalism,” or the replacement of duty and obligation with money, is connected with the use of scutage in place of personal service. Henry II is credited with introducing scutage, but it most certainly appeared earlier (Pollock and Maitland 1898, 267).

The complexity of the relations was a guarantor of its stability, wherein obligation was owed to multiple individuals who were both lords and vassals, and they themselves were lords and vassals of others. A terminal breach of these oaths to the point of a civil war or a split in the realm became far more difficult and was largely the result of catastrophic events like the loss of Normandy by King John. When a break did occur on the small scale, this action was taken seriously by the rest of society, whose relationships were all in peril if infidelity was tolerated. Felony is the term for breach of the bonds of homage and fealty, in other words, to break the cords that held society together (Downer 1972, 171; Pollock and Maitland 1898, 304; Warren 1973, 247). To this day, the word felony refers to a crime so heinous that it permanently severs the bonds of society between the perpetrator and the rest of the community, excepting of course the pardon of the king.

The role of the free men was central to this conception, as they formed the core of the feudal web of obligation. All free men except the king are both *dominus* and *tenens*, who hold land from another and also let land to another (Maitland and Pollock 233). As such, the entire feudal hierarchy with the exception of the king and the unfree participate in the social network of obligation to people both above and below. The erosion of the rights of one's vassals serves as precedent for the erosion of one's own rights, and the diminishment of the authority of one's lord sets likewise precedent for the diminishment of one's own authority. The mutuality and reciprocity of the feudal oath functions to preserve its integrity as well as the greater integrity of society as a whole, granted that the legal system remained efficient, effective, and equitable. This fact demonstrates why such emphasis is placed on King John's effort to corrupt the legal system to serve the ends of the Angevin Monarchy; the corruption of the legal system to aid political favorites and hinder political outcasts served to undermine the relationships between all members of society, such that the oaths of homage and fealty could not be relied upon to remain legally binding. Without legal force, these oaths would break apart, destroying the very bond which linked man to man and secured the property of every individual. An oath of homage was required by law for any grant of land, of free tenement, tenancy by service, or any kind of tenancy by rent (Hall 1965, 106). No person could hold land who was unbound by feudal oath and thereby outside of the community of the realm. As mentioned before, one could hold of multiple lords, but one of those lords was lord by homage or else the landholder was ineligible to take *seisin* of his lands. Allodial right, or the right to land based on tribal membership, ancient possession, or direct inheritance, was abolished altogether in England such that no communities existed who were outside of the king's community of vassals (Holdsworth 1936, 199).

Each tenancy was personal and unique, as the product of an individual relationship between lord and vassal, and was also unaffected by other contracts, meaning that the Lord's vassalage to another Lord does not affect his relationship with his tenants, nor predicate a relationship between his

lords and his vassals (Pollock and Maitland 1898, 233). A knight who holds of a baron who holds of an earl has not relationship at all with the earl, as his homage is to the person of the baron. In the question of aids, the aid owed to the earl would be entirely the responsibility of the baron, not the knight, although the baron can and often would use the occasion of the aid to levy one of his own upon his vassals. The failure of the knight to pay his aid would not relieve the baron of his obligation to pay the earl, but would be a private claim by the baron against his knight. Furthermore, although tenancies were unique, in England nearly all free tenants were military tenants, while on the continent, military tenure separates nobility from commons (Holdsworth 1936, 303; Pollock and Maitland 1898, 254). This commonality in tenures was created by William I's original enfeoffment of his followers in the aftermath of his Conquest, and thereby creates a community among free landholders. The diversity of the English ruling and landholding class meant that there were various kinds of landholders who were not barons or knights, but after William I they are all military tenants. Their numbers are disputed by modern scholars, but it is unlikely that these were a small portion of landholders. In 1224, Henry III ordered all tenants-in-chief with more than £20 in land to be knighted, demonstrating a considerable population of wealthy free tenants outside of the knighthood (Stubbs 1979, 327). These individuals are most certainly derived from the large free landholding class of the Anglo-Saxon period, even if one argues that there is no true continuity between the Anglo-Saxon *thegn* and the Norman knight. As early as the Domesday Book, evidence of this class as being substantial can be found in royal records. The Domesday Book itself describes the small freeholder class as "*liberi homines*" in its census, which is possibly the first mention of the Free Man after the Conquest (Pollock and Maitland 1898, 546). As there is no evidence of large-scale migration from Normandy, the vast majority of these *liberos* must be Anglo-Saxons who probably saw no real disruption of their practical lives from the replacement of Anglo-Saxon earls with Norman earls. This body of Anglo-Saxon landholders formed the core of William's feudal community and their assimilation into a broader Anglo-Norman society was not immediate (Holdsworth 1936, 200). Before

the fire, Cotton's Library contained a copy of Henry I's coronation oath in Latin and another in Anglo-Saxon, implying that the freeholder class included Saxon-speakers (Holt 1985, 16).

It must be emphasized that feudal landholdership was unrelated in any way to capitalist landownership (MacFarlane 1991, 58). The commoditization of land began in the late Middle Ages, which destroyed the notion of a connection to the soil and a sense of belonging to a place, as well as breaking up communities through allowing greater mobility across the country through the buying and selling of land. Tenure in fee simple is a form of landownership that would be utterly foreign to the freeholders of the 12th and 13th Centuries, for whom landholding was part of a broader connection to the community as well as to one's own family. The understanding of property by small landholder is not proprietorship but a trust held by previous generations for successive ones, as inheritance is both a central component of feudal land law as well as the concept of feudal tenure (MacFarlane 1991, 18). The notion of land as a commodity asserts certain rights to do as one pleases with the land, including transforming its purpose, increasing or decreasing it, and even destroying it. On the other hand, freeholders have an absolute right to dispose of the income of land, but not to dispose of the land itself, to which their claim is limited only to the produce of their own lifetime and not to the land's produce in the future (Kamenka and Neale 1975, 105). This relies on an understanding of the individual as an organic part of a wider bloodline, tracing itself back into eternity and forward through the heirs and successors of the current generation. In this way, primogeniture especially among the forms of inheritance serves as a form of ancestral memory, where the bloodline is tied to the estate, which is understood in this context as the land of the fathers. This connection is made more explicit by the notion that through the graves of the ancestors, the land itself becomes blood kin to the family, as the blood of the family lay in the soil through the interment of the ancestors, thus the "*pater*" root of *patria* is understood literally, since the fathers have been joined to the land itself through the grave (Smith 1985, 27). This connection between the individual, his ancestors, descendants, and the land serves as

both an anchor to the past and a promise to the future binding all of them together into a single communal concept and affording to each generation a kind of immortality in that they are remembered and honored by the imitation of their life on a particular piece of land which bears their bones by their descendants in perpetuity (Smith 1985, 192).

The features of English medieval land law are the inalienability of land, familial ownership, lack of intestate law, and non-commodification of land (MacFarlane 1991, 80). The significance of these characteristics is that they demonstrate the vastly different premises that underlay landholdership in comparison to how modern capitalist landownership is understood. In specific, the treatment of inheritance in English law is significant because of its connection to the feudal order and the propagation of the relationships between lords and vassals in time and between generations. The importance of heritability laws is that they make the economic element of landholdership subservient to the biological and physical order of the generations, such that the economic properties of landholdership and the possibilities of material gain in the current time are subjected to the principle of stability in time and the long-standing relationships between individuals and families who share land (Kamenka and Neale 1975, 68). Thus, heirs are understood as being bound to a kind of continuity with their ancestors and a continuation of the relationships between their families and the families of their ancestors' lords and vassals. In terms of the law, it is very clear that heirs are bound in perpetuity by the testaments of their ancestors, such as grants of lesser tenancy, especially to the Church (Hall 1965, 79). Legally speaking, the heir is the same person as the ancestor for the purposes of fulfilling the terms of agreements related to the land, an understanding of individuality markedly different from the atomism of early modern political thought.

Because of this understanding of the nature of landholdership and the individual as a part of a bloodline extending beyond the life of the individual, the ability of the freeholder to alienate his land is

sharply restricted. In theory, freehold land is completely alienable under the legal doctrine that *nemo est heres viventis*, but the alienability of freehold land is not formally legalized in the Common Law until the *Statute Quia Emptores of 1290*, over a generation after Magna Carta (MacFarlane 1991, 83). Even if it was allowed under local or county custom, there were always sharp restrictions on what lands could be given, how the land could be given, and to whom. Generally, exceptions were made for the distribution of lands to younger sons in counties in which lands were inherited by primogeniture, as well as exceptions for land dowries for daughters. For example, in Glanvill, a free man may distribute a “reasonable” portion of his land as dowry for his daughters without the consent of his heir, but inherited land is exempt from this right, as is the last of a man’s land, even if it is acquired (Hall 1965, 70). This line between inherited and acquired land is evidence of the significance of inheritance as a blood link between the generations and the common thread holding together the ancestors with the living generations of the family. What is never allowed during this period is the complete severance of this link between the ancestors and the heir to the land. To do so would be a destruction of the family as it was understood. It should not be surprising, then, that this would only change once land had been commoditized and monetized beginning with the Commercial Revolution and the rise of the burgesses class who bore no relation to the land and had no links to the communities which lay on the land. Their reforms allowed the total disinheritance of the legal heir in 1540 with the *Statute of Wills* (MacFarlane 1991, 82). Of course, in the territories which did not inherit by primogeniture, namely Kent and East Anglia, the rules were somewhat different but based upon the same premises as those which inherited by primogeniture. Glanvill states that holders of either free or socage tenures in gavelkind counties may not give away any land for any reason (Hall 1965, 71). As gavelkind divided the lands among all the sons of the landholder, any diminishment of the land would diminish the inheritances of all the sons. The exceptions noted above in primogeniture counties were largely for the benefit of younger sons and

daughters, but this concern is not significant under gavelkind. In fact, wills were not valid at all for those who held by socage tenure in any county until the *Statute of Wills* in 1540 (MacFarlane 1991, 84).

The study of tenure and the particular forms of landholdership which the free man participated in is significant because medieval liberty was expressed through legal, procedural, and contractual limits on feudal tenure and service (Painter 1961, 6). Feudal tenure was the dominant institution of the period, so it should be no surprise that it is through this institution that free men should exercise liberty and describe their understanding of the free life. Certainly, feudal tenure is not the only way in which liberty can be expressed, but the shift in the social definition caused by the Norman Conquest makes it necessary for the interpretation of Magna Carta. Under the Anglo-Saxon law, the Free Man is free first by right of birth, but under feudal law he is free because of tenure, meaning that because of birth, he inherits land which makes him free (Stubbs 1979, 15). Practically, it makes no real difference, as those who are born free are free in either understanding of the law, but to analyze liberty from the standpoint of a scholar, the shift in the feudal law makes a study of landholding necessary. Furthermore, the paradigm of tenure as the lens through which liberty is understood makes contemporary distinctions between the free and unfree clear in a way that scholarship ignoring tenure cannot. Tenure is understood as the prerequisite for the kind of independence which made liberty possible and prevented the rise of clientage which would undermine public order through the elevation of over-mighty, licentious aristocrats and base, servile courtiers. The landholder is free because of his fee, thus independent, while the administrator was radically dependent on the King for his wages, and thereby was client of the King (Kamenka and Neale 1975, 72). Likewise the wage-earner in the boroughs and the noble households followed the same pattern, wherein a slavish and licentious group destroyed the liberty of the realm. Against these forces, the feudal law imposed an ideal of mutuality, equity, and duty which would retain the dignity and liberty of all parties to the feudal contract. The mutuality of feudal law made it a natural force in opposition to arbitrary rule, as the terms of enfeoffment strictly controlled

the relationship of lord and vassal (Painter 1961, 249). It is this arbitrariness that fundamentally undermines social order, both on the part of the tyrant and the slave, and it is the well-ordered free man who lived in opposition to tyranny through a life under law.

Obligations and Duties of Free Men

In addition to tenure, feudalism is also concerned with the bonds of *fidelitas*, or loyalty, among the community of the realm. Wherein the bond of society in classical political thought is consensus commune and the bond of society in early modern political thought is the social contract, medieval society is bound together by the bond of fidelity between men, such that the free man who is both *dominus* and *tenens* is bound by reciprocal agreements with which he must hold faith. The nature of this bond as a contract distinguishes it from the classical, and its often involuntary character distinguishes it from the modern understanding. The dual nature of King, both feudal lord and vicegerent of God, means that feudal right never approaches republicanism because of the concept of divine election (Ullmann 1961, 154). The king is placed in his position by God, as are all other figures of authority, and to refuse faith is an act of rebellion not just against human actors but against the order of society ordained by God himself. As mentioned before, the individual is understood as a member of a bloodline which stretches into the past and future, such that the homage of one's ancestors is equally binding on the self, just as their testament is legally binding on the heir to the estate. The terms of that homage are required to be mutual (*mutua*) except for the reverence due from vassal to lord (Hall 1965, 107). However, that is not to say that one chooses one's lord; just as one's heir cannot be chosen but is born, so is the individual born into the position which is chosen for him by God. The duties and obligations of that position are expected to be accepted with magnanimity and faithfully carried out as part of the consequence of being born free. To give and receive homage is the mark of the free man as a full and responsible member of feudal society (Hall 1965, 106).

The first and most important obligation of the free man is his character as a warrior, and so important was this obligation that for a free man to be unarmed meant that he was to be immediately reduced to servitude along with all of his descendants (Stubbs 1979, 156). This is not to be confused with the soldier, who receives pay for serving in the profession of arms, or with the citizen-militia whose only role is the defense of the homeland when invaded by a foreign enemy. The free warrior must serve his king in war for a determined period of time each year, whether it be abroad or at home, and his service must be personal rather than by proxy (Stubbs 1979, 38). As a warrior, he is a member of a social class defined by the practice of arms, but is still not a professional soldier because his livelihood is independent from his military activities, resting instead on the cultivation of the soil. The free warrior serves his king out of a sense of obligation rather than for pay, glory, or plunder. In addition to the duty to serve the allotted time in the feudal levy, there was an additional obligation of every man, free or unfree, to defend the homeland in a defensive war independent of feudal obligation (Pollock and Maitland 1898, 256). The Anglo-Saxon institution of the *fyrd* was the manifestation of this obligation before the Conquest, and this army of all the people was the primary defense of the realm against Viking and Danish forces. After the Norman Conquest, William I retained the *fyrd* as a tool of national defense against those who might follow in his own footsteps (Loyn 1984, 182). Although Henry II's Assize of Arms attempted to reorganize the *fyrd* to keep it as a tool of the monarchy, it was hopelessly obsolete by his day, but the principle of common defense of the realm was never abandoned. Furthermore, the freeholder held obligations of watch and ward, of following the hue and cry, and to take the oath of peace (Stubbs 1979, 156). These additional duties contribute to the understanding that the Free Man is an armed man and the practice of arms cannot ever be separated from his status. Especially in England, where every freeholder holds by military tenure, arms serve as a physical emblem of liberty. They were the means by which one held faith with one's lord as well as the means by which one protected vassals. Within the context of the feudal oath, the maxim that "The sword is the guardian

of liberty” provided the ultimate guarantee of liberty is always the use of violence against the *infidelus* or the felon, the faithless lord or vassal (Holt 1972, 172). Arms were the means by which the free man was never made a dependent or a client, as he bore the tools of his own liberty as a mark of his very identity.

In addition to his military obligations, the free man had significant legal obligations, especially to his vassals. One of the primary obligations of the lord was to vouch warranty for his vassals “against all men who can live or die” (Pollock and Maitland 1898, 306; Stenton 1932, 45). The meaning of this phrase is that the lord must stand for his vassals in a court of law and attempt to defend him as best as he is able. Examples of this include criminal charges as well as suits over the possession of land or revenues. For unfree vassals, this was generally performed in one’s own manorial court or in that of neighbors if the dispute crossed the boundary of the vill, but for free vassals, this meant that the lord was responsible to act as an advocate in Common Law courts or the Curia Regis itself, as the freeholder’s right on his property trumped all manorial custom and law and were only subject to the Common Law (Pollock and Maitland 1898, 634). The Common Law court, then, was the particular jurisdiction of the Free Man and thereby one of the great obligations of the Free Man was to act in court, since he would be called upon to defend his free vassals in this court, as well as advocate on behalf of himself. Unlike in manorial courts, the status of the participants in Common Law courts were irrelevant, as the Court recognized all free tenants-in-chief on the same terms, as peers (Holdsworth 1936, 201).

One of the greatest errors in English constitutional thought is the association of the rise of Parliament with classical concepts of consent. Certainly, the language of consent was taken from the Roman law and adopted by Parliamentary writers, and weight was certainly given to the consensus of the council, but consent is a minor theme beside the notion of the obligation to advise one’s lord which

is invoked by the feudal oath. The connection of the obligation to advise one's lord, the rise of Parliament, and feudal tenure was lost by Restoration thinkers like William Prynne, who tended to ignore the role of feudalism in the foundation of Parliament (Pocock 1987, 160). This obligation is not, as it is portrayed by early modern thought, part of the relationship between the state and the individual, but a part of all feudal relationship, wherein aid and counsel are an obligation of any fee holder to his lord, from the smallest freeholder to the king and his earls (Nederman 1990, 139). Like many of the early constitutional institutions, the rise of Parliament and assemblies of counsel arise from the application of the principles of local feudal and shire government to the government of the entire realm. The feudal obligation of counsel which was brought from Normandy in the new forms of feudal right merged with the Anglo-Saxon assembly tradition in both the hundreds, shires, and the *witanagemot* itself after the Conquest, as the Normans did not attempt to squelch Anglo-Saxon institutions but instead to co-opt them for their own uses (Maddicott 2010, 76). English government at the level of the shire and below is largely intact after the Norman Conquest and varied little from how they operated under Edward the Confessor. Even at the national level, evidence shows that the Norman lords were concerned with maintaining a legal and institutional continuity with the Anglo-Saxon kingdom and even seem to have seen the advantages of maintaining certain privileges and rights which Anglo-Saxon lords exercised in the kingdom, such as the right of assembly and the elective nature of the monarchy² (Oleson 1955, 83). The summoning of knights to Parliament was seen as early as William I, however, those summoned were tenants-in-chief of the King, not the knights of the shire (Maddicott 2010, 84, 198). Although the Grand Assembly has certainly taken on a feudal character after the Norman Conquest, there is little real difference in those who attend. During the reign of Edward the Confessor, the *Witanagemot* was primarily composed of the two Archbishops and several bishops, with earls attending to a lesser degree and a small number of abbots and *thegns*, although no assembly was

² Understood as the right to assent, not a right to consent. The lords did not have the right to choose the king but to reject or accept the candidate, although even this right was more theoretical than practical.

completely devoid of these last two groups (Oleson 1955, 50). While the justification changes from that of social status under the Anglo-Saxons to that of tenural status under the Anglo-Normans, the national Assembly remains a constant presence across the events of English history. This is not to claim that Parliament was a constitutional institution as it would be after Magna Carta, as the Grand Assembly was understood in the context of customary practice more than constitutional law. Right cannot be applied to a body which is largely fluid and undefined, whose membership changed from year to year based on the nature of the Assembly's business, location it was being held, and the will of the king. The members of the Assembly usually did advise the king and consent to taxation, but the significance of this action depended heavily on such factors as the power of the king and the customary nature of the act (Oleson 1955, 77).

The language of the Community of the Realm as it applies to the assembly of all freemen first appears in Henry II's 1181 Assize of Arms, specifically with reference to their status as military tenants (Maddicott 2010, 142; Stubbs 1979, 155). While feudal tenure created a web of relationships, the act of being assembled in an army emphasized an older tradition of monarchy, that of the Germanic king who served as representative and leader of the whole people. When assembled, the members of the army's feudal bonds to one another became subservient to the role of the king as commander. The crucial feature of English feudalism is that the bond of subject to King superseded that of lord to vassal because of how William I universalized this military aspect of feudalism in creating all free tenures in the military mode. This connection of the crown to its lesser vassals and to the freeholders was crucial to Henry II's efforts to counter the powers of the great lords, as the many lesser vassals when united with a royal authority which respected their liberties made a formidable force for stability and order in society (Warren 1973, 362). The wisdom of Henry II, however, did not descend to his sons, who squandered the legitimacy of the Crown and neglected the ties which Henry II had made between the monarchy and the lesser vassals. Due to their overriding obsession with raising funds, both Richard I and John were

infamous for using the feudal obligations of their vassals as a means to increase their incomes. In addition to this, the feudal obligations and dues were used by John to control his baronial enemies by forcing them into debt to the Crown (Holt 1985, 136). This abuse of feudal obligation was one of the reasons for the transition in language from *fidelitas* to *ius* and *libertas*; so long as the Crown acted within its right, the emphasis of the relationship was on obligation, but when the Crown veered into misuse of their authority, the flip side of obligation, or right, asserted itself.

Liber Homo and Local Government

In the study of the English constitution of Magna Carta and the period leading up to it, it cannot be disputed that political liberty was an outgrowth of agrarian society, opposed to commercial and urban understandings of government and society (Kamenka and Neale 1975, 5). This certainly has been universalized by some thinkers to refer to all politics, such as Aristotle's discussion of the farmers' polis versus the merchants' polis in the *Politics*, but this argument is largely irrelevant to the current case, which is the study of 12th and 13th Century English liberty and constitutionalism. In this case, liberty is understood through the context of a rural social order based largely on feudal tenure, but other institutions beyond the *communitas regni* of the feudal bond are important to the English self-interpretation of the Free Life. Liberty is often described in the context of local government, and in one specific type of local government. It is not the borough which forms the local basis of the self-governing community but the shire in English politics. The shire serves as a stable unit of self-government throughout the entirety of English history up to the present day, even granted the reforms of Steven which attempted to transform the shires into French counties (Maddicott 2010, 413). The shire is the traditional form of local organization above the level of the hundred which can be traced back to the pre-history of the Kingdom of Wessex; by the time of Alfred the Great, the five shires of Wessex had existed so long that it was the shire assemblies which formed the core of Alfred's strategy to inspire resistance against the forces of the Great Heathen Army. The process of converting the rest of England

into shires and hundreds began under the reign of Alfred the Great and continued under his successors (Abels 1998, 274; Loyn 1984, 76). By the time of the Norman Conquest, the shire has long been a traditional part of English self-governance at the local level and remains so throughout the period.

One of the important themes of local English government at the shire level was its continuity across time and the fact that its origins date from before the beginning of written history and law. Just as the earliest West Saxon laws postdate the establishment of the shire system, by the time of the first truly national English laws, the shire system had taken root throughout the entire country. Not even the Norman Conquest managed to shake the foundations of the shires. Local government beneath the level of the Earl and later, Count, was largely unchanged by the Norman Conquest, reflecting the pre-existing Anglo-Saxon social order (Larson 1902, 204; Stenton 1932, 115; Wormald 1999, 19). This continuity of the local government, however, takes on a predominant character after the Conquest because of the nature of the higher courts set up by the Norman kings, namely the lack of any higher court beyond the Curia Regis which is held in the presence of the king himself. Local courts dominate all legal matters in the wake of the Conquest, retaining a distinctly Anglo-Saxon character (Holt 1997, 19). Until the time of Henry II and his establishment of the circuit courts, the only truly national court was found in the person of the king himself, such that the shire court was the legal establishment in the Kingdom of England for the entirety of the Norman dynasty. This continuity was a product of large-scale collaboration of Anglo-Saxons with Norman rulers, who were able to usurp and continue the Anglo-Saxon administrative tradition across the Conquest, as the Normans had no indigenous tradition of administration or law (Maddicott 2010, 64).

The shire government is central to the understanding of the role of the free man in his own self-government under the English constitution because the shire court was the particular domain of the large class of small landholders which dominated rural society, especially in the north and western parts

of the country. The duty of free men to regularly attend both the hundred and shire courts dates from the reign of King Edgar the Peaceable, the “Good King” associated with the Ancient Constitution of England under Kings Æthelred the Unræd, Cnut the Great and Edward the Confessor (Loyn 1984, 143). This gathering is compared by some to the ancient assemblies of the Germanic tribe as portrayed in Tacitus’s *Germania*, but this is a stretch of the evidence. The Shire Court is an explicitly political body whose customary practices have been completely absorbed into the concept of unwritten law, such that one could clearly argue that the Shire Court was a Common Law court under the Anglo-Saxons and early Normans, as the court met by royal command and the shire reeve was a royal officer (Wormald 1986, 162). This body was not tribal in nature, as was the Germanic moot, but based upon the community of the shire, either under its old Anglo-Saxon definition as a community under the authority of an *ealdormann* or the tenural definition after the Norman Conquest. This tenural definition of the jurisdiction of the shire meant that the shire was organized as a grouping of fiefs and estates rather than an ordinary geographical district; what is meant by this is that the individual fief, not the fiefholder, belongs to a shire, in the sense that a lord may hold a fief in two shires, but he stands separately and distinctly in each shire court for the vassals of each fief. His acquisition of another fief does not change the shire jurisdiction. Representation before the Shire Courts was also originally feudal rather than geographical, as lords may dismiss (*acquietare*) their vassals from attendance in the *Leges Henrici*, which demonstrates the development of the notion of representative bodies grew out of the notion of the Lord’s authority to publicly speak for his vassals in court (Downer 1972, 101). Despite the fact that a free vassal might be represented by his lord, there is a clear expectation that all free men would attend the shire court as an element of their obligation to the crown. In the *Leges Henrici*, all free men are liable to be called by the King to judge in his court, meaning in the shire court as it conducts Common Law business, only excluding *villeins*, cottagers, and *ferdings* (Downer 1972, 131). These three categories which are exempted from the requirement to judge form the three classes of unfree

Englishmen which exist in the shire. Burgesses are also explicitly excluded from participation in the shire court in the *Leges Henrici*, however, the boroughs are not considered part of the jurisdiction of the shire but a special district with its own parallel court system, so they are not included in the list of unfree men under the shire court. The other matter to note is that these three classes of unfree men are also subject to yet another parallel court system within the shire, namely the manorial courts. Their cases are placed before their lord rather than the community of the shire because they are not members of that community but dependents, unlike the freeholder who is immune from manorial laws, court, and most local taxes (Pollock and Maitland 1898, 623). Within the Common Law court system, the origins of the rule of law stem from this particular feudal way of interpreting both membership in the court and representation on the court. As any member could be called upon to judge a case or to declare the law of the shire, it necessitated that the influence of status would be diminished within the context of the shire court. Thus, equality before the law becomes an element of the shire courts because of the legal maxim from feudalism that courts recognize all free tenants-in-chief on the same terms (Holdsworth 1936, 201). The members of the court are described in the laws including the *Leges Henrici*, *Glanvill*, and Magna Carta itself as “pares,” or the root word from which the modern English “parity” is derived. Jenks’ argument, then, that trial by a jury of peers in Magna Carta does not apply to the majority is patently absurd, as the “pares” of Magna Carta and the shire courts comprise the whole of the membership of the court, or in other words, all free men.

The shire court was not the only unit of local government in England, but was subdivided into smaller units known as hundreds, from the ancient West Saxon practice of dividing the shires into districts of either one hundred men or one hundred hides of land. In addition to being a district of a shire, the hundred was also an assembly of all free men, both *husbonds* and those in service to others (Downer 1972, 103). The principle of representation that is given in the *Leges Henrici* at the level of the shire court does not seem to be applicable at the hundred, where personal attendance by every free

man seems to have been mandatory. The vast bulk of local concerns were handled at the level of the hundred, whose head was referred to as the hundredsman. Rather than the Grand Jury of the 13th Century, accusation was a function of the whole of the hundred court; the hundredsmen had a collective duty to report all misdeeds in the neighborhood before the assembly above and beyond the private accusations brought by injured parties (Holdsworth 1936, 197). This “accuser’s jury” was the equivalent of the public prosecutor, wherein all free men held the responsibility to accuse and try those who broke the laws of the hundred and the shire. The free man was therefore intimately involved in the process of justice in his locality.

The right of soke is how the law described the authority of a person to preside over a local court. The most prominent holders of soke were the reeves of manors, hundredsmen, borough officials, and sheriffs (Downer 1972, 123). This list from the *Leges Henrici* correlates to the four kinds of local courts which were existed in parallel: manorial, hundred, borough, and shire. While these were the most prominent, they were not the only holders of soke in rural English society by far. The group of people referred to as *Vavassors* held the right of soke over their own lands and all their unfree tenants (Downer 1972, 129). The most likely definition of *vavassor* is one who holds his lands by military tenure, meaning that this category encompassed nearly all free men within the entire realm of England. Any freeholder with a single unfree tenant would have the authority to hold a private manorial court, meaning that a core element of the free man’s identity is that he is not only a member of the shire court, but he is a judge in a manorial court over his tenants. This is what Holt refers to when he states that those governed were also governors, exercising their own dominium while enforcing that of the King. Through participation in the shire court, hundred, and their own personal manorial jurisdiction over their tenants, the Angevin system of law thereby gave to local leaders an education in government (Holt 1992, 48). Nearly all free men would have a great deal of experience in matters of the law and local courts, as it formed a central component of their practical duties within the communities of the

shire and the hundred. The life of the free man involved intimate knowledge of the workings of the court system in England, such that many scholars suggest that the litigiousness of English society was due to the large number of freeholders who were well-versed in the law and legal procedure (Holt 1985, 189; Ullmann 1966, 86). This group of men, the small and medium landholders of the shires, especially in the north of England, formed the core of resistance against the extension of royal power throughout the 12th and 13th Centuries, and this should be no real surprise. The experience of defending local liberties against royal officials formed a major part of the education of Magna Carta's proponents, a group of people who spent a good portion of their lives in courts of some kind or another (Holt 1992, 71). This experience forms the basis of the free character of the English small landholder; this class of person would have a deep respect and attachment to the institutions and customs which made up a large part of his life. As one who spends a lifetime litigating, especially on subjects closely related to the practical lives of himself and his neighbors, these free people, unlike the unfree, have a "history of liberty" to draw upon in which they are able to preserve and protect their liberty, comprised of experiences, customs, institutions, and myths (Smith 1985, 55). The symbol of liberty as interpreted through such a person must be understood as a product of this life and the common experiences which compose the life. Liberty is an expression of the rural community's self-interpretation of these shared components of their practical experiences with local government and their substantial conflicts with royal officials who disrupt the order of the community.

As the shire court is the definitive institution through which the free man experiences his liberty, the way in which liberty is judged is often by local standards. There is no serfdom in Kent, Norfolk, and Suffolk, very little in the North, but the majority of people were serfs in Bedford, Buckingham, and Oxford (Pollock and Maitland 1898, 432). The free man was defined exclusively in the latter category of shires, such that his was a highly privileged position to which few men belonged, but in the case of the former shires, all Englishmen, or at least the vast majority, belonged to a category of free men whose

privilege and legal standing may have practically been fairly limited. In some cases, a technically free man holding by socage involving significant labor obligations may have differed little from an unfree villain in another shire. Nevertheless, the common thread of liberty as it was expressed in local government was the obligation to participate in the institutions of the local courts. It was this broad body of free men in the courts which made up the foundational class of Magna Carta's *Liber Homo*, and also the justification as to why the initial aim of English liberty was directed not at municipal or aristocratic immunities but local control of the administrative instruments of government, especially the courts (Holt 1992, 29).

The Common Law character of the shire courts was eroded during the Anarchy, when Stephen's county reforms turned the County courts over to the control of local aristocrats rather than the royal sheriffs, severing the connection between the Curia Regis and the Shire Courts which unified the Common Law across the realm (Stubbs 1979, 115; Warren 1973, 22). This precipitated many of the reforms introduced by Henry II, such as the creation of a circuit system extending the Curia Regis into a national court system wherein the representative of the king rather than the king himself presided over the court. Furthermore, Henry II's administrative reform granted administrative power and authority at the shire level to the knights of the Shire, thus attempting to return these courts to their roots as institutions of local self-government by the small landholders under the protection of the King and the Common Law (Maddicott 2010, 136). These efforts by Henry II do not go to waste, but form the foundation of the revolution in English jurisprudence which occurred during the latter 12th Century. For example, between *Leges Henrici Primi* and Magna Carta, the shire court becomes far more active, due partially to a great increase in litigation (Stubbs 1979, 170). This increase is enabled by Henry II opening the court system once again to the bulk of freeholders and returning its control to local leaders rather than powerful counts, as well as rebinding the county courts to the Curia Regis through the circuit judges, whose presence transformed a session of County Court into a sitting of the Curia Regis. The

court at this time was dominated by ordinary freemen, as evidenced by the fact that English was the language of oral pleadings and debate in Common Law courts until the time of Edward I (Holdsworth 1936, 229; Ullmann 1966, 88). What this demonstrates is that the attempt by Stephen to turn the shire court system into an extension of the manorial system ultimately fails due to Henry II's reforms, which are rightly credited with forming the foundation of the modern Common Law. An attempt to strip the control of the Common Law courts from the ordinary freeholders will not occur again until much later, when the bar is closed to amateurs beginning in the reign of Edward I (Holdsworth 1936, 229). Edward I ends the period where the Common Law and shire courts are the domain of free men through mandating the use of French in the court and blocking access through monopolies granted to certain legal institutions like the budding Inns of the Court.

Liber Homo and the Common Law

In the study of liberty and the Free Man of Magna Carta, the Common Law gets special emphasis because of its status as the law of the free man in England. There are two major trains of thought regarding the root or origin of the Common Law as it appeared in England during the 12th and 13th Centuries. The first theory states that the root of Common Law is in the Anglo-Saxon laws as modified and interpreted by the Normans (Holdsworth 1936, 12; Pollock and Maitland 1898, 88). The codes of law and unwritten legal customs that survive from the Anglo-Saxon period are understood as the source material from which Norman lawyers of the 11th and 12th Centuries would create and interpret a truly national Common Law of all free men of England. The second theory states that the *lex terrae* or the unwritten feudal law, was the root of Common Law (Ullmann 1961, 166). What this argument asserts is that the core of Common Law thought was a product of customary law and usage which was primarily unwritten and practiced law rather than the royal codes. The informal feudal law of free tenure, especially, is believed to have heavily influenced how Common Law operates. What both of these theories hold in common, however, is the idea that there is a legal continuity across the Norman

Conquest that parallels the institutional continuity found in the lower courts which were discussed in the last section. Which theory is more compelling relies on whether one asserts that the Common Law is primarily a product of the high court of the Curia Regis and its circuits, especially during the reign of Henry II, or whether it is the product of the shire courts which gradually from the period between the Norman Conquest and Magna Carta. Both conceptions acknowledge the legal truism of Glanvill that written laws are merely rules that are frequently observed, while true law is unwritten, which, if anything, is the basic assumption upon which the Common Law is built (Hall 1965, 3). Common Law is an explicit rejection of the notion of an exhaustive royal code at the center of the law and an embrace of the historic process of legal custom and precedent.

A common claim by scholars from after the Restoration is that the Feudal Law was imposed on England by conquest, namely by the act of William I in his tenuous reforms, against the will of the Anglo-Saxon population. The first problem with this argument is that the imposition of such a law is impossible, and only occurs in mythology: Nimrod, Romulus, Theseus (Pocock 1987, 287). Never in history has a people's law been completely abolished by a conqueror and replaced out of whole cloth from an alien source. Even without the evidence which shows widespread cooperation between Anglo-Saxon and Norman leaders in the wake of the Norman Conquest, such an act would have required the complete disestablishment of the court system from the hundreds to the Curia Regis. The fact that an essential continuity exists in the institution of the shire court demonstrates that whatever reforms were instituted by William I, they were not wholly alien and were compatible enough with the preexisting Anglo-Saxon system of local government. Lastly, the destruction of an Anglo-Saxon system of law and the imposition of Feudal law on the population would require a destruction of the identity of the English. A major principle of early medieval law is "Personality of the Law", which means that every person had the right to be judged by the law of his own people (Wormald 1999, 31). There was a deep connection between the law and the identity of a people, such that the two were largely synonymous. If

the Anglo-Saxon law had been destroyed and replaced with Feudal law, then it would have been the Anglo-Saxons who were absorbed into the Norman culture, rather than the other way around.

Common Law as it existed in the 12th and 13th Centuries had a number of characteristics which demonstrated its relationship with the Feudal Law and the Free Man. The first characteristic which deserves mention is that the Common Law did not recognize wills, as the heir to an estate in land was determined by heredity alone, not the wishes of the landholder (Pollock and Maitland 1898, 307). This fact stems from the nature of a feudal landholder as an occupant of the land in trust rather than the proprietor of the land in the sense of a commoditized capitalist landowner. Feudal inheritance relied on the conception of the individual as a member of an undying line wherein the present is not permitted to infringe on the rights of either the past or the future. While this most often took the form of dispute over the alienability of land, the larger principle covered many aspects of how the individual related to his property as a free man relating to the free men of the future. In addition, Common Law jurisdiction was not divided into superior and inferior courts like modern systems but overlapping jurisdictions based on rights, crimes, and territories (Pollock and Maitland 1898, 528). Like many other feudal concepts, the basic jurisdictional rule is that of diversity and parallel authorities, wherein multiple courts exercised shared authority in the same geographic area, rather than a singular sovereign authority subdivided into inferior jurisdictions as in modern judicial systems. Lastly the commonly cited “communalist” view of property under Common Law is false, by which it is meant that a right in property is held jointly by the members of a community in a feudal Common Law system. On fact, all rights are individually possessed under the Common Law, but common lands are those to which multiple people held individual right (Pollock and Maitland 1898, 621). In this way, the rights of the free man are not subject to the consent of his community, but are individually held. The objects of that right, especially when concerned with property, may admit multiple claims however. In cases where there are multiple claims to a single, indivisible good, the Common Law admits all right but grants access to the

greater right (*maius ius*) (Warren 1973, 350). Since, as mentioned, no property was understood as being reified in the capitalist sense, at most the greater right is one to revenue or use, not to the property or object itself.

The Curia Regis as it is understood through the context of Magna Carta is a creation of Henry II and his reforms in the wake of the Anarchy (Pollock and Maitland 1898, 153). While all kings of the Norman dynasty held a Curia Regis, the notion of the court as a permanent body rather than a temporary situation when and where the king happens to hold court is a product of Henry II's use of royal representatives as judges and the circuit-riding system by which those representatives were sent out to the various counties. These reforms also helped to pry the county courts away from powerful aristocratic magnates with whom the courts had been bestowed under Stephen, as the presence of a circuit judge made the session of the county court a royal Common Law session, and therefore reverted to the Common Law rules such as the equality of all vassals-in-chief before the court. In this way and in others, the rise of the royal courts undermined the authority of manorial courts over free men (Pollock and Maitland 1898, 272). New rights to appeal cases out of county court and into a Common Law court, new writs like the *Writ of Novel Disseisin*, and expanding the jurisdiction of the Common Law diminished the ability of a handful of powerful and well-connected earls to control the processes of the courts in the counties. Although appeals of judgment to the Curia Regis usually occurred only by the will of the king, the notion of an appellate process begins to emerge out of Henry II's efforts to make justice cheap, efficient, and relatively devoid of corruption.

The King's Court, however powerful, was nevertheless bound by tradition and local rights of the free men (Loyn 1984, 42). At no point is the Crown able to impose its own policies of local governments and court administration on an unwilling population; much of Henry II's success and John's failure can be explained by the fact that Henry II's reforms were popular, even if he was not, while John's attempts

to change the system in favor of the king's power were deeply resented and resisted by the very free men and small landholders who controlled politics at the local level. At this time, jurisdiction is a proprietary right of individuals attached to land tenure, and no amount of reform is able to separate jurisdictional rights from tenure altogether (Pollock and Maitland 1898, 527). Certain people, causes, and claims were the definitional domain of the feudal and proprietary courts. One such example that is expressly reserved to manorial court is the reasonableness of aids, which Glanvill places outside the jurisdiction of the king and Common Law (Hall 1965, 112). Aids, which were solely a matter of the terms of a feudal oath, necessarily needed to be resolved through a feudal tribunal. On the other hand, Henry II especially found a way to undermine the power of manorial courts not by stripping them of jurisdiction but by granting new jurisdictions and rights, a power which was clearly within the authority of the king by customary law. One such example is the grant of the grand assize to all free men of the realm by Henry, meaning that a free man could demand to a trial by a set of judges rather than a trial by combat in a manorial jurisdiction. The ruling by the grand assize is described by Glanvill as a royal gift (*beneficium*) granted by the mercy of the king (*clementia principis*), based on the principle of equity in justice (Hall 1965, 28). By expanding the liberties of the realm rather than contracting the right of landholders to their court, Henry II achieved the same result with the support of the landholders rather than their opposition.

As has been mentioned before, the central identifying feature of the Common Law is that it is the law for the Free Men only, while *villeins* are subject to manorial law (Holdsworth 1936, 260; Pollock and Maitland 1898, 361). In the accounts of the law, it is sometimes alternately stated that the Common Law is the law to which all free men have a right. The personality of the law does not only describe the law of a person by their ethnic or tribal identity, but also class and tenural divisions, such that which law belongs to an individual is a matter which can become complicated quickly, depending on interacting elements of feudal, class, and ethnic status. The Common Law belongs to the free man

primarily for two reasons. First is the privilege which freehold tenure provides against arbitrary jurisprudence. The freeholder's right on his property trumped all manorial custom and law and were only subject to the Common Law (Pollock and Maitland 1898, 634). By right, the freeholder held the power of soke on his own lands, such that to submit him to the manorial court of another for actions on his own land would be an infringement of that right of soke. This infringement, if made precedent, would undermine the entire system of manorial jurisprudence from the landlord with one tenant to the great estates of the most powerful noble families. Therefore, an alternate court system was necessary which avoided the problem of infringing on the right of soke, leading to the second characteristic of the free man relevant to this discussion. Free men have the explicit right in the written laws to be judged by equals (*pares*) from their own shire (Downer 1972, 135). While the Anglo-Saxon notion that a superior cannot be accused by his inferior had mostly disappeared from the law, the status divide between the free and unfree man remained valid in the court of laws. No free man could be judged by an unfree man, thus necessitating the formation of a kind of court which was composed of free men as the officers and judges. This right to judgment by peers, like all rights, was based on the existence of an obligation, namely the liability which free men held before the court as an aspect of their liberty. Free men are always culpable for the crimes they commit, such that they cannot be absolved by group punishment like the unfree, however unlike the unfree they are protected from the standard of absolute liability: "*Reum non facit nisi mens rea*" (Downer 1972, 95, 191). Lastly, it should be mentioned that none of this applies to the burgesses, who are excluded from the Common Law and are judged under a special form of manorial law called merchant law in borough courts. This distinction is demonstrated in the forms by which tenure is established, namely that letters of enfeoffment took the form of a writ, not a charter like tenure by burgage (Stenton 1932, 153).

The spread of the Common Law as the characteristic law of all free men in England contributed greatly to the development of the English Constitution and distinguished England from the other nations

in western Christendom. A major influence was that the equality of free men before the court limited the exercise of aristocratic privilege in England to the extent that it existed in France (Maddicott 2010, 434; Stubbs 1979, 171). In this way, the Common Law is both a product of the broad middling class of landholders in England as well as their source. This class, which served as the core of the Magna Carta resistance, especially in the beginning of the conflict, will be influential on the course of English politics throughout the Middle Ages until their dissolution through the land reforms which commoditized all landholding in the 15th and 16th Centuries, disenfranchising the small landholder in favor of the great estates of the high nobility and the new burgesses landlords. The spread of Common Law over local traditions correlate to the expansion of the class of Free Men as well, as new groups of men who were not included in the class of rural landholders were incorporated into the class (Ullmann 1966, 79). Both unfree tenant farmers and burgesses were quickly incorporated after Magna Carta which bolstered the cause of the Commons but simultaneously changed the nature of the Commons from a body of landholders and military tenants to a voice for commercial and urban interests. One common description given of the law by scholars is that the essential quality of Common Law liberties is a guarantee against abuses of government (Holt 1972, 169). While the truth is a little more complicated and changes with the rise of the burgesses, Common Law is inherently conservative, interested in preserving the status quo, and during the rise of the Common Law in the 12th and 13th Century, the primary concern of its practitioners was liberty.

The way in which the Common Law adjudicated on liberty was not only the protection of local liberties against the agents of the Crown but also in the protection of an individual's liberty against another. These two concepts were not distinct in the mind of the 12th Century Common lawyer, but were essentially the same issue. The king's attempt to assert an authority was no different than a lord's attempt to assert a right to labor or aids, as without the public-private distinction in law, both were treated as an attempt by an individual to assert a claim of fealty. In all such cases, the rule of the

Common Law was that there existed a powerful assumption of liberty in favor of the defendant. The Court must presume in favor of liberty unless proven otherwise, placing the burden of proof on the one claiming against liberty. Once proven free in court, the law states that the man will be perpetually free (*perpetuo liberabitur*) of that charge, so that his liberty may never be questioned again on that count (Hall 1965, 56; Pollock and Maitland 1898, 417). As mentioned, the courts operated through a parallel system of jurisdictions, so that the Common Law does not control all cases having to do with liberty. For example, while the claim of personal free status belongs to the Common Law alone, a claim to a particular free tenement belongs in county court unless the King wishes to grant review or the individual possesses that right to appeal to the Curia Regis (Hall 1965, 4). Claims of property would be understood as distinct from claims of status, although the proceedings and proof would probably be little different between the two claims. A man whose free status is challenged is judged by the King's Court but his land is judged under the Sheriff; free status, however, is proven by producing blood relatives of free status, secondarily by the testimony of neighbors, just as claims to a free tenement is proven by producing neighbors who would testify as to the ownership (Hall 1965, 54). As mentioned before, free tenure and free status were deeply intertwined, such as the possession of free tenure was proof of status. Thus, while the courts distinguished between the two, the difference was actually much less. Magna Carta served to take these rules, which had previously been subject to the king's graces, and made them part of the established procedure of the Common Law. The primary effect of Magna Carta was to place tenants-in-chief of the King under the disinterested and neutral courts of law rather than reliant on the good graces of the King (Holt 1992, 172).

This Common Law procedure is in stark contrast to the way in which the unfree are able to gain their liberty under English law. In order to liberate a bondsman, a charter is necessary, granting his liberty from the lord (Hall 1965, 57). A charter is an explicit grant by a lord to his vassal of liberties which are freely given by the grace of the lord, as opposed to a writ which establishes a legal right or obligation

to grant a liberty. Unlike the free man, who could produce a writ of enfeoffment before the court, the freed bondsman was given a charter to show that his freedom was a gift of his lord, and thus he was still subject to obligations to that lord under the customs of each county. Likewise, the liberties of the burgesses were understood to be not a matter of right but a gift of the king, who was the special patron of the towns and therefore protected their members from claims of fealty by landholders. As stated in Glanvill, any unfree Englishman (*nativus*) who stays a year and a day in a chartered town or royal vill (*villa privilegiata*) becomes a citizen (*civis*) in their community and is free from feudal duties (*villanagio*). Community is clarified to also mean guild (*gildam*) (Hall 1965, 58). Note that the word for the chartered town or royal vill is a privileged place; their rights were matters of the king's good graces, not of law or right. Likewise, the work citizen is only used in Glanvill to describe the burgesses, never to describe free men, who are called *liberos*.

This large community of freeholders who were not subject to private law of the manors enabled the creation of a truly national Common Law in England where it had failed on the Continent (Holdsworth 1936, 17). One of the foundational documents of this national law is the coronation charter of Henry I, in which the king promises to uphold the good laws of King Edward the Confessor. This is treated by the lawyers and scholars of the 12th Century as a restoration of the Ancient Anglo-Saxon Constitution and a binding legal agreement to restore the liberties which William I and II had reduced. The problem of interpreting Henry I's charter is that it is closer to an election speech than a charter of liberty in its language and its function (Holt 1992, 37). Its status as a document of legal doctrine, thereby, is questionable at best. Furthermore, in the course of the 12th Century, many major reforms change the way in which the Common Law would eventually function. By the time of the *Leges Edwardi*, the three-fold division of English law between West Saxon, Mercian, and Danish law seen in the *Leges Henrici* has been abandoned (O'Brien 1999, 32). This loss of the regionalization of English law demonstrates that the national character of Common Law is still evolving after the time of Henry I.

Furthermore, between *Leges Henrici* and Magna Carta, the idea that the oath of a ranking man is worth more has disappeared from the Common Law (Pollock and Maitland 1898, 412). What this means is that the notion of the equality of all free men before the Common Law is not a product of the Anglo-Saxon laws or of Henry I's time, but of the legal revolution occurring before and during Henry II's reign. Part of this revolution was the rise of a secular law profession, a result of expanding the Cathedral education system to include non-clerks (Morris 1987, 46). This allowed a large body of trained, educated civil servants to arise around the time of Henry II, which was necessary to the rise of a national Common Law because of Henry II's ability to find judges for his new circuit courts. Common Law's character was truly formed during the reign of Henry II, as it is his legal reforms which are cemented into the Common Law by Magna Carta. Henry II first made *disseisin* of any Free Man illegal without a judgment of court, and then afterwards declared *disseisin* to be a breach of the King's Peace, subject to the jurisdiction of the Common Law (Warren 1973, 336). Henry II's courts were truly national, made so by the circuits of the Curia Regis. Magna Carta is, if anything, a product of Henry II, whose legal reform of English Common Law gave it the shape which would distinguish English liberty under law until the modern age.

Magna Carta on the Liber Homo

The extent to which Magna Carta is a document about the ordinary free man is a topic of dispute among historians and political theorists. Opinions diverge as widely as Sidney Painter's statement that the *Liber Homo* is the center of Magna Carta to Edward Jenks's claim that Magna Carta has little to do with the ordinary free man (Holt 1972, 35; Painter 1961, 247). The first thing to note is that Painter and Jenks are talking about two different aspects of Magna Carta; Jenks is referring to a document about a particular controversy over feudal tenure in 1215, while Painter is referring to an idea about government born out of the Barons' Wars which dominates Anglo-American constitutional thought to this day. This is not to say that they are both right, however, as Painter is far closer to the

truth than Jenks, whose political aims were inherently hostile to the very notions of constitutional forms of government, and thereby colored his work. Simply put, Magna Carta needs to be examined in both senses, as a document in a particular place, time, and conflict, as well as an event which changed the way the English thought about government and politics.

This change was not the birth of liberalism or democracy, as some argue, although it can be seen as the birth of limited constitutional government. Magna Carta does not include a single mention of a universal human right, nor does it claim to justify its terms by either Natural Law or reason. In clauses like that of Article 55, the ultimate justification for all rights and the limits of those rights refer to the *lex terrae*, or the unwritten law of the land, commonly referred to by modern scholars anachronistically as the Ancient Constitution. The source of justice and social order is found in history, specifically the legal or forensic history of the law as understood through the feudal and national customs which were understood to be timeless, as they existed as long as memory could recollect. Furthermore, this social order was national in character, belonging to the English alone, as evidenced by the separate clauses dealing with the Welsh, who are said to be under their own law, their own social order in history. Rights are not the focus of Magna Carta the concept, as they are particular reflections of an understanding of social order in equilibrium. Rights do not create the equilibrium but display it as it functions, and a failure in the equilibrium destroys Right, thus destroying particular rights. In this sense, the notion of individual rights as they exist in liberal thought is meaningless in the context of Magna Carta. The *Liber Homo* does not exist as an atomistic individual but in a set of interrelated and overlapping communities whose harmonious interaction forms the substance of the Right and rights, Liberty and liberties. These communities are social, *communitas regni* and the community of the vill, spiritual, the Church, and “blood and soil” communities, communities of kinship and the *patria*.

For these reasons, early modern or modern interpretations of the nature of rights in society are of no real use in the interpretation of what Magna Carta meant as either a document in time or an event in history. In the centuries before Magna Carta, the language of *beneficium* had been transformed to *foedum*, such that the notion of the grace of the king was replaced by the law as the source of authority and power; likewise, Magna Carta takes individual proprietary privileges which were often sold by the crown and transforms them into class rights, following in the example of the Church and chartered cities (Holt 1992, 55; Stubbs 1979, 60). Rights under law belong to groups of people who are defined by their legal status and standing, not by nature. No person is entitled to the exercise of any right in his own right, but only through his membership and participation in a non-universal community of peers. Practically, the language which is used by Magna Carta distinguishes the origin of rights and privileges in two broad categories. Language of right (*ius*) and liberties (*libertates*) seem to be defined as coming from custom and royal grant, respectively (Holt 1985, 205). The former refer to the practice of justice as understood through custom and usage, while the latter refers to privileges which are not guaranteed by custom, but under the logic of Magna Carta, have the potentiality to become custom in the same process as Common Law precedent. Where Maitland describes the differences between *leges* and *laga*, a parallel can be found in the treatment of *libertates* and *ius*. An example of this can be found in the treatment of certain privileged unfree men in Article 39. While the text of the 1215 document states that free men are protected from arbitrary imprisonment and seizure, the 1216 Reissue of Magna Carta clarifies that *villeins* on the King's own *demesne* are also protected under Article 39 (Holdsworth 1936, 211). This is an example of where the same right of a free man is extended by the grace of the king to protect another class of people, unfree *villeins* of the king. In this case, the freedom from arbitrary imprisonment and seizure is a right (*ius*) of free men but a privilege (*libertas*) of the king's *villeins*. Through the long-standing nature of such privileges, they are assimilated into the law and become rights themselves.

One of the most overlooked elements of Magna Carta as well as the first use of the term *Liber Homo*, used here in the plural, is in Article 1, the article on the liberties of the Church. In the preface, the word *fideles* is used, referring to the act of homage done by all free men to the king, so that technically the preface is the first mention of the freeholder class, but Article 1 calls them out specifically as the recipients of the promise “*in perpetuum*” to abide by the liberties of the land. More importantly is the fact that this promise is linked to the liberty of the church by its inclusion in the same clause. Article 1 can be compared in this way to the First Amendment to the United States Constitution; whereas separating the rights in the First Amendment is a modern misinterpretation of the meaning of the First Amendment, so too is distinguishing between the bulk of the ecclesiastical rights in Article 1 and the clause on the rights of free men. Both of these writings are legal documents that reflect a non-legal reality of the free life; in other words, the legal documents represent an experience of life in which these legally distinguishable clauses cannot be distinguished in any real form in reality. While a court of law may argue that an infringement of free exercise of religion, for example, is unrelated to the clauses on freedom of speech, the press, and association, this distinction is a legal artifice for the purposes of litigation and does not reflect the fact that life is experienced as a singular train of consciousness, and therefore liberty itself is a singular concept. To infringe on any element of the free life is to infringe on liberty itself. Applying this back to Magna Carta, Article 1 is a demonstration of the essential unity of the realm and the Church as experienced through the life of the free man; one cannot separate membership in either from the other because the human soul is a singular, indivisible entity. The gospel’s statement that “No man can serve two masters” is a reflection of this unity, wherein it is impossible to segregate the two internal identities of citizen and Christian, such that one does not impact the other. The statement “Leave your faith outside the voting booth” is as stupid as arguing that one should leave any other immutable characteristic out of politics³. Likewise, the liberties of the Church and of the Free Man

³ To the argument that people can and do change or lose their faith, there are two objections. First, is the

in Magna Carta are not distinct but part of a fabric of experienced life wherein the freeholder understands himself as a member of the Church and the churchman as a free Englishman, both of which are part of a set of overlapping communities known as the Realm of England.

As mentioned before, the free man's life is understood through the context of his communities, especially the *communitas regni* which is the community of the feudal oaths. For this reason, Magna Carta is largely concerned with the shape of just order within that community and therefore on the abuses of feudal right and obligation. Many of these are concerned with maintaining the integrity of the feudal oath and contract in the face of a rising capability by lords to manipulate the feudal obligations to their benefit. It was not only the king, but also the great lords, as the nature of feudal powers were mutual; as the king's authority increased over the great lords, the great lords' authority increased over lesser vassals. This mutuality is explicitly addressed in Article 15, which limits the aids which can be demanded by all lords on their vassals to match the limits of the king on the great lords. Other sections simply ban feudal abuses in general terms, without specific reference to either the king or great lords, such as Article 16, which bans the use of distraint to perform duties beyond those which are required from a free tenement, or Article 20 which limits the amount which a lord may amerce his vassals. All of these focus on maintaining the integrity of the bonds which hold together the community of the realm. However, other articles are concerned with repealing the reforms of the Angevin kings, many of which are elements of what historians call the "bastard feudalism" of the 12th Century. Article 29 focuses on the importance of personal service to the relationship between lord and vassal, and attacks the scutage reforms which were instituted by Henry II. Specifically, it states that payment in lieu of personal service must be voluntary, rather than obligatory. Furthermore, there is a discussion of the relative strength of

difference between cultural attachment to the form of a religion, which is not faith, and a deep belief in a spiritual truth. Secondly, is that even if people do have a crisis of being and lose deeply held beliefs, faith is experienced as immutable; the person who has a crisis and loses their faith no more experiences that loss as voluntary than a religious person understands their faith as voluntary, but as a reaction to eternal truths.

feudal obligations; as mentioned before, the Common Law admits multiple claims to right to a single object, but ranks these in terms of lesser or greater right. Likewise, Article 37 states that any obligation by military tenure trumps obligation to the king by socage, burgage, fee-farm, or lesser serjeanty. The free man is first and foremost a military tenant, such that his obligation to serve militarily is his first obligation. As Pocock says, the terms of military obligations are foremost under a feudal regime, while economic considerations such as the terms of tenure in the latter half of the clause are incidental to the military nature of the feudal oath (Pocock 1987, 333).

To the extent that Magna Carta opposes arbitrary government in itself, as opposed to arbitrary abuse of feudal obligations, there are two major categories of clauses describing the rights of the free man. The first is concerned with his property and the latter are concerned with his person. One of the great abuses of King John was the way which he abused the court system to his favor, and wresting control of the administration and courts from the personal power of the king and into a neutral body was a major objective of the barons' party. Certainly, one can look ahead to the 14th and 15th Centuries and see where the great lords would find the ability to turn the courts to their own benefit, but in the 13th Century this was not a real possibility. Both the Angevin monarchy and the county free men were powerful enough to prevent the barons from becoming the forces for petty tyranny which would define the Wars of the Roses. Looking at King John's tactics, it is no surprise that there would be a concern with wills and the problem of men who die intestate. Article 27 addresses this concern, stating that their property be divided by their kinfolk rather than a royal court official who could seize it for the king. Furthermore, the corruption of the courts by the king influenced the new and popular reforms of Henry II, such as the *Writ of Novel Disseisin*. This writ allowed a free man who was deprived of his land to appeal his *disseisin* to the courts for immediate action. Article 18 places all such disputes over land and *disseisin* in county court, which would be less subject to the king's corrupting power, but under a circuit justiciar, meaning that the session of county court would be a Common Law session rather than a county

law session. Finally, as a result of King John's incessant wars and the costs incurred in prosecuting them, the barons' party was concerned with the notion of seizure. In two articles, both 28 and 30, Magna Carta addresses the seizure of property by force, an issue which would be deeply important to a small landholder like the *liberos*.

The second category, of the free man's person, is largely concerned with the powers of arrest which were abused by the king. Article 34, for example, states that no *Writ Praecipie* can be used against a free man or his tenement in such a way that he loses his jurisdiction. This involves the very character of the Free Man as one who is subject to the Common Law alone. By stripping a person of his court, he loses the element of his liberty which defines him. In addition, there are two clauses concerned with arrest and trial, the famous articles 38 and 39 of Magna Carta. Article 38 states that no person is to be arrested without witnesses on the word of the bailiff alone. This article forms the foundation of the right to a grand jury indictment. Last is the right of a trial to jury, as Article 39 states that no freeman is to be imprisoned, disseised, exiled, or destroyed without judgment of peers or law of the land. These rights seem to serve as the foundation of the liberal regime of individual rights, as they are concerned with the classical three "Natural Rights" of life, liberty, and property. While it would be wrong to say that Magna Carta did not inspire the notion of liberal rights, it must be pointed out the specific wording of the clauses, especially Article 39, is not concerned with an abstract right but with the proper legal procedure, namely the law of the land or a jury of peers. As mentioned before, the role of the *Liber Homo* in local government is that of judge. He has the knowledge and character to levy justice in the shire or county according to the customs of the jurisdiction. The right to a trial by jury according to the law is a product of membership in a county and participation in the process of self-government which defines the county community and court.

Of all the articles, it is 60 and 61 which best summarize the role of the *Liber Homo* in Magna Carta. Article 61, of course, is the security clause describing the 25 barons who would ensure that Magna Carta is followed. Article 60 states that all liberties and customs which were described before (*predictas*) be observed by all men, lay and clerical. Article 61 sets up the 25 barons as a kind of court over the king, who have the power to pass judgment over where he has transgressed against Magna Carta, but the ultimate enforcement mechanism is placed in the body of the feudal assembly-in-arms. The power to “distrain and oppress” the king is given to the 25 barons along with the whole community of the land (*tocius communia terre*). Certainly, there are problems with this clause, especially with the notion of community and the novel terminology used here; *tocius communia terre* is not a common usage when referring to the feudal assembly, which generally goes by the name *communitas regni*, as in Henry II’s Assize of Arms. According to Holt, this strange usage was inserted either by a clerical or burgesses representative who was attempting to find a way to describe all three communities of the feudal vassals, the Church, and the burgesses in one phrase (Holt 1972, 44). Nevertheless, this strange usage has no real effect on the substance of Article 61, since the enforcement of Magna Carta would be accomplished by arms, and arms were the province of the feudal vassals, or the *communitas regni* in arms. The hypothetical proto-nation of *tocius communia terre* had no reality, despite attempts by men like Stubbs to impose a 19th century nationalism on the 13th Century. The three distinct communities of the burgesses, the Church, and the feudal assembly remain distinct in the wake of Magna Carta and do not form some greater corporation of the nation-state.

Chapter 2

One of the great problems facing those who study medieval literature as modern historians is the propensity of the Medieval author to describe things as they should be rather than as they were (Morris 1987, 8). What is a source of error in historical works, however, is a mine of political thought, as it is the political theorist who is exactly interested in how things should be. While the *Liber Homo* existed as a concrete social class defined by their jurisdiction under law and characterized by elements like military duties and free land tenure, it also existed as an ideal type in medieval philosophy. This type was defined by attributes that are purely theoretical, having more to do with characteristics of the soul rather than socio-economic or land tenure concerns. First, a few items regarding the nature of medieval thought must be established.

The distinctive feature of Western Europe was the keen awareness of a previous cultural tradition that was superior in every way to the contemporary attempts at the sciences, arts, and politics (Morris 1987, 21). This statement cannot be stressed enough; everything the medieval man could do was inferior to the glory of the Roman Empire, and the evidence of this fact lay in the very land around them, from the Roman roads to the ruins of Hadrian's Wall to the very nations themselves who stood as living testament to the disunity of a Europe which was once Roman from the Atlantic to the Black Sea. The high point of medieval scholarship was the imitation of Roman forms and this colored everything produced until the Renaissance. All original work by medieval scholars was conducted in the shadow of the Romans and thereby made in a form which seemed to reflect Roman ideas and conclusions. Even when the conclusions of the medieval author differed from the Roman, the language of Roman writers was used to hide the originality of the work; as Ullmann argues, Ciceronian language was used to describe the most un-Ciceronian idea of the feudal contract (Bolgar 1977, 199; Ullmann 1966, 80).

The paradigms of medieval philosophy are the two poles of classical philosophy and Christian theology. One result of this was a continuation of the classical clash between the *vita contemplativa* and the *vita activa* in political philosophy, with the *vita contemplativa* redefined by monastic reformers to refer to their own way of life. Christian ethics were indeed composed of virtues which were useful to society, but also contained virtues with no seeming use for society such as moderation and hope which served the individual alone (Voegelin 1975, 27). The monastic life amplified this effect by its emphasis on separation from society at large, wherein those who chose the life of contemplation of God existed in a society that was in its ideal form completely apart from political life (Bolgar 1977, 135; Morris 1987, 32). Furthermore, a great deal of medieval philosophy insisted on the antithesis of anima and corpus; since justice comes from the soul, the whole of the individual's life must be ruled by the soul, and therefore the division of the spiritual and temporal which makes political life sustainable as a choice in and of itself is impossible under the conditions imposed by medieval thought (Ullmann 1961, 92).

Vita contemplativa naturally leads to monarchy, as contemplation of the universal and the hierarchy of Being leads one to see the Monarch as the embodiment of celestial order in microcosm (Pocock 1975, 56). In other words, Christianity is at its root an Imperial religion, with assumptions at its base that give preference to monarchic forms of government, but Christianity was not the sole intellectual force which advanced monarchy; much of the classical works which survived were neo-Platonic or Stoic, with heavy emphasis on the contemplative life and therefore implicitly supporting a monarchic type of government. This led to the great conflict of humanism and philosophy in the 12th Century: the former leads to the *vita activa*, the latter to the *vita contemplativa* (Pocock 1975, 58). The kind of political activity suggested by writers like John of Salisbury suggested broad participation by large sectors of the population in the administration of government, even (or especially) by clerks who might otherwise spend their time in devotion to God. The 12th Century Renaissance can be understood as the era of Aristotelian and Ciceronian friendship, which became highly influential on medieval thought in

this period and is reflected in contemporary writings (Morris 1987, 118). One of the great innovations in Aelred's *Life of Edward, Confessor and King* is the emphasis placed by the author on friendship as the essential bond of the nation (Yohe 2003, 180).

The theory of medieval monarchy rested on a fundamental concept of *auctoritas*, or final authority to make Law. While *potestas* is divisible, *auctoritas* is indivisible, and therefore the lawmaking authority of the *lex regis* demonstrates the necessity of royal government (Ullmann 1961, 57). This is embodied by the medieval maxim of "*Quod principi placet, legis habet vigorem*," and this idea is invariably true in all of Western Christendom, even in England. England's unique interpretation of this maxim, as explained by John of Salisbury and eventually Magna Carta, is what distinguishes the *lex regis* of France from what becomes the Common Law of England, not a rejection of the lawmaking authority of the King.

Lastly the King's subjects and the realm are two distinct notions in medieval thought, which are later joined together into a single symbol called "the People" by early modern liberal thought. Under the first symbol, all individuals are subjects of the King, and under the second, feudal landholders join in a body to parallel the king as a *baronagium* (Voegelin 1952, 38). This dual ordering of society is deeply influential in the way that liberty is understood and explained by thinkers of the era. An error in the interpretation of this dual ordering is to assume an identity between classical and medieval conceptions of the realm. In fact, the classical theme of consent as found in Cicero had been replaced by feudal theme of *fidelitas*, a unitary concept encompassing God, the Pope, and the King (Ullmann 1961, 95; Ullmann 1966, 31). Fidelity was the sum of an individual's obligation to hold faith to all authorities to which he was bound, from high to low, resting not on his rational ability to choose but on a sub-rational appeal to honor and virtue. Political sentiment and character were organized through the virtues and vices, which were the basic political bonds which united society, rather than reason (Smith 1985, 209).

12th Century Renaissance

The 12th Century Renaissance is not nearly as well studied or understood as the Italian Renaissance which would follow several centuries later, such that its contributions to the idea of Liberty are often undervalued. The 12th Century was the century of Cicero and Seneca, the century of friendship as the characteristic binding together free men and defining the political and social realm (Morris 1987, 96). The ideals of this period are well suited to the class of men defined by their status as peers, who understood themselves to be bound together by personal oaths of loyalty, but Magna Carta is seldom studied in this context, as a product of an age where free men understood themselves in the context of the great literary and cultural works of men like John of Salisbury, Peter Abelard, Geoffrey of Monmouth, Henry Huntingdon, and the troubadour poets.

As mentioned, the 12th Century humanists are defined by their movement towards Rome: essentially oriented toward the past and aware of themselves as an imperfect and insufficient successor (Morris 1987, 51). It is not to be surprising, then, that the major influences on their work and the examples which they attempted to emulate were largely Roman, especially the Stoic writers which had been elevated and glossed by medieval scholars in the manner of Boethius's *Consolatione Philosophiae*, which can be understood as the great link between the Stoic tradition and Christian philosophy (Morris 1987, 15; Pocock 1975, 36). Part of the change involved in this humanist movement was the move to restore value to secular goods and the *vita activa* which had lost much of their luster under the influence of monasticism and neo-Platonism as the major philosophical and scholarly movements of the previous centuries. Christianity itself had roots in classical thought that predated the 12th Century; Christian understanding of the *ius naturale* was drawn directly from Stoicism, and Christian equality was adopted from the Stoic writers, sometimes with very little modification in the language, as evidenced by Alfred the Great's famous translations of classical works by authors like Boethius and Augustine (Holdsworth 1936, 6; Keynes and Lapidge 1983, 131).

The redemption of classical works through a Christian interpretation was a major part of the scholarly work being done at the time. This is not to say that Christian ideas were giving way to classical ideas or that the Christian writers were becoming pagan philosophers; this would be a misrepresentation of the process. 12th Century humanists honored ancient texts for what they could add to the works of contemporaries, not for what was meant within the original context of the writer, and actively minimized the differences which were evident (Morris 1987, 54, Ullmann 1966, 142). Nevertheless, through the process of Christianization, certain ideas, words, and concepts were taken from the classical corpus and incorporated in new ways within a Christian context, sometimes in ways that run counter to the original context of the author. For example, the redemption of Cicero's *de Officiis* by university scholars like John of Salisbury allowed these scholars to understand themselves as critics and reformers of the civil state, despite the fact that the application of Cicero's works was to make the Church a moral authority and check on the state, an idea which Cicero himself would strenuously oppose (Morris 1987, 47). Just as Cicero never envisioned a body outside the republic serving as a moral authority for citizens in their civilian lives, many other ideas were taken into Christian thought through the classics but converted into new contexts that were deeply medieval.

The great achievement of the 12th Century Renaissance was the reintroduction of Aristotle to the West, concluding with the translation of *Politics* and *Ethics* into Latin at the end of the century. Aristotelian ideas about citizenship heavily influenced the humanist thinkers of the period and the critique of government coming from their works. Two major features of Aristotelian thought needs to be emphasized with regards to Magna Carta. First, Aristotelian ideas of citizenship relied on a degree of ethical equality of every citizen, so that to be dependent on another is equally vicious as to reduce others to dependency, as both reduced the ability of others to live virtuously (Pocock 1975, 75). The Aristotelian citizen both ruled and was ruled in turn by the other citizens, an idea that seems to resemble feudalism at first glance. Secondly, Aristotelian citizenship relies on the peculiarities of

individual cultural goods being subsumed by the act of good-seeking itself (Pocock 1975, 68). Aristotelianism understood cultural goods like liberties as reflections of a universal drive and therefore deemphasized the particulars of politics and culture. One of the great problems of understanding Magna Carta is to understand the inherent conflict between the language and ideals of 12th Century Aristotelianism and the Common Law as both a philosophy and basis for Liberty. Common Law and its emphasis on precedent is a mode of thought that conflicts with the universalism of classical thought, putting its emphasis on the very parochialism and particularity in English culture and law that would necessarily be incompatible with the kind of Roman legal philosophy that grew out of classical thinkers. Classical philosophy never crosses over to the Common Law, whose Roman influences are limited to the legal works of Cicero and Seneca and which takes for granted the questions of being and eternity, instead predicating itself on order as it presents itself in history (Holdsworth 1936, 5). Aristotle and Magna Carta, therefore, share an uneasy partnership as sources of English Liberty.

Policraticus and Liberty

Policraticus is one of the few works of political philosophy written in the Middle Ages, and the earliest English work of that nature. This dissertation emphasizes *Policraticus* in the introduction because of its importance as a work of the Archbishop's office. John of Salisbury was a secretary to two Archbishops during the 12th Century, Archbishop Theobald and Archbishop Thomas Becket, and therefore held a position of power and trust in the institution. Since Archbishop Stephen Langton is largely considered to be the father of Magna Carta (Stubbs 1979, 345; Warren 1961, 213), it is important to understand the great work on politics written by such an influential figure, whose work would not be strange to Canterbury. What John of Salisbury wrote about liberty and justice are important factors in considering what Magna Carta means by those terms, especially given the hypothesis of a Canterbury origin to the document.

There were many classical influences on *Policraticus* and in many ways it does seem more like a classical treatise on politics than a Christian or medieval work with its emphasis on worldly virtue and its stated theme of courtiers and their behavior. Boethius was the most likely inspiration for Books VII and VIII in *Policraticus*, as evidenced by similar statements on such topics as the nature of liberty, vice, and the nature of the philosophic experience as journey toward God (Nederman 1990, xviii). In addition to Boethius is a clear Aristotelian influence, through his use of the concept of *hexis*, the golden mean, and other Aristotelian language when writing on ethics. One problem in this theory is that Aristotle's *Ethics* was not available to John, who must have borrowed from other sources of Aristotelian thought, such as Cicero, Boethius, and the Topics (Nederman and Bruckmann 1983, 212). Despite this fact, there is clear evidence of Aristotelian influence, and John certainly found access to it in some way, the details of which are the topic of dispute among scholars today.

This is not to say that *Policraticus* is merely an imitative work of classical political philosophy. Certainly, John of Salisbury's work is a medieval text on contemporary politics, not a medieval text on classical politics. While influenced by classical thinkers, many of Salisbury's uses of classical sources are to confirm his pre-existing conclusion (Bolgar 1977, 199). Especially on issues like homage, which would smack of corruption to a classical political thinker who viewed such arrangements as clientage, John uses the classical citation as a cover for his actual politics, rather than for the true spirit of the classical text itself. In a society which placed value on the longevity of an idea, nothing did more to support a statement of political philosophy than being able to attach a great name of the past to the idea.

Policraticus is a book of body metaphors, which permeate the text (Nederman 1990, 66). In this way, John described the virtues as the "muscles" of the soul whose exercise strengthens it. Conversely, the passions are leprosy of the soul, which rots away its constitution (Nederman 1990, 15). The discussion of ethics in the book centers around this conception of virtue and its role in creating a healthy

person. The link between virtues of the individual and virtues of the citizen lay in the role of justice. Just as vice degenerates the soul, John argues that evil is like a wound on the soul which must be treated to prevent further injury. The end of justice is to be a curative to evil, to cauterize the wound through a mean between mercy and harshness (Nederman 1990, 50). Justice is not a calculative act which determines who gets what by means of a formula, but is a practical art of maintaining social order by binding the wounds which men cause one another. Justice is concerned with finding the answer to a dilemma that brings peace, regardless if the outcome is an equal distribution of goods or not. Whether the outcome is fair to an outside observer is irrelevant, what matters is that the parties involved believe that justice has been done, much as medieval jurisprudence as a whole understood it. Lastly, the performance of justice is both a spiritual and civil good; the two are not separated in Salisbury (Nederman 1988, 376). Performing justice is an act which “exercises” the soul, making it strong, while also making the social bond among men stronger.

Just as the nature of the just solution is relative to the conflict, based on particulars of the individuals or groups involved, the nature of the mean in all virtues is relative to the agent or culture involved (Oswald 1999, 42; Nederman 1986, 135). In this, Salisbury does not stray from Aristotle; he does not claim that virtue itself is relative, but that the exact point of the golden mean is dependent on the individual, and therefore must be understood to vary among people. Just as the same meal that is gluttony to the child may be insufficient to the Olympian, so the exact point of balance in the other vices will vary among various people. The reason that one should pursue this mean of virtue is that virtue is the path to happiness, with a dual *summum bonum*: both the journey and the destination are the goods being sought by the virtuous actor (Nederman 1990, 157). Salisbury argued that the benefits of virtue could be found both on earth and in heaven, as the virtuous life made this life good while simultaneously preparing one for felicity in the next life. This is not to say that solely earthly goods were valuable in and of themselves. He argued that since there is no proportionality between eternity and

time, so there can be no proportionality between temporal and eternal goods. Eternal goods are the only goods of value, and it is eternal goods rather than earthly goods that define the good life on earth (Cooper 1991, 21; Nederman 1990, 55). In this, he is little different than Boethius and the Stoic thinkers, who understand virtue in its oppositional state to fortune or *Tyche* in Boethius (Cooper 1991, 21; Pocock 1975, 36). The good things of this world are bestowed by fortune and belong to the realm of material desires, while the truly good things are eternal and spiritual in nature, and their goodness stems from their permanence.

This is the danger of good fortune, according to Salisbury. An abundance of earthly goods, as epitomized by things like wealth, health, and possessions, turns the soul toward material desires which strips him of his reason and turns him into a brute, loving ignorance and hating understanding (Cooper 1991, 44; Nederman 1990, 9). For this reason, *Policraticus* criticizes wealth, not just in Kings, but also in magistrates and subjects. The distinction between sufficiency and wealth, in Salisbury's mind, is that one has enough to pursue virtue. Insofar as it is the concern of government to deal with issues surrounding material, earthly goods, for the end of public welfare it is necessary to foster a secure life and no more (Nederman 1990, 14). The pursuit of glory, riches, or power is not a legitimate objective of rulers, magistrates, or common subjects. The King and his magistrates are permitted to pursue these things only so far as providing the security necessary for the people of the realm to seek virtue in their lives.

Salisbury's ethics depart from the classics in one major regard: the error of the classical philosopher to him was in substituting personal virtue for God's grace (Nederman 1990, 148). For Salisbury, true blessedness cannot be achieved by worldly means alone, as the classical philosophers argue, since the fallen nature of man separates him from God. Like St. Paul and St. Augustine, he holds to the doctrine that an individual must be born again, or *renovatio*, so that the fallen, natural man dies

and a spiritual man is born in his place. Virtue itself is certainly important, as the Good life begins with virtue, but virtue cannot be pursued without the element of the Grace of God because man is not capable of good without the transformative power of the Holy Spirit changing Man's deformed will into a new rightly-ordered will aiming at God (Cooper 1991, 58; Nederman 1990, 227). Thus, Christ comes before personal virtue, as described by his ladder analogy to the good life. Citing the Proverbs, he states that the beginning of all wisdom is the fear of the Lord, and begins the analogy by stating that the law is like a ladder of virtue leading to blessedness, but its first rung is fear of the Lord (Cooper 1991, 59; Nederman 1990, 47). Outside of Christ there can be no virtue.

Another departure from the classics is Salisbury's treatment of liberty. Certainly, he agrees with them that Liberty and virtue are deeply intertwined, for only virtue can banish servility and make one free. However, for Salisbury, liberty is a *habitus*, and therefore a virtue itself, alongside justice, courage, moderation, and wisdom. When he uses the word *habitus*, it only makes sense by understanding that this is Cicero's translation of the Greek *hexis*, a central concept in Aristotle's understanding of the virtues. *Hexis* is a kind of knowledge of the soul, thus by becoming known it becomes an essential part of the soul and is called a "second nature" because it changes the essential character of an individual (Oswald 1999, 41; Nederman and Bruckmann 1983, 207). Therefore, liberty is something that is an inherent part of one's personality and nature, a characteristic that either is or is not present, and that is wholly dependent on the "exercise" of the soul, to use the body metaphor from earlier. Like justice or moderation, one's liberty is not subject to fortune, therefore not subject to external circumstances. St. Paul was as free in prison as he was in the city because his liberty stemmed from the Lord, being a gift of God's grace. *Hexis* is not habitual behavior, however, but the assimilation of the idea of that behavior to the soul until it becomes an element of the man's character itself (Oswald 1999, 167; Nederman and Bruckmann 1983, 218). Just as a person can act justly without being just, one can act freely without being free, who John calls the libertine, and the essence of any virtue as *hexis* is the internal assimilation

of the virtue to the personality of the individual. A person is just, wise, moderate, courageous, or free because that is their nature and they cannot be anything other than what they are. Behavior certainly aids in the process of building a *hexis*, but the true act is the mystical transformation of habitual behavior into personal character through the power of the Grace of God. This is the most important fact when understanding Salisbury's liberty: the *renovatio*, or the "second birth" which St. Paul describes is the fundamental force which forges virtuous *hexeis* in the souls of the righteous individual. Virtue is impossible without Christ, therefore there can be no liberty outside of the mystical body of Christ, the fellowship of all true believers.

As John stated, truth itself is the source of liberty and it is by the agency of the Holy Spirit that one becomes free (Nederman 1990, 27). This is clearly in line with St. Paul's discussion of being "born again" of the spirit into the liberty of Christ. The application of this understanding involves looking at liberty as a spiritual and eternal concept rather than one focused on material goods. He states that the measure of liberty is the Law of God, with the understanding that the Law of God is not the earthly Canon Law as writers like Wulfstan of York argue, but instead is an unwritten law that must be interpreted through wisdom, study of scripture, and divine inspiration (Nederman 1990, 32, 214). Note the commonality here in the conflict between Roman Law and Common Law, between the written code and the unwritten constitution. Thus, the Church has a special role in the maintenance of liberty because it is the institution that is tasked with the interpretation of God's law and granted the gifts necessary to do this vital work. One might say that John's interpretation of the Church's work with God's law was influenced by his work in the administration of the English state and his observation of the Common Law. Unlike human law, however, the laws of virtues have a relative component, namely the golden mean. Liberty requires one to respect others understanding of the golden mean because no person can see the mean of another, as explained above, but this does not imply that one must respect those who abandon the virtue for license or servility (Nederman 1986, 140). Honest attempts to seek

liberty must be granted tolerance, but those who deny the virtue itself are outside of tolerance and deserve reproach or punishment.

Just as liberty is virtue, true slavery is to be ruled by vice, for any who practices vice becomes shameless in their devotion to it and gives themselves every more to be mastered by it (Cooper 1991, 104; Nederman 1990, 183). The nature of slavery, like liberty, is spiritual and ethical, not political or social. The slave is slavish in himself because he bears the characteristics of the slave in his soul. By turning to vice and rebelling against God, the slave is completely subject to the demands which his vices put on him and is incapable of turning away. Vice, like leprosy, rots away a person's soul until it has taken over the entirety of their nature, personality, and character. The individual is utterly defined by their vice, incapable of asserting an identity independent from that vice, and therefore completely subjected until nothing remains of who they are, and they are merely a puppet dancing at the tune played by the evil in their souls. This kind of slavery is the destruction of the free will and its replacement by the need to serve the every command of vice (Cooper 1991, 103; Nederman 1990, 17). For the slave, every act, every thought, and every intention is ruled by their vice and they are incapable of doing, thinking or being anything but the servant of their particular evil.

Liberty is a mean, and so slavery is comprised of two opposing extremes: servility and licentiousness. Both are defined by their absolute bondage to vice. For Salisbury, there is only one cure to slavery that can break the individual free from the grasp of his own vices. God's grace and the power of Christ's redemption can restore even the tyrant, the arch-slave, through his repentance and submission to the authority of God (Nederman 1988, 378). Barring that act of repentance, however, political liberty does not apply to servile or licentious members of society, who would be incapable of using it if granted (Nederman 1986, 139). Political liberty is a benefit to a free will, but those who are slaves are incapable of practicing that freedom and therefore incapable of participating in politics, which

is defined by the exercise of rational judgment and experience. Granting liberty to the unfree introduces the element of corruption in society by creating a faction of people whose every choice is dictated by vice in much the same way as a Roman patron would dictate the votes of his clients. Their actions are not based on an understanding and pursuit of the good but on their subjugation to evil.

The root of corruption in politics according to Salisbury is dependency, not just moral dependency of the vicious but also those without independent means of living who are economically subject to their patrons (Nederman 1990, 90). Dependency of any sort removes the capability of moral and political agency by the individual, creating factions in politics whose goal is not eternal goods but worldliness, either in the sense of the servile client-dependent who lends himself to his master's pursuit of power, wealth, and fame, or the libertine whose every impulse is controlled by the passions. The end of both the servile and libertine is the destruction of true liberty in society and its replacement with the kind of false liberties which promote a character of slavishness; when all pretend to consent to what the tyrant commands, liberty is completely extinguished (Nederman 1990, 23). This is why how both libertinism and servility make a mockery of freedom, though a twisted kind of consent under threat of force by the tyrant⁴. True liberty is displeasing to those who live as slaves and cannot thereby have it, and so in their egotism, they must force the free to subject themselves in the same way that they are subject (Nederman 1990, 175). The vicious cannot be alone in their vice, for the very existence of free people anywhere demonstrates the lie of their lives, so they abolish liberty by mandating participation in vice. The form this takes is a lust for power which forms the essential root of tyranny (Nederman 1990, 189).

⁴ While John of Salisbury is basing his work on the classical assumption of tyranny as rule by a dictator or evil king, this is not the only interpretation possible. Other moral writers like Wulfstan of York admit the possibility that society itself could become tyrannical, such that there is not a single individual who can be assassinated in order to restore a just social order. Salisbury approaches this concept in his writings on the flatterers and vicious citizens, but his reliance on classical language lacks the words with which to express this idea. The solution to such a society is usually the judgment of God through a Scourge like the Huns, the Vikings, or the Normans, or else a great repentance by the society as a whole and a return to God. See Alfred's Preface to the Doombook, Wulfstan's *Sermo Lupi*, and Aelred's *Geneologia Regum Anglorum* for examples.

The key to avoiding corruption is found in the basic structure of society. Salisbury argues that the organization of a free nation is based on Christianity as its moral foundation but also with land as its economic foundation. The ideal citizen of a free state is a warrior-farmer, whose land makes him independent economically and whose arms give him the means to resist tyrants (Nederman 1990, 112). Salisbury, unlike the classical writers, did not see the bonds of fealty as a form of clientage but as the center of all organized society because of the mutual nature of the feudal oath, as was discussed in Glanvill (Nederman 1990, 76). The exchange of land for fealty was an expression of friendship and the conditions of loyalty were spelled out in the terms of the enfeoffment. As mentioned before, unlike in France, the vassal has no obligation to go to war on behalf of any lord other than the King in English feudalism because internal war was a fundamental breach of the King's Peace, therefore the higher oath to the King overrode obligations to a lord which would tend to disorder the state. In this way, the nature of the feudal oath as limited, based on personal friendship, and subject to a universal homage to the King meant that feudalism did not create dependency and corruption among the freeholder classes. On the other hand, tenure in burgage was not so endowed with protections against servility, and therefore Salisbury excluded the burgesses from free citizenship. Rural people are required for citizens because the urban arts are practiced for a servile wage, under servile tenure, and therefore are fundamentally dependent and corrupt (Nederman 1990, 110). The rights and liberties of the towns were subject to the will of the King, and arbitrary power suffused the entire social hierarchy of the chartered cities, even to the level of the employees who could be coerced through their wages to bow to the will of their employers. As unfree people, the burgesses would be afforded the same status of *villeins* in the countryside, which means that they ought to be denied political liberty for the good of the community as a whole, according to Salisbury.

Corruption was not only a product of cities, however, but also a product of the royal court. Royal servants were especially susceptible to corruption in Salisbury's account, especially when the royal

administration began replacing obligation with money as the basis for service; substituting wages for fealty is the greatest evil in public administration, according to John (Nederman 1990, 93). First, the use of wages leads to public servants who are servile like the burgesses already described. Secondly, Salisbury argues that servants who serve for pay rather than obligation and duty are untrustworthy and are subject to bribery (Nederman 1990, 196). As magistrates are elements of the monarchy, they are subject to many of the same effects as the King, including the fact that their moral character influences the moral character of the subjects of the nation (Nederman 1988, 373). The effect of a large body of salaried administrators, therefore, does not merely create corruption in the government, then, but creates corruption throughout the whole of society. Their vice becomes the vice of the people who come in contact with them: administrators who take bribes create citizens who give bribes. The end of this effect is the corrupt government which Salisbury calls the Kingdom of Wealth, where money alone determines honor (Nederman 1990, 99). His argument is that this kind of tyranny is worse than tyranny of the sword. Two forces defend the state, the armed and unarmed; the first defend with swords, the second through the Courts of Law. Both are headed by the Prince, but the latter is more dangerous when misused because the crook destroys the law while the rebel is destroyed by the law (Nederman 1990, 105). In this, the salaried administrator is not just responsible for a lapse in the public peace, but for undermining the entire basis for social order by destroying the law itself through his misuse of public powers. By creating a culture where law can be subverted, the people served by that law expect that law will be subverted and its power to affect justice ceases, especially given the practical definition Salisbury gives. If justice is concerned with ensuring the public peace by satisfying the parties to the dispute, then justice is impossible under a corrupt administration because everyone believes justice to be for sale. Even if the particular hearing of a case was unbiased, the perception of bias destroys the reconciliatory properties of public justice.

In addition to administrators, the other group of corrupt officials is called the flatterers. These are the members of the king's own court and also be termed his *familiares*, for which King John was infamous. Salisbury describes the flatterers as an enemy of reason, extinguishing it in their subject, and those who accuse any who dissent of enmity and define agreement as love (Nederman 1990, 18). Their particular crime lay in displacing the feudal tenure holder in the role of counsellor, replacing those who owe the King true advice with people who offer lies which please the King's ears. The flatterers sever the critical link between the King and the *communitas regni* by inserting themselves in the critical position where the witan, *sapientes*, or eventually Parliament would stand, thus depriving the King of the ability to understand the truth and depriving the free tenants of access to their liege lord. Salisbury does not claim that the King should not have counsellors from outside the body of his tenants; he certainly commends the king to get the advice of all levels of the community, even the "feet", but especially from among the clergy. On the other hand, courtiers are defined by venality, who have a price for everything and do nothing for the sake of goodness (Nederman 1990, 86).

Lastly, one must bring up the role of the Church as an institution independent of the State. Salisbury is certainly a student of the Continent rather than England in this respect, as he asserts the identity of the English Church as one subject to the Pope in Rome alone, and the clergy as outside the jurisdiction of the civil state. Indeed, in reaction to tyranny by a king, the Church has authority to raise and depose kings, based on the example of Samuel (Nederman 1990, 33). The Church, given its role as the interpreter of God's law, has the ultimate voice on its meaning within society. John is not so naive as to say that this power will never be misused, but instead pays particular attention to what he calls the ecclesiastical tyrant. Ecclesiastical tyrant is worse than the secular because he corrupts the sanctified, not just the corporeal (Nederman 1990, 217). This tyrant is able to turn the very sacred order itself into anarchy by proclaiming the wicked to be good and vice versa. Like the secular tyrant, however, tyranny and vice are not institutional but products of the evil of a particular soul, and therefore can be cured by

the removal of that individual. Unlike a layperson, however, who can be judged by the Common Law, the ecclesiastical tyrants may only be judged by the Church, although the Pope himself is beyond earthly judgment (Nederman 1990, 221). Of all members of society, it is only the Pope who cannot be remedied, and who is truly subject to none but God.

Policraticus and the King

No medieval work on government can ignore the role of the king; the Middle Ages truly were the Age of Monarchy. John of Salisbury took a view of monarchy that was unique in his time, neither a purely feudal conception of the king as highest lord, nor the theocratic model of the Davidic king. For one, the ideal Prince is no different than the ideal man, defined as the just man (Nederman 1988, 373). The ruler has no unique characteristics which set him apart from the rest of the nation, no Saint-like relationship to God, and no superhuman powers of judgment or inspiration that gives him the *auctoritas* to be the classical Lawgiver. John's understanding of monarchy seems to be deeply republican, if one can understand the seeming paradox in that statement. The republican component in *Policraticus* arises from the principle of *coherentia*, wherein each office is endowed only with the powers suited to it, including the crown, and whose functions are limited to only those powers (Ullmann 1961, 67). The notion that each part of society is suited by nature to a specific function and purpose is deeply classical and deeply republican, and may provide one of those vital links between classical republican thought, feudalism, and the rise of constitutionalism. In short, government is understood as a set of offices, not individuals, who are organized into a natural order based upon their character and aptitude. Therefore, constitutional law as understood in *Policraticus* must not be interpreted as a "bridle of the Prince" having an administrative function, as described after Magna Carta, but instead is part of the nature and order of Being (Maddicott 2010, 98). The law attributes to the King that which is appropriate to him, to the Parliament that which is appropriate to them, and this distribution is not based upon a rational, "Newtonian" distribution of powers. The law is no more a restriction on the King's liberty than God's

law is understood as a restriction on Christian liberty. The law is liberty, and violation of the law is violation of the golden mean between servility and licentiousness. Bracton's famous clause shows the work of early liberalism already at work, where law is conceptualized as a barrier. Law is not a barrier in *Policraticus* but a description of the natural order of Being.

The real barrier on the King's authority must always be self-restraint and a solid moral character. The reason that the law will not suffice as a barrier to tyranny is because the strength of the law to prevent evil is only as strong as the will of individuals to uphold the law. If the King and the People are wicked, the law is powerless, but the onus is especially on the citizens of the realm, more than the King. Even Caesar's power was limited by his self-restraint because he felt shame at committing acts of extreme indecency, where the licentious or servile man has no limits to the shamefulness to which he will submit (Nederman 1990, 23). There are two major royal virtues which were necessary to prevent tyranny according to Salisbury. The first is royal humility, which was a proper attitude of the King towards his position and role in society. Royal humility is the golden mean between arrogance and baseness, as baseness erodes the dignity of office and promotes an equality of degradation, while arrogance leads to contempt of the law (Nederman 1990, 49).

The second royal virtue is justice, which was understood, as mentioned before, as a practical art of maintaining amicable relations between members of the community. The greatest function of the King is the "*amator justitiae*" in *Policraticus*, whose only will is to seek to nurture and maintain the *publica utilitas*; the Pope is the guardian of the *publica utilitas* and *sedes justitiae* because he alone has the *scientia* to see the universal need (Ullmann 1961, 69). As mentioned before, the King has no special knowledge or wisdom, and therefore must rely on the Church, namely the Pope, as the source of his understanding of the public good. The conclusion that Salisbury comes to is that the King cannot be an individual if this is his role, but instead must become the office and have his personality destroyed in it.

The Prince has no private will, since his will must be the Crown's will for justice and equity, thus the will of the Prince is law because his only will can be that which is lawful (O'Brien 1999, 19). This is the great difference, then, between the good ruler and the tyrant: the true ruler is a slave to justice and law, while the tyrant is a usurper who places his will above God's rulership (Nederman 1990, 25). The difference between the Prince and tyrant is obedience to God's Law and the will to serve the whole community as a human manifestation of the office of the Crown. The Prince's power comes from God but does not depart from God's will, for the Prince is an agent of God whose only authority is obedience to God's will, and anyone who holds the office of the Crown but asserts his own will is a tyrant and usurper (Nederman 1990, 28).

The virtue of the king is more than a reflection on his personal character, however, but the King, as representative of the realm, is the teacher of virtue to his subjects. The lower classes learn from those above them, and thereby a good king turns a nation away from the path of destruction, while wicked king reduces an entire nation to servitude by his example (Nederman 1986, 136; Nederman 1990, 37; Ullmann 1975, 66). For this reason, liberty is an important virtue for the king to demonstrate in his administration of justice because of his special position as teacher of the nation. The king's justice must be performed in such a manner that the liberty of his subjects is not infringed, as even the justice of the king, if performed poorly, can be turned into a vice by making the citizens slavish. Hence the product of humility in punishment and justice in honors ultimately serves to promote liberty in the realm. In the courts of the realm, the Prince's role is to navigate the mean of servitude and license in his judgments such that the virtuous are made freer and the vicious are corrected and placed back on the path toward true liberty in virtue (Nederman 1986, 138).

One of the great examples of good kingship given by Salisbury in the book is that of Lucius Brutus. In the act of killing his sons, Brutus shows how the King has no family other than the nation; his

rank obliterates his private self and makes him a public person whose obligations to the nation completely annihilate any kinship he holds to his own flesh and blood (Nederman 1990, 58). He extends this metaphor, then, to include anyone who holds any office of public power throughout the whole of the realm. Salisbury asserts that the officers of the King are members of his body, that is to say, the office of the Crown itself, and that the King is to share in the blame for their negligence of dissimilitude (Nederman 1990, 63). Just as the King loses his personal will in the performance of his duties, so too, do the magistrates. In their official actions, especially those having to do with justice, the magistrate's will is the will for justice and equity. Magistrates are considered part of the office of the monarchy, so they are equally bound to all of its ideals, including the loss of their independent will (Nederman 1988, 373). Just as a king who asserts his private will is a tyrant, so too a magistrate who asserts his private will is a tyrant, albeit a little tyrant over which the King holds the responsibility to discipline. If the king fails to discipline a magisterial tyrant, as Salisbury argues, the King becomes responsible for those actions and becomes a tyrant himself.

The major role of the Church in *Policraticus* is as ministers of the unwritten Law of God. As for the relationship between the King and the Church, the priesthood serves as the arbiters of Sacred Law for the King, while the king's office is to enforce it, not to interpret it (Nederman 1990, 32). The power of interpretation of the unwritten law is called *scientia*, and is a power attributed to the Papacy and its delegates. Salisbury does not describe the source of this knowledge, either as a product of long study or of divine inspiration. Part of this knowledge involves understanding the will of God, which is the foundation of the Church's authority to raise and depose kings, based on the example of Samuel (Nederman 1990, 33). Because the right to rule comes from divine selection, not blood, the King is ultimately responsible to God for his position, and therefore his will is subjected to God's (Nederman 1990, 70).

Policraticus is best known for its doctrine on tyrannicide, and for that has been called an infamous book. His doctrine on killing a tyrant stems from a handful of axiomatic statements. First, he asserts that private tyrants are restrained by law, but public tyrants subvert law and therefore there is no remedy for them within the law (Nederman 1990, 205). What he means by this is that those who use force or the law of the land to violate justice are ultimately reined in by the Law, given that highway robbers are hung, crooked administrators are disciplined by the King, and over-mighty barons are brought to subjugation before the throne. These kinds of tyrants are destroyed by the authority of the Crown, who is the agent of law and justice in society. When the Crown itself becomes tyrannical, however, there is no force which is able to bring it to submission. His second axiom states that just as liberty is a virtuous *habitus*, servility is a vicious *habitus*; the nature of *habitus* as an element of personal character means that the tyrant must be killed because he cannot reform (Nederman and Bruckmann 1983, 226). As stated before, liberty and servility must be understood as characteristics of the soul, not as mere habitual actions. A person who is slavish because that is his character will not change his ways unless his entire character and personality are changed, a feat which Salisbury does not seem to believe is within the realm of political possibility. Lastly, given the nature of liberty as a *habitus* and a virtue, Salisbury asserts against most Christian philosophers that long suffering under a tyrant is not a virtue, but a vice (Nederman 1986, 141). It is vicious to suffer under a tyrant because slavish behavior forms a slavish *habitus*, and because those people who are free would find that submitting to a tyrant goes against their very character, the *habitus* of liberty in their soul, compelling them to act viciously. Salisbury finds the notion of submission to be a gross violation of the principles of liberty and virtue as he set out in the beginning of his book. No philosopher would assert that one is compelled to take part in the essential disorder of an evil regime, but each individual has the obligation to live their life in order. If one argues, as Salisbury does, that liberty itself is a virtue, then resistance against tyranny becomes

mandatory, even to the extent of force of arms, if necessary to protect liberty and the right to live one's life virtuously.

Salisbury argues that tyranny is the ultimate treason, and the ability of all to prosecute such a crime is drawn from the feudal law itself (Nederman 1988, 369; Hall 1965, 173; Nederman 1990, 25). Glanvill describes treason as the one crime where an unfree *villein* is able to bring the highest earl before the Curia Regis and proclaim his guilt, and where the judges of the court are obliged to hear the testimony of every person equally, including the unfree, women, and non-English subjects of the Crown. It is in the protection of the realm itself that the early Common Law displays a true equality of all individuals, as this obligation is beyond the social order and incumbent on each person as an individual. Salisbury concludes from this idea that tyrannicide, too, must fall within this category as a personal obligation on each person as a person, not as a citizen, lord, freeman, peasant, or any other such social category. Tyranny is a crime that demolishes the community, subverts the law of the land, and therefore must be dealt with from a perspective which precedes these things. There are only two situations where Salisbury limits who and when a tyrant may be killed. First, he declares that personal fealty trumps the duty to kill a tyrant, for breach of faith is worse than tyranny (Nederman 1990, 209). One may not claim to be upholding the virtue of liberty if one is breaking the bonds of an oath before God and Man. Lastly, Salisbury affirms that God's grace can restore the tyrant through his repentance (Nederman 1988, 378). The centrality of the transformative power of the Holy Spirit to Salisbury's doctrine of liberty is affirmed again in his section on tyranny. All vicious men are little tyrants without the saving grace of Christ, but their tyrannies are private and subject to the law of the land. The king is no less a mortal man than any other of his citizens, and equally in need of the power of the Blood of Christ to transform his soul from the *homo naturalis* to the *homo spiritualis* in the great rebirth of the Holy Spirit, the true servant who is capable of submitting his will to God and thereby become truly free.

English History and the *Laga Edwardi*

The works of philosophers was not the only or even the most influential source of knowledge about Liberty in the time of Magna Carta. More important than writers like John of Salisbury were the historians, whose works formed the self-interpretation of English social order which could be understood by the entire literate population. Henry of Huntingdon's *Historia Anglorum*, for example, was probably intended for the less educated members of the landed classes, such as monks, parish priests, and members of the great households, whose Latin could not be expected to be particularly polished (Greenway 2002, xix).

There were two forms of history that was written in this period. The first is the ecclesiastical history as epitomized by Bede's work, which tended to focus on the actions of sacred actors, especially saints but also Popes, and whose characterization of secular actors tended to be incidental except in cases where there was an overlap between royal and ecclesiastical history, such as the case of saint-Kings. These accounts focused on the miraculous rather than the mundane, and largely took their models from the Hebrew Bible, especially in the case of Bede (McClure and Collins 1994, xviii). The second forms of history arrived with a major shift in historiography in the early 12th Century; ecclesiastical histories fell out of fashion and histories based on the actions of great men became popular. The cyclical view of history as expounded by Classical sources became much more prevalent in these histories, which were heavily influenced by writers like Livy, Caesar, and Plutarch (Ullmann 1966, 110). The result of this change was a greater focus on the actions of secular political actors outside the context of sacred history, a focus on war and the personal abilities of the King as a determinant of international relations, and an interest in the history of law and lawmaking by lay authors from the emergent secular legal profession.

This last element helped form the way that 12th Century histories served as a source of knowledge about social order to the English, especially the way that it was treated in the context of the new national histories. As mentioned before, within the feudal context of the 12th Century, Law was understood as the primary source of the king's *fidelitas* to his subjects (Wormald 1999, 134). It is through the Law and its administration that the King is seen to carry out his side of the feudal contract, and this understanding of the Law is displayed throughout the histories of this period as a way to express the fundamental character of the King as feudal lord. To say that a King was good, an author might say that he wrote many laws, or that he abolished the wicked customs. This was not understood as a literal process of law-making and amendment as a modern reader may suspect; for example, the *Laga Edwardi* does not refer to a specific law code but to the general customs of England prior to the Conquest, thus the importance in the "false" text known as *Leges Edwardi Confessoris* of the sworn witnesses to testify to how things were in the reigns of the good kings (O'Brien 1999, 26). The truth of the matter is that Edward the Confessor wrote no laws that survived to the current day and there is no evidence of a lost law code; nevertheless, the fact that Edward the Confessor was considered a good King in the histories is shown by the appellation of lawgiver to his name.

Theory of History

To understand what English history as it was written in the 12th Century says about the 12th Century, one must first describe the problems of historiography as they existed in the contemporary mind of the historian. The traditional Christian understanding places Christ as the subject of history, not merely an event in history, and as shown through ecclesiastical histories, the beginning and end of history is bounded by the divine Logos. In the beginning was the Word, and in the end is the Kingdom. As mentioned before, however, this kind of history is not the only kind of history, as the medieval mind was deeply cognizant of the fact that another civilization came before them, whose achievements towered over their own (Morris 1987, 21). In addition to the Christian mode of sacred history there

existed a tradition of national histories which began their narrative at the point where the nation achieved awareness of their status as a larger whole, often with the foundation of the monarchy by a great national hero, although not so in the case of England. As a result of these two traditions of historiography, as well as certain elements of Christian metaphysics which encouraged this division, rather than a single thread of history, history is understood as a dualism of sacred and profane history which describes simultaneous yet distinct narratives about the nature of history, the origin of society, and the end of history and time (Voegelin 1975, 7).

The element which sustains the division of history into these two threads is the fact that Christianity radically de-divinizes the political sphere by separating temporal and spiritual authority (Voegelin 1952, 104). Unlike in pagan political order, the sphere of power associated with the King is not divine in nature, meaning that the King is a representative of an order that is not contiguous with the spiritual order of the representative of God, namely that of the Church under the Roman Pope. The notion of an essential unity between the Roman Empire and the Roman Church was an ideal often floated by late Roman Emperors and continued in another form under Byzantine and Russian auspices, but with a few notable exceptions which will come to light in this chapter, Western Christianity abandons this division for the more differentiated understanding of a dualism of authority. The importance of this idea has to do with the role of the King in historiography; the King in most histories takes on the role as the personal representative of the nation who gives it existence and meaning such that his personal being becomes symbolic for the nation as a whole (Greenway 2002, xx; Voegelin 1952, 46). In his role as the representative of the nation, he embodies the political order of society, but under the spiritual order, the King is merely a man. As is ascribed to Alfred the Great, "The dignity of a ruler must recognize that in Christ's kingdom, which is the Church, he is not a king but a citizen. Thus, he must not govern priests by his laws but be humbly subject to the laws of Christ that the priests have established" (Freeland 2005, 78). One of the results of this de-divinization of the political is the loss of

influence and authority by secular leaders due to the fact that the ultimate purpose of life is no longer found in political action but instead belongs to the now-distinct spiritual sphere of action. As the 12th Century historian Henry Huntingdon concludes in his *Epistola ad Walterum de Contemptu Mundi* and the epilogue to his *Historia Anglorum*, human deeds in history are utterly insignificant when history begins and ends with Christ (Greenway 2002, 119; Huntingdon 1879, 298). After writing eight books on the Kings of England from the Romans to the death of Stephen, he addresses readers in the third millennium to look at what they have done (perhaps mostly in reference to the Anarchy) and see that nothing of significance remains. The purpose for writing his history, he proclaims, is that those who live in the third millennium should learn from him that only those struggles undertaken for the sake of Christ survive, for those things become immortal through the power of God, while the end of all political action is to perish from the earth and to turn to dust.

This mode of history was not without its competitors, however. The particular Christian problem of relating sacred and secular histories was often resolved by incorporating secular empires into sacred symbols (Pocock 1975, 32). Civil theology refers to the understanding of spiritual order which incorporates the State into the realm of religious authority, wherein society and government are elements of the order of God, often ordained or instituted by God as representatives of his authority. Voegelin refers to the common medieval non-differentiated form as an Imperial civil theology, wherein the Empire is the whole of the spiritual body of the Church and the Emperor is the representative of God to both the secular and sacred orders. Non-differentiated forms of civil theology, commonly known as Caesaropapism, dominate Byzantium and Russia, which never adopted the Augustinian understanding of the Two Cities (Voegelin 1952, 114).

Beginning with the restoration of the Holy Roman Empire by Charlemagne, there is a thread of this Imperial civil theology which spreads throughout the Latin West and temporarily supplants

Augustine as the primary theory of history and social order. It is primarily from Byzantium, namely the restored links of scholarship and trade which Charlemagne established, that the ideas which surrounded the Carolingian and Anglo-Saxon kings with a mantle of priesthood are derived (Ullmann 1961, 117). It is in the works of Pseudo-Dionysius that the notion of the earthly kingdom as a mirror of heavenly order takes its medieval form, with the earthly order not just being a copy, but an extension of the celestial order, primarily centered on the principium unitatis of the monarch, whose role on Earth is analogous to that of God's in Heaven (Ullmann 1961, 46). In this understanding, either the Pope or the King ruled the worldly hierarchy but ultimately stood above and outside of it, as their role was to be the vicegerent, the mediator between God and the people of the nation, and therefore were members of neither the heavenly nor the earthly orders, but instead some kind of demi-God-like figure (Bequette 2008, 25; Ullmann 1968, 19; Voegelin 2000, 141).

This cosmological representation of the King-Priest was an attempt to align the order of the State with that of the Cosmos, and was often confounded by resistance from both within and without (Voegelin 1952, 54). With the fall of the Carolingian Empire, the notion of a single Roman Emperor for the Roman Church took a significant blow, despite attempts by the Ottonian court to revitalize the ideal of Charlemagne as the Emperor of Christendom with his foundation of the First Reich (Loyn 1984, 82). In England, however, the Imperial civil theology took another turn, and incorporated the prophetic history of Israel into its particular vision of secular and spiritual order. The use of prophetic history served to re-sacralize the political by rejecting Augustine's conception of the City of God and replacing it with the symbols of Israel, especially the Davidic Kingdom and the accounts of the prophets (Pocock 1975, 44). English thought merged the Ottonian conception of the Roman Emperor over a Roman Church with the notion of England as a chosen nation subject to a unique covenantal relationship with God through the "Petrine Covenant". The former was shown through the Imperial claims of the Anglo-Saxon kings beginning with Edgar the Peaceable, who claimed to inherit their right to rule from the

Romans as Emperors of Britannia, much as other post-Roman kings had done (Loyn 1984, 82). The latter was claimed through a number of sources, including Bede's claim of an English church subject to the Archbishop of Canterbury alone, miracle stories claiming a special relationship between the dynasty of Wessex and St. John or St. Peter, and especially after the Conquest through the canonization of Edward the Confessor (Freeland 2005; McClure and Collins 1994, 42; Bequette 2008, 27; Wormald 1994, 12). England was not understood as a part of a larger Christendom, but part of a special realm centered on the British Isles, wherein England was the Israel at the center of the myth. The Danish invasions could be assimilated to the mythology using the symbols of the Babylonian Captivity inherited from Hebrew scripture, thus preserving the myth, but the Norman Conquest ultimately put an end to this mode of historical understanding despite the attempts by some authors like St. Aelred to continue it through Henry II and the Angevin dynasty.

The important thing to consider about this form of historical self-interpretation is that by linking the secular and spiritual histories into one common thread, the changeability of secular politics is tamed and the existential fear of destruction is diminished as the regime becomes one with the spiritual order. No understanding of a "historical sense" is necessary because the cosmos are unchanging, therefore "the times" never really change and political uncertainty can be eliminated due to the knowledge that the civil authority is eternal (Smith 1985, 34). As mentioned before, this certainty is certainly illusory and is confounded by resistance to the regime, but so long as the political institutions remain strong, the questions of mortality and change in the political order can be deferred rather than being confronted. All forms of self-interpretation, of which history is one, are concerned with addressing real tensions which exist within society and which predate the philosophical and theological investigations into themselves (Voegelin 2002, 342). Any attempt at symbolizing a people's origins must necessarily take into account their ends, and therefore the major tension addressed by history is not the foundation but the destruction of society, or rather addressing the fear of destruction through a symbol of eternal life.

Unlike political mythologies based around a political regime, English history is built upon the notion of England as more than just a kingdom united by a monarchy, but as a homeland of a people with a unique identity, of which the realm is merely one part; the Latin *gens* is the only appropriate word to describe such an identity, as English words like race or nation fail to describe the situation as it existed. Anglo-Saxon *eðel* and Latin *patria* were words used by the English to describe their relationship to England, and the Latin derivative “patriot” may serve best to describe the relationship of individuals to a particular people, place, time, and ancestors (Smith 1985, 10). This difference underlies the gap between the English experience of history and the German experience beginning with Otto the Great. Political structures, unlike kin structures, have a definite beginning and end in time; while blood can be traced back beyond the mists of time, republics are born and die (Smith 1985, 9). Wherein Otto could establish the First Reich, it would be impossible for a historical figure to establish England, since England is understood as a people extending back into eternity rather than a political structure established by a great Emperor. Brutus of Troy was an appropriate mythological founder for such a people because he existed outside of time, in the mythological period of the heroes alongside Aeneas, while Otto the Great existed clearly within history, thus opening the possibility that what was wrought by him could be undone by another and the First Reich might be as mortal as its founder. While the notion of what existed “within” or “without” history changed over time, the distinction is central to understanding how the English understood themselves and their origins (Sandoz 1993, 310).

As implied by the words *eðel* and *patria*, England should not be interpreted as a people alone, but the full understanding of patriotism as defined above must be brought to bear on the question of English identity. The notion of *patria* is one of a relationship between land, ancestry, and blood; the individual is tied to the soil because the land itself shares the blood of kin through the graves of the ancestors (Smith 1985, 27). The individual has a deep connection through time to the whole of the realm and to other members of the realm, all of whom have a familial relationship through the

mediation of the land as kinsman to all and the ancient ancestors of the distant pre-historical past. Thus, England is an entity whose temporality shares elements with the eternal realm from the sacred histories, and therefore can be drawn upon as a permanent symbol of order which does not require justification or foundation to maintain its relevance, unlike a republic whose foundation is its essential symbol. The timelessness of England as allows the association of the ancient with the good, due to the fact that the ancient is outside of time and therefore not subject to falsification in the way that an intra-historical foundation may be shattered by historical contingency. Nations which equate the ancient with the good have no need of positive history because their national history provides the origins of all things human and divine through the representation of the national hero, and this national history takes place outside of time (Smith 1985, 28).

In such a realm, the power of culture is regular and repeated formation of habit in the individual, as opposed to republics which must appeal to the language of virtue and corruption in order to justify their moral and ethical order (Smith 1985, 15). As recognized by thinkers like Machiavelli, Montesquieu, and Tocqueville, the appeal to habitual custom is a lower barrier to the maintenance of political order than the appeal to abstract, rational standards of virtue which have no basis in the customary memory of the people. Customary habit is the form of memory for unlettered societies, who may not be capable of comprehending or internalizing a more philosophical standard of moral order in society (Smith 1985, 118). The great philosophical injunction to “know thyself” is largely impossible for the masses of society, who require a mirror in someone or something else to form any kind of real self-interpretation (Smith 1985, 97). This mirror often takes the form of a monarchy in which the King is the representative of the People, but may also take the form of institutions or ideals, especially in regimes which understand themselves in the context of a constitutional order. Just as the notion of the covenant itself as mediator between God and Man replaces the semi-divine King in Hebrew thought

after the Captivity, so too does the Ancient Constitution take that role within societies whose identity is formed by their laws (Voegelin 2000 151).

In this context, free people, unlike the unfree, have a history or “memory” of liberty to draw upon in which they are able to preserve and protect their liberty, comprised of experiences, customs, institutions, and myths (Smith 1985, 55). When the “ancient” is associated with the “good” and that good is a form of liberty, then custom and culture become a force for liberty in society. As described in the last section, liberty understood as *habitus* is dependent on this kind of culture for its formation within the individual, but when a large enough group of individuals possess the *habitus* of liberty that it becomes a cultural characteristic, one might with some degree of certainty call this a free people, whose customs and institutions reinforce themselves by promoting and producing free individuals, along with resisting changes which infringe on the liberty of the community.

Change, then, is understood as a threat to liberty, and this kind of society will have a deep, abiding distrust of the new. If the ancient is good, and the ancient makes one free, then certainly change will be both wicked and unfree. In a republic, the notion of restoration as a return to the conditions of the Founders serves as a way to introduce change to the political and social order (Pocock 1975, 207). Because the foundations of realms like England exist outside of history, however, the concept of a true restoration is impossible; the ancient laws are an idealized understanding of justice not a constitution with known characteristics. In this case, the impulse to oppose the new and embrace the old is met by the tendency to cloak the new with the old to protect reforms from attack (Smith 1985, 36). What this means is that reforms had to be understood as a return to the “ancient ways” or as repeals of bad law in order to be understood as legitimate. This led, as one might assume, to a great deal of what modern historians like Edward Jenks call “bad history,” but in fact is not positive history at

all but a kind of mythopoesis in the form of a national history, wherein the national existence is explained and symbolized in a format more closely related to drama than to positive history.

The role of conquest in this kind of society is that it opens the space for great change in a society where change is often distrusted. Catastrophe is an act of forgetfulness, where part of the past is lost, opening the way for a new foundation of the social and political order (Smith 1985, 74). There are two countervailing forces in action during such an event. First, there is a tendency to lose symbols of the national heritage or the “memory of liberty” as it was held before the great catastrophe. This can be understood as the natural effect of conquest, as leaders are slain, governments deposed, and a new political order is erected by the conquerors. Secondly, however, this loss is attended by an ever-greater attachment to the symbols of liberty which are retained. Symbolic graces and benefices of the old regime may evolve into deeply felt ancient liberties of the realm. The role of suffering and the memory of suffering in a national catastrophe is that it provides the impetus for moral, political, and military virtue; while a history of liberty shows them how to maintain a free community, a history that includes some tyranny shows them the price of failure to maintain their liberties (Smith 1985, 60).

Since the order of society and history is based on interpretations and self-interpretations of societies, new symbols of representation arise from these kinds of conflicts in the wake of a society’s corruption and catastrophe (Voegelin 1952, 74; Voegelin 2002, 342). The erosion of symbols by a quickly changing context leaves a gap between the society as it understood itself in concretized symbols of the past and how it experiences its present. The problem of symbolic dogmatisms is that they cease to reflect reality of their original meanings and therefore fail to fulfill their function of explaining an ancestral insight into the experience of order and liberty. The reaction to a malfunctioning symbol is often a “return to the myth” which allows a restoration of the experiences which led to the original symbol and a new exegesis on the nature of social order (Voegelin 2002, 385). What this entails in

generally a revolution in self-interpretation surrounding a critical event wherein a people reinterpret themselves in an attempt to restore unity with the past. This revolution does not perceive itself as a revolution but as a restoration; by restoring itself, however, it inevitably changes itself and destroys the old social and political order which it sought to maintain. Magna Carta is the archetype of such a revolution, for it was Magna Carta, in seeking to save feudal liberty, which ultimately destroyed it and began a new era in English self-interpretation and English liberty (Holt 1992, 300; Painter 1961, 245).

The Sacred Cycle of English History

The “sacred cycle” of English history was a form of self-interpretation which dominated the Latin West in the early Middle Ages. The root of this self-interpretation was the re-divination of the political done during the early Middle Ages by millennialist forms of immanentized eschatology, in opposition to Augustine’s orthodox Two Cities theory (Voegelin 1952, 109). The earliest Latin manifestation of this divinization was the restoration of the Holy Roman Empire under Charlemagne and the resumption of Imperial Roman symbols of sacral kingship, but it was neither an innovation of the Franks nor a borrowing from classical forms which brought about this new form of historical interpretation. Non-differentiated forms of civil theology had dominated Byzantium and later Russia, which had never adopted Augustinian thought with regard to the relationship of the civil authority to the Church (Voegelin 1952, 114). It is from Charlemagne’s importation of Byzantine thought during the Carolingian Renaissance that the ideas which surrounded the Carolingian and Anglo-Saxon kings with a mantle of priesthood are derived. The non-differentiated theology placed an emphasis on apocalyptic thought, especially the immanentization of the 3rd Age, which served to secularize history while sacralizing political authority, vesting it with an intermediate relationship between God and the Realm (Pocock 1975, 46; Voegelin 1952, 112). The Byzantine expression was certainly more extreme than that expressed in the Holy Roman Empire; movements like Paulicianism and Iconoclasm were attempts to restore gnostic monophysitism through denial not only of Augustinian “Two Cities” thought but also the

Incarnation of Christ. Byzantium, sitting on the ecumenic fault line between the Greco-Roman and Perso-Asiatic worlds, underwent a unique conflict between Greek and Asian cultural interpretations of Christianity which left it more vulnerable to heretical gnostic movements and attempts by Orientalists to eradicate the influence of philosophy on Christian theology (Bolgar 1977, 63).

The Latin West, however, lacked the influence of a powerful cultural movement for gnosticism, which never threatened to eclipse orthodoxy completely, but was instead selectively used to support the power and authority of the new Carolingian Imperium, its successor states, and its peripheral kingdoms in northern Iberia, Britain, Hungary, and Italy. Unlike the apocalypticism of more common gnostic movements, however, English apocalyptic thought is inverted; rather than looking for a kingdom to come, it asserted a kingdom that was, under savior-kings like Brutus of Troy, Arthur, Alfred the Great, and Edward the Confessor who had established the "Third Age" in the past and who now served as examples to imitate (Pocock 1975, 344). The nature of medieval thought as self-aware of their existence as a successor civilization, the fact that English law was never absorbed by Roman Law and was essentially past-focused, or the nature of English identity being forged during the Viking Age may have contributed to this particular understanding of apocalypticism. Since the Kingdom was placed in the distant past rather than the future, the symbols of Revelation were not valid to explain the English experience, so in their place, the major symbols of the Chosen People, the Kingdom of Israel, and the Babylonian Captivity were adopted by English historians (O'Brien 1999, 13). As in Jewish thought, the bloodline of the royal line played a central role in English mythopoesis as the link which bound the nation to their covenant with God and the source of the messianic figure which would deliver England from successive Captivities, from Alfred the Great's defeat of Ivar the Boneless, to St. Edward the Confessor's replacement of the sons of Cnut the Great. The historical experience of the Viking Age and the mythological symbol of the Sacral King would then be projected into the past and onto contemporary historical events by historians until the 13th Century. The bloodline of the Prince is the

vessel of memory in a principality which ensures the continuity of the myth, and so long as the House of Cerdic ruled over England, the mythology could remain intact, but the extinguishing of the bloodline is destructive of the memory and therefore identity of that people, destabilizing and ultimately destroying the myth (Smith 1985, 81).

Among Western cultures, the reversion to Old Testament models, especially the Davidic Kingdom, is a reaction to the change in Christianity from a volitional faith distinct from secular society to a faith one is born into where the Church and Society have identical membership (Morris 1987, 25). This concept may be among the central markers separating medieval from classical thought, and deserves a full treatment that this work cannot provide. The Christian experience of the Classical World was that of a volitional faith, meaning that the act of becoming a Christian was a choice one made and the act of conversion was a major moment in one's self-conception as well as an important emphasis on the early Church. St. Augustine is an example of the classical Christian viewpoint, with the message about the importance of free will in choosing to leave the dominant cultural milieu to participate in a new community which expressed itself in its distinction and dominated by the symbol of resurrection. Becoming a Christian for Augustine meant turning his back completely on the life and people with whom he had previously participated; the concept of the death of the old man and rebirth of the new was deeply experienced by one who had to leave everything behind to join a new, spiritual community. Christianity was deeply counter-cultural, opposed to participation in civic rituals and attitudes which still bore the characteristics, no matter how ossified, of a pagan society. This is a kind of Christianity which could not be compatible with active participation in the political, where St. Jerome could boldly say, "Quicumque in civitate sunt, non Christiani sunt"⁵ (Salter 1999). In contrast, the medieval world was one where a person was born into the Christian faith, baptized as an infant, and immersed in a Christian

⁵ Literally, "Whosoever is in the City is not a Christian." An alternate interpretation of this would be that 'in civitate' should not be interpreted geographically but spiritually. A person who is in the city is centrally concerned with civic life as opposed to spiritual life and the hereafter.

worldview for one's entire life, and where there could be no conversion experience except in the sense of a lapsed Christian coming back to the faith or a monastic seeking an introspective vision of the divine. The conflict between the City of Man and the City of God is subdued when the King is a Christian and the highest positions in society are filled with bishops.

With the conversion of the last of the Anglo-Saxons to Christianity, England experienced for the first time a society where the English Church and the English people were one and the same, an identity that was all the more significant due to the fact that ecclesiastical unity preceded national unity, a unique occurrence in the medieval world. One of the earliest works in this mode of thought was Bede's *Historia Ecclesiastica*, which could be considered the founding text of English nationhood, establishing the theme of England as the new Canaan (Wormald 1993, 14). Bede asserts the existence of a nation based upon a common cult of local Saints, whose borders are defined by pilgrimage routes, and whose Church is functionally independent from Rome. Bede's England has no single king, but is represented through the Archbishop of Canterbury as the spiritual head of all the English and the patronage of St. Cuthbert as the foremost of all the English saints (and the patron of Bede's own Lindisfarne, which housed the saint's grave).

Returning from this detour to the post-Conquest period, one of the great proponents of this vision of non-differentiated civil theology was an unknown writer known only as the Norman Anonymous. The central interest in the Norman Anonymous's work is his claim of the partial realization of the Kingdom of Heaven in history through messianic kings (Williams 1951, 156). His civil theology is based heavily on Carolingian models of sacred kingship (*rex et sacerdos*) and episcopal church government largely in the mode which had been common throughout the Anglo-Saxon period and which had recently fallen out of favor among the continental advocates for a powerful and ascendant Roman Papacy (Williams 1951, 167). The Norman Anonymous is largely known as a royalist and

advocate of increased power over the Church by the State, but this conception is beside the point, largely a product of Anglican and Protestant scholarship making opportunistic use of his writings. The importance of his writings is not in the 16th Century debates over Church and State but in his understanding of an immanentized eschaton and the role of the sacred king in bringing about the Kingdom on Earth. Norman Anonymous does not support the King's authority over bishops merely because he is the king, but instead because the consecration of the King makes him into an image of Christ for the realm, therefore a kind of soteriological figure with the ability to save his people (Williams 1951, 163). The king, therefore is not just the head of the state, but as the representation of Christ for the Kingdom, is also the head of the Church, since he alone is divinely appointed, he alone is Christ in the sense of the Anointed One, and therefore he alone bridges the gap between the hierarchy of Heaven and that of Earth. The King serves as the mediator between God and the People, assisted by the Priests whose *scientia* gives them wisdom, albeit inferior to the aspect of divinity bestowed by the act of anointment (Williams 1951, 173). In his goal to present an image of the ideal king, the Norman Anonymous draws upon the Hebrew Scriptures, much as Alfred the Great does in his Preface to the Doombook, and claims the precedent of Solomon to justify the sacral role of the King (Williams 1951, 158).

The 12th Century, however, is far richer in historical resources, stemming from the expansion of literacy beyond the clergy and the popularity of rediscovered Latin historians from the classical period. The works of the historians of this period forms a narrative regarding the nature of England as a unique, chosen nation ruled by a holy monarchy, whose antecedents include not only St. Edward the Confessor but earlier English monarchs whose succession is not a literal biological descent but a spiritual descent from anointed to anointed, to avoid the problems that arise from the break in royal lines caused by successive conquests. Brythonic kings like Arthur, competing royal lines like St. Edmund Martyr, and the dominant line of Alfred the Great and St. Edward the Confessor can thereby be unified beginning in the

12th Century by this slight tweak in the definition of succession. These historians view the nation as a kind of three tiered hierarchy, from God, to the King, to the People, all of whom are tied together by “*devotio*,” the kind of religious awe and obedience which those at a lower tier would pay to those on the higher. The King’s religious character as object of devotion stems from his role as the central figure which binds the People and God together (Bequette 2008, 25).

The English monarchy is portrayed as a Davidic kingdom, complete with a unique “Petrine” covenant which exists in parallel to the New Covenant of the Church as a whole, but granting a unique promise to the English which excluded the rest of Christendom (Bequette 2008, 23). In short, in exchange for righteousness and a special devotion to St. Peter (and sometimes St. John) the English were promised that their kingdom would be restored to them under a ruler who would be like Christ on Earth. The primary evidence of this covenant was English history, which displayed the attempt to restore England by both saints and kings and the inevitable failure when the kingdom fell away from God and disappointed their holy leaders. The penultimate attempt to restore the Kingdom occurred under St. Edward the Confessor, who served as the last in both the line of Kings and the line of Saints beginning with Alfred the Great and St. Cuthbert, unifying the two in a King who served as the last earthly successor before the promised coming of the messianic figure (Freeland 2005, 76, 81). Just as St. Edward restored the good laws and good government of his ancestor Alfred the Great, the true successor to St. Edward would bring England back into a state of perfect justice which would reflect the Kingdom of Heaven. Edward’s role was supported in Aelred’s account by a copy of a letter from Pope Nicholas, who uses parallelism in the text in order to compare the Kingdom of England and the Kingdom of Heaven, seeming to admit the identification of the two under the reign of St. Edward (Bequette 2008, 31).

The accounts of St. Edward focus on his role as redeemer of the nation from the conquest of the Danish invaders. The Danes are largely understood within the symbol of the the scourge of God, punishing England for its sins, and the Babylonian captors who are holding England in bondage because of the wickedness of King Æthelred II and his subjects, especially regarding the murder of St. Edward Martyr, the rightful ruler (Aelred 1997, 26; Greenway 2002, 6). Numerous Hebrew and Christian symbols are used in the description of St. Edward, especially in the accounts of his life that were written in this period. The authors are keen to establish St. Edward as not simply a saint or a king, but a special kind of sacred ruler in the image and example of Christ himself. Edward the Confessor's election before birth was one of the major signs of God's appointment of him to rulership, and the use of Godwin as the Judas Iscariot of the tale help point the reader to see the similarities between St. Edward and Christ (Aelred 1997, 22; Bequette 2008, 20). One of the most important symbols attested to him, however, is how Westminster is used as a simultaneous representation of the Church and the Kingdom of England. The story accorded to the abbey is an analogy to Christ's establishment of the Church as well as the sacred history of England. Westminster is described as an ancient Roman church which was devoted to St. Peter before the Anglo-Saxon invasions, was destroyed by the Vikings under Ivar the Boneless, and finally restored to glory by St. Edward and made the center of the English realm and church, so that in the redemption of Westminster, he is understood to be restoring the Kingdom and the Church (Bequette 2008, 26). With the restoration of Westminster, St. Peter is said to have come down to England to bless the new abbey and the people of the kingdom with the restoration of their special covenant and all the blessings that come along with it, namely peace and prosperity. Westminster takes on a role as the new center of the world, the new Jerusalem and the new Rome which functions as the hub of England's covenantal relationship to God. Westminster explicitly is described as bypassing Rome, as described by the crippled man's miracle; the man goes to Rome for healing six times, but is told by an angel to seek St. Edward at Westminster for the seventh, and then he shall be healed (Bequette 2008,

27). Furthermore, you get a sense of the relationship between Rome and England in the correspondence between St. Edward and the Popes in Aelred's *Vita Edwardi*. The relationship of St. Edward to the Pope is one of personal submission but institutional alliance between parallel secular and spiritual authorities (Bequette 2008, 40). St. Edward submits to the judgment of the Pope regarding his personal issues of sin, as well as accepting advice from the Pope, but never submits to the Pope in his capacity as King of England. There is no Henry-at-Canossa moment in the accounts, although that may be expected from the life of a "Confessor and King," but more importantly there was not even the kind of submission that King John infamously gives to Innocent III. The feudal language of homage is absent from the accounts of St. Edward's interaction with the Papacy, and instead the Pope is treated like a confessor and priest to the Saint-King, in stark contrast to the language with which King John will explicitly make himself the vassal of Rome.

Two of the most important stories in the various accounts of Edward's life are the death of Godwin and the prophesy which he gives about the coming Conquest. Godwin and his sons are described in Aelred and Huntingdon as the source of English sin in the generation of St. Edward, and the story about Godwin's death reinforces their role as the ones responsible for the breach of the Petrine Covenant. In the prophesy, St. Edward pronounces the judgment of God on England for the sins of the Godwinson family and declares that England would be reduced again to servitude as it was before his reign. Although Edward prophesizes the Norman Conquest as a punishment for Godwin's sins, he ends by predicting a coming king to redeem England in his example (Aelred 1997, 88). This coming king would, like Edward, be a saintly king who would restore the covenant and good laws, bringing an end to war and invasion forever. The nature of the Norman Conquest in the historians of Henry II's generation follows in this vein; the Normans are not portrayed as just conquerors but as a Scourge of God in the manner of the Vikings. As Huntingdon states it, the Normans reduce the English to slavery (*servitutum*) due to their cruelty and avarice, oppression of the poor, injustice (Arnold 1879, 31).

When the Normans are discussed by late 12th Century historians, they are described in the terms of wickedness and strength. The major attribute of William is his power; Huntingdon argues that William's power is so great that his peace was inviolable. A small girl could cross the country with a sack of gold and be unharmed (Greenway 2002, 32). In this, the Normans were a tool of God's will rather than actors in their own right, described in such a way as an Angevin would be comfortable in the description. One must remember that the Normans were the hereditary enemies of the House of Anjou, despite being the heirs to the Norman Conquest of England. As all Scourges of God, however, the Normans in turn are punished for their evil, especially Robert of Normandy and William Rufus (Greenway 2002, 48). Both Robert and William Rufus are described as having all the wickedness of their father but none of the virtues that made him strong. With the exception of Henry I, the greatness of William I's generation is cast down by their unworthy heirs, and the Normans are thereby destroyed by their own wickedness (Greenway 2002, 100).

Unlike the other Normans, Henry I sets the stage for the redemption of England by his marriage to Edward's grand-niece, whose grandson will unite England (Aelred 1997, 91). In Aelred's account of the line of Kings, this serves as the point where the legitimate succession transfers from the Anglo-Saxon line to the Plantagenets through Empress Matilda. The succession passes William Adelin because of the excessive love of luxury, fine clothes, and pride of the Normans of Henry I's court (Greenway 2002, 101). God cannot allow the evil of the Normans to pass to another generation, and therefore he casts down the son of Henry I, leaving a woman as his only heir. Like William I, Henry I was described as deeply wicked, as evidenced by the account of his death by gluttony, but Huntingdon nevertheless praises him for his cunning and great deeds while admitting that he shares in the nature of the Normans as vicious conquerors (Greenway 2002, 107). In his death, however, he opens the hope of a new line of kings who lack the Norman vice but still carry the bloodline of the Norman and Anglo-Saxon dynasties through a female heir. This promise is betrayed by the treason of the English Lords, who elevate Steven to the

crown. Like God in the Hebrew Scriptures, God allows a chance at redemption by giving Stephen a chance to rule by the Petrine Covenant, which is amalgamated to the three oaths of Stephen's coronation charter. Here, the theme of the coronation charter as a covenant emerges as part of the English understanding of just rulership. Stephen, despite usurping the crown, is allowed to rule given his promise to uphold the good laws of his predecessors. When the three oaths are broken, however, God tires of the Normans' sinfulness and decides to end their reign, resulting in the Anarchy (Greenway 2002, 68).

The eventual end of the Anarchy is due to an act of divine intervention; the treaty of Stephen and Henry is named a miracle by Huntingdon, wherein God has allowed the hardened hearts of the combatants to accept peace upon the restoration of justice, namely that the rightful line of the monarchy under Matilda's heir should rule over England (Greenway 2002, 93). When the first thought of betraying the miraculous treaty enters Stephen's head, God strikes him dead on the spot and Henry II is elevated to rule. Like St. Edward, the historians use the language of prophesy, divine intervention, and miracle when describing Henry II and his ascension to the throne. One of the great themes of Aelred's geneology is the power of love to redeem the nation; the love of Henry I and Matilda of Scotland restores the realm through their grandson, Henry II, who is the chosen king and successor to St. Edward the Confessor (Yohe 2003, 184). Henry II described as a new Melchizedek, who brings together Patriarch and Monarch, Norman and Saxon, Priest and King, with the King as the savior of the people. Henry II is the "cornerstone," drawing on Christ's use of that term (Freeland 2005, 20, 74). Aelred, especially, portrays Henry II as the fulfillment of St. Edward's prophesy, who would redeem England from the Norman Conquest and whose coronation is the event of reconciliation between Saxon and Norman and the unification of England's royal lines (Aelred 1997, 11). As mentioned before, the line of the Prince is the vessel of memory in a principality, and while the extinguishing of that bloodline destroys the memory and therefore identity of that people, the resurrection of that line restores the

self-identity of the English nation (Smith 1985, 81). Understood this way, the Norman destruction of Anglo-Saxon memory and identity is undone in Henry II, who by joining these two royal households together, both restores the identity of the conquered Anglo-Saxons and creates a new English identity out of both peoples.

This is the attempt, then of the late 12th Century historians to justify and explain the English mythology of the sacral kings up to the time of Henry II. The Norman invasion does a great deal of damage to the narrative in that four Norman kings rule without a restoration of the Anglo-Saxon dynasty. In all other conquests, the Captivity phase of history always ended within a single generation with a member of the House of Cerdic on the throne. As mentioned, the replacement of the literal bloodline of Cerdic by an anointed, sacral line as described by the Norman Anonymous allows for post-Conquest thinkers to accept a jump in the lines of kingship from St. Edward the Confessor to the Angevin dynasty, but also allows a retrospective inclusion of pre-Saxon monarchs like Brutus of Troy and King Arthur. It is probably no coincidence that the earliest Arthurian romances stem from this period where a new form of succession comes to the consciousness of the historians. Certainly, it is not being argued that the practical value of praising the current king was not at work in the histories being written during Henry II's reign. Nevertheless, Henry II is being praised in terms which form a long tradition in the self-interpretation of English history which bear reflection on the way the English understood their own continuity, both royal and national. The inverted apocalypticism of early medieval English thought, however, came to an end when a new set of symbols replaced them suddenly within a few decades of the 13th Century.

Changing symbols: from the Good Kings to Good Laws

The cycle of captivity and redemption in English historiography came to a close in 1215, as Magna Carta did not merely change the relationship of the King to the barons, but changed the way that

the English perceived themselves and their origins. This change had its antecedents going back to the Norman Conquest itself, given the inherent weakness of Imperial civil theology towards dealing with conquest in history. There were several major effects of this shift in historical self-consciousness. First, the Imperial mode of history was abandoned by English thinkers in favor of a more orthodox differentiation of sacred and secular history. Secondly, apocalypticism in English history is replaced with a language of virtue and corruption to describe the way society changes, its origins, and its destination. Lastly, the symbol of the Good King is replaced by the symbol of the Ancient Constitution: rather than a man as the symbol of the nation, the Common Law becomes the representative of the English people. Magna Carta is not the efficient cause of this change; one would probably argue that the experience of the 11th Century is the efficient cause of this change in historiography, beginning with Sweyn Forkbeard and the destabilization of the Anglo-Saxon state. Although the Danish Conquest was assimilated into the narrative as an extended period of captivity, the fact that the Norman invaders were not either expelled or subdued within a generation opened cracks in the edifice of English historical mythology which the 12th Century attempted to close, but ultimately failed in doing so. What Holt refers to as the “argument” of Magna Carta is more like the formal cause of this change in historiography, the idea which shapes the historical consciousness of the men of the period.

The 11th Century was defined by the conquests at either end; 1014 saw England fall to the Danes, and 1066 saw the Norman invasion. The dominant mode of Anglo-Saxon history, as described above, positing the themes of the new Canaan, Davidic kingship, captivity, and restoration, had significant legitimacy but was being challenged, like all histories undergirded by an Imperial civil theology, by powerful outside forces as well as challenges from the inside from both the Godwinson family and the Ælfricson family (Wormald 1994, 10). Cracks in the surface of the narrative were turned into rifts by the Normans and the continental influences which flooded across the English Channel into an otherwise closed English cultural and intellectual world. The Conquest did not shatter the ecumene

the way that the barbarians shattered the Roman ecumene, however, but changed the ecumene of England from one focused on the North Sea to a much broader one focused on Europe. An England facing the Continent and under the increasing power of Rome (with many of its native Saints facing delegitimization by foreign bishops) is transformed from a place of power and prestige to a mere colonial outpost of an Angevin Empire (Holt 1997, 1). This movement did not bode well for a world-view which claimed England as a chosen nation in a closed ecumene centered on the British Isles.

Not only was the socio-political situation shifting in the 11th and 12th Centuries, but the intellectual foundations of England were rocked by the renaissance in classical literature. A comparison of William of Malmesbury and Henry of Huntingdon, men who might be considered opening and closing brackets of 12th Century history in England, show the fashion in history changing from one which imitated writers like Bede and other early Christian historians to one that imitated Livy and Plutarch. This change in intellectual fashion was part of the major shift in historiography in the 12th Century; ecclesiastical histories fell out of fashion and histories based on the actions of great men became popular. Classical cyclical history reemerged as the way to explain secular events outside of a spiritual or sacred context (Ullmann 1966, 110). The effect of this shift in historiography accelerated the delegitimization of the Imperial civil theology described above by positing a history devoid of the spiritual elements of divine purpose, national calling, or the Scourge of God. Swein Forkbeard can be analyzed by Huntingdon without having to describe his invasion as judgment against the sins of England, and Swein himself is described in such terms as “fortissimus” and “audacissimus,” full of “igna digna” (Arnold 1879, 174). Huntingdon was writing history from the assumption that the actions in history were the products of men, not God, and that the invasions of England had causes rooted in the actions of great leaders rather than a covenantal relationship between God and England.

The result of these movements is the replacement of a historiography based on the Imperial civil theology of the Anglo-Saxon state with a new understanding of history where the representative of the English nation is no longer the “Good King” but the “Good Laws”. Without the elements of the Petrine covenant and the Davidic monarchy, the King lost his status as England’s representative before God and God’s vicegerent on earth. While the Kings of England would continue to attempt to trace their lineage back to King Arthur and Brutus of Troy, it would be more and more contrived and less and less valid as a means of establishing royal legitimacy. What defines the English is not the monarchy any longer but the laws which establish English identity through their longevity and their attachment to the soil of England.

The symbol of the ancient “Good Laws” of England did not arise out of a vacuum, however, but were themselves an oft-used symbol of English politics dating from the time of Alfred the Great. Alfred the Great’s famous Doombook begins with his preface, describing the process of lawmaking as selecting from among the ancient laws those which were best and leaving out the bad ones. While this was probably not a literal process of judicial review as a modern would recognize, and while many scholars dispute how much of the Doom Book is borrowed and how much is Alfred’s original legislation, it displays an understanding of the law as being based in the communal wisdom of generations of Kings and wise councillors even if, in fact, it was largely based on contemporary royal judgments (Abels 1998, 247; Wormald 1999, 272). The three wise kings whom Alfred claims to borrow from, Æðelberht, Ine, and Offa, correspond to the three divisions of Alfred’s kingdom, Kent, Wessex, and Mercia (Pratt 2007, 218). At this early stage, one can see that the ancient laws of the heptarchic kingdoms give legitimacy to the new “Engla Lond” being established by Alfred and his successors. By incorporating the laws of the three kingdoms into the great Doom Book of Alfred, these three peoples are being united into a single, English identity. Even as late as the *Leges Henrici*, there is an understanding that the Common Law is a royal law that binds together the three “laws” of England, meaning Wessex, Mercia, and the Danelaw: De tripartitione regni Anglie in diversitate legum (Downer 1972, 96). The laws, even this early, stand as

representative symbols of the parts of England; by the time of Magna Carta, they will come to represent the nation as a whole.

The earliest use of the law as an explicit appeal to English identity is found in the account of the promise to follow the “good laws” in Cnut’s coronation oath, which declare the identity of these laws to be the laws of Edgar the Peaceable (Wormald 1999, 129). The primary difference between Alfred’s and Cnut’s use of this symbol is the fact that Cnut is a Dane, not English. Alfred is acknowledged to be the rightful ruler of Wessex and Kent, as well as the liege lord of the ealdorman of Mercia, whose legitimacy is not in doubt. Alfred uses the symbol of the ancient laws to legitimize his law book, not his own reign. On the other hand, Cnut has no such legitimate claim to the English throne beyond the right of conquest and an apocryphal agreement with Edmund Ironsides to be “each other’s heir” (Freeland 2005, 109; Huntingdon 1879, 185). Certainly, Ethelred II’s promises in 1014 have been pointed to as the first incidence of the laws being used in this fashion, to justify a ruler based on his adherence to the law, but evidence is thin as to the nature of character of this agreement. It is mentioned in the Anglo-Saxon Chronicle as well as historians like Henry of Huntingdon, but little else is said beyond , “Ille autem per Edwardum filium suum praemissum omnia rege et populo digna spondens eis” (Arnold 1879, 181).

One must remember that “Edgar’s Law” is used as a reference to a time of peace and well-being, not as literal legal usage, much in the same way as Henry I used Edward’s Law (Wormald 1999, 347). The symbol’s value does not lie in a literalist interpretation, which obscures its value as a reflection of the way of life embodied by past rulers who were still understood through the lens of the semi-divine Davidic kings. The good laws of King Edgar was meant to bring about an understanding that King Cnut meant to rule in the example of the righteous and powerful Anglo-Saxon monarchs who came before, much in the same way that Solomon promised to walk in the footsteps of his father King David, and the continuation of the symbol by Henry I assumed this same understanding of the laws as a

metaphorical rather than literal concept. It was through the historian William of Malmesbury that Henry I rediscovered the old Anglo-Saxon law and used it as a symbol of English identity against his brother's claim to the English throne (Wormald 1993, 17). Beginning with the coronation oath and continuing with the *Leges Henrici*, Henry I's use of the symbol of Edward the Confessor's Law was steeped in the old Anglo-Saxon political tradition, appealing to a body of Anglo-Norman aristocracy who either had begun to assimilate into their new nation or who needed the fiction of Anglo-Saxon legitimacy to justify the lands they held. The continued use of Anglo-Saxon records to justify the holdings of Normans through forfeitures and female-line inheritances in the Domesday Book and beyond demonstrates the seriousness with which the Anglo-Norman baronage took the justification of their landholdings and their Anglo-Saxon roots (Holdsworth 1936, 168; Holt 1997, 47). As far as the laws existed in their literal usage, the Great Code of Cnut (1020-21) was the most influential of the Anglo-Saxon laws on post-Conquest understanding, granted however that the codes of law which contain these laws, the *Leges Henrici* and *Liber Quadripartitus*, were most likely idealized constructions of the law rather than reflections of how the laws functioned in any real manner (Holdsworth 1936, 152; Wormald 1999, 345, 413). Until the reforms of Henry II, the law as it was actually practiced happened largely at the level of the shire courts, whose rules were determined by local custom and varied so widely that the author of Glanvill despaired at the possibility of writing them all down.

Before the Conquest, the law was a subordinate symbol to the King; in the Good Laws of Alfred the Great and Edgar the Peaceable, the emphasis is on the King rather than the good laws. Edward the Elder, Athelstan, and Cnut were comparing themselves to their predecessors, not comparing their laws and customs to some ancient ideal. It is only with Henry I's resurrection of this symbol that the laws themselves begin to take on the superior aspect, accelerating under Henry II's legal reforms. The more literal interpretation of the symbol under the Angevin rulers eroded the Anglo-Saxon interpretation of the symbol, imbuing it instead with a new meaning colored by the context of Henry II's legal innovations

like the Royal Grand Assize and the *Writ of Novel Disseisin*, which although of recent mint became the understood and customary standards for rule of law in the minds of the barons and freeholders (Holt 1972, 93; Holt 1985, 170). It is through the reforms of Henry II that the specific grievances of Magna Carta against John and the Angevin system in general took their forms. The restoration of the Laws of Edward the Confessor were less about reinstating the customs and laws of 1066 and more about restricting the abuses that John and his predecessors had practiced against general principles of good, honest, and efficient justice. While Law has displaced the King as the symbol of justice and social order in England, it must not be understood as a specifically Constitutional law at this point in history. There is no “first statute of the realm” in 1215, or perhaps even as late as 1225.

Nevertheless, Magna Carta ends the demand for the Laws of Edward the Confessor, becoming the new symbol of justice and right social order in England after its issuance (Holdsworth 1936, 215). It takes a generation for it to morph into what becomes recognizably a Constitutional symbol in English politics. By the time of Bracton, Magna Carta takes on the character of statute rather than a charter grant from the King, and thus it is in this period between 1215 and the majority of Henry III that a fundamental shift in English self-interpretation takes place (Holt 1972, 53). The symbol of the Good Laws is given a concrete form in Magna Carta, such that the charter is understood as foundational law. As a Common Law document, however, one should not interpret Magna Carta as something comparable to the United States Constitution; Magna Carta contains some part of the Law of the Land which like Glanvill says of his book, is most frequently observed and useful, not the whole of the Law which remains unwritten. One may cite Magna Carta to demonstrate a point of law, but one may not cite the absence of anything in Magna Carta to claim that it lies outside the Law of the Land. This notion of the unwritten Constitution, founded in this symbolism of the Good Law as inherited from the Anglo-Saxons, forms the foundation of a particularly Common Law kind of Liberty, wherein precedent is continually amalgamated to a body of ideals derived from foundational documents, whose primary value is in

negating the authority of innovative executive power through an assumption of liberty buried within the institutional character of the Common Law system (Pocock 1987, 51). In other words, under the post-Bracton understanding of English Constitutionalism, the value of the particular clauses of Magna Carta are not found in countering the kinds of abuses committed by King John, but in countering the expanding power of the modern executive branch through precedent that interprets the clauses within modern contexts, thus an “Ancient Liberty” takes its form from modern practice but retains the character of antiquity through the Common Law’s legal language and form. The idea that any claim of authority by the executive must be justified against the protections of Common Law precedent forms the essential Common Law assumption of Liberty; because the law is both unwritten and ancient, the executive must demonstrate affirmatively that the power is justified, rather than negatively by showing that it is not forbidden, with an understanding that all precedent is impossible to collect due to the antiquity of the law. This places the bar for government power extraordinarily high and leaves the realm of individual liberties strongly protected on many sides; to defend against government encroachment, the individual has the advantage of the timelessness of the Common Law, while the government must demonstrate its use of power is not only justified in recent precedent but is also not contradicted by older rulings. It is this character that forms the meaning of the “Ancient Constitution” drawn from antiquity through Edward the Confessor, Magna Carta, the Petition of Right, the Glorious Revolution, and into the American Revolution (Sandoz 1993, 3).

The Common Law “Ancient Constitution”

The term Ancient Constitution is rooted in 17th Century constitutional thought, and in the following centuries has picked up all manner of commentary, definitions, and dicta. To begin, the phrase needs defining; the Ancient Constitution is not a document or body of fundamental law which governs England and her daughter nations in the way that the United States Constitution governs the United States. Instead the Ancient Constitution is a theory about politics and social order through

history with an emphasis on higher law, continuity, and the preservation of liberty. While the latter tends to get the most coverage from scholars, liberty is a secondary virtue, perhaps even a product of the two former ideas. Modern liberal attempts to sever liberty from higher law and the essential continuity of social order from the mythical foundation of Brutus of Troy to the present day destroy the very foundations of Ancient Constitutionalism in the process, hence the modern confusion over the meaning of the term. Higher law and continuity are the essence of liberty because liberty is understood as a form of order, not an oppositional force against order as the deformed post-Enlightenment manifestations make it out to be. Liberty makes it possible for people to live in communities through an acknowledgment of the limits of authority and power bounded by both reason rooted in the divine and the traditions of the people. Liberty demands submission to authority when that submission is appropriate and just, and the authority is legitimate.

Another confusion that must be rectified is the relationship between the Ancient Constitution and the Common Law: they are not the same thing. Where the Ancient Constitution is an idea about politics in history, the Common Law is a body of jurisprudence which contains embedded norms, ideals, and values surrounding the concepts and symbols of justice, liberty, and order. The Ancient Constitution's relationship to Common Law lay in these embedded concepts and the manner in which their meaning changes and remains the same across time. Certainly they should not be understood as unrelated ideas, for an idea of politics based on a continuity of social order must certainly rely on a legal system defined by precedent for the most practical manifestations of its stability over time. Common Law demonstrates the validity of Ancient Constitutionalism in the past, while the Ancient Constitution justifies Common Law's authority in the present. In practice, the two are deeply linked, but a conceptual difference must be maintained in the analysis of these ideas.

The Ancient Constitution is a legal, rather than political artifact, built within the framework of the Common Law as a means to the interpretation of precedent (Sandoz 1993, 270). This seems to be an alternate, contrasting definition to the one given before, but ultimately they reduce to the same concept. The Ancient Constitution describes itself here in constitutional terms, as a body of law forming the foundation of the English order. As an unwritten document, it is more indefinite than a written constitution, but declares itself to be a collection of only the best laws, not all laws (Sandoz 1993, 200). It is through the use of this kind of legal language that the character of the idea of the Ancient Constitution manifests itself within the context of the laws and public policy. The principle of higher law, a “hidden” order of *Nomos* forms the mechanism wherein the concept of Ancient Constitution generates a body of laws in the form of a constitution that never dies (Ullmann 1966, 49).

In this theory of law, law is explicitly a power of Right, so that struggles over the law are interpreted as a conflict of justice against injustice rather than mere policy (Holdsworth 1936, 122; Sandoz 1993, 218; Stoner 1992, 19). As mentioned in the previous chapter, medieval thinkers understood a difference between law as a statute or judgment of an individual official and law as the fundamental “constitutio” of a nation, a differentiation which is largely lost on modern judicial scholarship. This two-tiered understanding of law meant that the jurisdiction in which the lawmaking body was able to make statute was sharply limited by another body of permanent law whose justification was superior to that of the lawmaker. In the language of the time, it would be that the Prince’s authority to make statute is limited by the Law of God, such that the ultimate limit of lawmaking authority for the medieval is the belief in the reality of higher law (Holdsworth 1936, 444). This led to a particular urgency in the ever-present conflict of government initiative and settled law in medieval states, where the central conflict of the 12th and 13th centuries lay more in the attempt by all the Angevin kings to escape the limits of the higher law than the particular personality flaws of King John (Holt 1972, 1).

Returning to liberty, most scholarship on the Ancient Constitution revolves around its treatment of liberty rather than political order qua order in history. One of the problems with this scholarship is the use of anachronistic standards to describe the idea as it manifested itself in the particulars of historical political controversy. The notion that Ancient Constitution was concerned specifically with liberty against the King rather than a political order of custom and usage is a product of 17th Century Whig thought (Pocock 1987, 232). The conflict with the King was the particular manifestation of Ancient Constitutionalism in the 13th and 17th Centuries, but by no means do these two conflicts define or exhaust the theory or its treatment of liberty. In fact, it is the exceptional nature of these events which should be the emphasis of their treatment by political theorist; the conflict between the King and Commons centered around the symbol of liberty was the exception to the rule, and the way that the Ancient Constitution was fitted into the language of these conflicts was unique for a political idea and symbol that is largely concerned with explaining the cooperation and coexistence of the Crown, Baronage, and the Commons. In fact, the Ancient Constitution as much enables the exercise of power as hinders it because its emphasis is not on power as such but on custom and usage. Power exercised contrary to those is checked by the law, but this central tenet of English government rests on the assumption of reasonableness of the King's use of power, and thereby grants tremendous political power when exercised in accord with customary means. Only when the use is clearly unjust⁶ is the King challenged on the basis of the law (Painter 1961, 270). One must only reflect on the difference between the Danegeld as levied under William I and his sons with the barons' reaction to John's less frequent tax levies; there was no tax revolt against the traditional Anglo-Saxon levy which only fell into disuse during the Anarchy. Hence the two definitions given here for the Ancient Constitution, that of a description of political order in history and that of a guarantee of liberty against tyranny, are both accurate, as the

⁶ The association of the ancient with the good also creates an association of the just with precedent.

latter is an example of the former under extraordinary events, but not a total description of how the Ancient Constitution operated during ordinary times.

According to Pocock, the primary attraction of Ancient Constitutional arguments for practical political actors in times of crisis is in their negative value; as an argument best employed in refuting infringements on liberty (Pocock 1987, 51). This statement is correct but incomplete; the value of Ancient Constitutional arguments for the practical actor is in their negative value in refuting innovations, especially given that English society traditionally values liberty. Pocock's formulation puts the cart before the horse. The character of English society as free must necessarily precede the assumption of identity between the ancient and the good, or else liberty would be the innovation rather than the good. Certainly, there are examples where the Ancient Constitution was invoked in defense of custom without regards to individual liberty. The kings contributed to the Ancient Constitutional mythos by appealing to them in order to restore royal prerogative against baronial and parliamentary infringement (Holt 1992, 115). Henry II most famously appealed to the laws of his grandfather to restore powers of the monarchy which Steven had lost. Furthermore, Ancient Constitutionalism was used by Archbishops against the Pope, especially the custom that Papal legates were not welcome without the invitation of the King (Warren 1973, 416). At the root of this understanding of social order based on continuity in time is the claim that the customary liberties of the people date from time immemorial, not by a grant from the King or the State (Pocock 1987, 16). History is the legitimizer of political practice as it always had and always will be done. Liberty itself is not the emphasis but customary liberties, because the existence of custom is outside of time and ties to a people's identity and self-interpretation. Tyranny is defined in this way as the imposition of arbitrary will over the common judgment of the ancestors, and is more heinous for its destruction of the *scientia* of the great kings and wise judges of the past. The ultimate defense against tyranny is the maintenance of the memory of the ancestors as expressed

through custom and the affections which tie them to a place, a past, and each other; without these bonds, they are ready victims of the tyrant (Smith 1985, 163).

It is important to note that custom is not understood as ritual but as the spirit of a way of life and a people (Smith 1985, 113). When the Ancient Constitution protects customary liberty, then, one should not interpret it in the most rigid sense; the liberties being protected are not the specific forms of liberty but the essence of the liberty as it is practiced in contemporary society. No serious person argues that freedom of speech should be limited to quill pens, freedom of the press should be limited to hand-presses, or freedom to bear arms should be limited to black powder muskets. In this sense, the liberties protected by the Ancient Constitution change with time, expanding but never contracting due to the nature of precedent as the controlling element of the practical understanding of custom.

Medieval legal thinkers do not hold the Ancient Constitution to be immemorial in the literal sense, but invokes custom and usage in a vague, ambiguous way such that the law is both unchanging and evolving (Pocock 1987, 274; Sandoz 1993, 28). However, there still remains a commonality which forms the “roots of liberty” as Sandoz describes it. These roots are understood by English thinkers, especially before the Enlightenment, as a patrimony or a special kind of inheritance from one’s fathers (Adams 1954, 13; Smith 1985, 123). The link of the individual to the customs and *scientia* of the ancestors is treated as literal rather than figurative, even if the purported ancestry is contrived or mythological, as in the case of immigrant populations like the Anglo-Saxons and Normans. The liberty established by Brutus of Troy and King Arthur is taken by these successor peoples to be a literal inheritance, with myth rather than genealogy providing the evidence of succession. Part of this myth is the notion that the character of a people is the only permanent thing; while institutions and beliefs pass away, the English retain a certain character of freedom throughout waves of immigration and conquest (Smith 1985, 157). This contributes to the understanding of the uniqueness of the English constitution. The Ancient Constitution flows from the English people, not from any external imposition of act of a philosopher,

founder, or King. Because it is an almost biological outgrowth of the national identity of the English, it cannot be imitated or applied to other nations. Creation of laws and customs only allow a free people to remain free; they do not establish the character of Liberty in a people, and any attempt to impose an English-style regime on another people would inevitably fail (Smith 1985, 194). A foreign nation would not be able to support such a regime in liberty because they lack the kind of character (or to use a phrase from earlier, *habitus*) that creates, sustains, and nourishes liberty.

The concept of the Ancient Constitutionalism arose out of the promises of Henry I, Stephen, and Henry II, especially in the coronation oaths and the language surrounding the “good laws” of their predecessors (Holt 1985, 13). As discussed before, the language of the laws of the good king had begun to evolve after the Norman Conquest. Before the Conquest, the onus of the symbol was on the righteous king rather than the laws, and therefore the laws were understood to be a way of describing the kind of social order engendered by a wise and Godly ruler, backed by the understanding of a special covenantal relationship between England, the Saints, and God. With the Conquest, there is a partial erosion of the symbol and a movement toward a more literal and dogmatic interpretation of the law as it participated in this symbol of social order. The evidence of this literalization of the concept of ancient law is found in the understanding of the restorative nature of Magna Carta (Pollock and Maitland 1898, 172). Magna Carta is understood to be a statement of ancient law rather than a novel construct. With the exception of Alfred’s Preface, no previous code of law makes this claim, but instead includes a statement of obedience to the laws of the antecedents alongside the laws of the present ruler. Cnut’s Code makes no claim to be the law of Edgar, only to follow in the spirit of those laws.

The last thing to note about the Ancient Constitution is its relationship to feudalism. The necessity of understanding Ancient Constitutionalism as social order rather than specifically as liberty is evidenced by the fact that the focus of medieval rights is not personal rights but relationships between

the members of the feudal hierarchy. This explains the general lack of modern personal rights in medieval laws, with the exception of the right to bear arms (Painter 1961, 14, 259). Liberty is not understood within the context of an atomistic individualism where each person was a *cosmion* unto himself, but within a broader social *cosmion* which makes up the *communitas regni*. The friendships of the feudal bonds connect a conception of liberty which can be simultaneously individualist but actualized at the level of the community. It is through feudalism and its understanding of the communal liberty of friends that the source of the love of liberty becomes a part of the political identity of the English (Painter 1961, 262). Indeed, it is the decay of feudal symbols like the medieval Davidic King that intensifies the demand for feudal virtues like liberty and friendship, as the intensification of feudal ethics is a result of the decay of feudal institutions (Painter 1961, 15; Smith 1985, 60). Intense attachment to the remnants of a decaying symbolic system is the natural response to the collapse of such a system, and the result of such an event in history is usually a repurposing of old symbols in new ways to preserve the form of the old while creating a new context of the symbol to fit changing circumstances. In this way, English patriotism is the offspring of feudal *fidelitas*, wherein the ancient symbols surrounding their attachment to the land and the people were redefined by the event of Magna Carta in a manner which reflected its feudal roots but expressed the experience of the post-feudal or “bastard” feudal order (Smith 1985, 199).

Common Law theory

In understanding the role of the Common Law in English liberty, one must remember that the earliest documents of the law cannot be clearly divided into theoretical and jurisprudential categories. While the role of the Common Law in the life of the *Liber Homo* was treated in the last chapter, this section focuses on how Common Law is interpreted in the context of the Ancient Constitution and the English philosophy of liberty. In this sense, the Common Law can be understood as a slowly evolving body of cumulative wisdom, changing in response to history (Pocock 1987, 174; Stoner 1992, 23). It is

not a body of positive law but a product of an entire people across their history, thus easily lending itself to stand symbolically as a representation of the particularly English life. It was used previously to demonstrate the life of the *Liber Homo* as understood through their legal presence. Here, the elements of the Common Law which contribute to liberty in the abstract sense will be described.

As mentioned before, Common Law is not made but found; it grows organically from usage and custom (Ullmann 1961, 187). This distinguishes it from the legal tradition which grew out of the Classical world. Unlike classical law, within the Common Law, the written laws are supplementary, not superior to unwritten law (Stoner 2003, 79). This tradition is described in the *Leges Edwardi Confessoris* through William I's use of a jury of wise men whose responsibility it is to recite the good laws of Edward the Confessor. The ultimate repository of the laws is not a royal code but the shire courts, wherein the body of judges, namely all free men, declare the laws and customs of the shire before the royal representative, often the sheriff. In this way, the Common Law is deeply related to the nature of the *Liber Homo* in Magna Carta; the *liberos* of the realm are the foundation of the law and therefore of social order itself.

The origin of the Common Law is distant antiquity according to the mythology, but the myth itself is a product of the 12th Century Renaissance. Part of that intellectual movement was the rejection of the universal empire symbol wherein the entire ecumene was understood to be naturally part of Rome, and instead a focus on the distinct nations and peoples which made up the Western world. For this reason, the Common Law is built on the 12th Century humanist ideal of law fitted to a people rather than a universal law of the medieval doctors (Pocock 1987, 33). Common Law serves as a point of identity for Anglo-Saxon civilization in a way that Civil Law on the continent does not; living under the Common Law is one of the defining characteristics which makes one a member of a distinctly English culture group. While Civil Law is pan-cultural, without reference to the particulars of its practitioners,

Common Law is uniquely entwined with the national character of its practitioners in such a way that citizenship and jurisdiction blur together in a uniquely medieval way: the last refuge of the notion that every person has a right to the law of their own people, and Common Law is specifically the law of one's people rather than of one's sovereign. The barrier to this assumption of identitarian status by the Common Law before the 12th Century was the notion of *scientia* as the basis of law, wherein the King or the Church were assumed to have access to special knowledge which made them uniquely suited to be lawgivers while the people had no such knowledge. Humanism's greatest contribution to the Common Law was providing it with a basis to be understood as a *scientia*, thus putting it on equal footing with the Roman Law (Ullmann 1966, 62). The 12th Century's way of interpreting the Common Law as cumulative wisdom allowed it to challenge the special wisdom of the lawgiver King, the Church, or the classical Founder and even to claim superior status to Roman Law. The Roman Law may contain the wisdom of a founder like Romulus or Numa, but the English Common Law contained the combined wisdom of all the great kings and counsellors of the past. In this way, Civil Law theory revolves around the notion of the Lawgiver as central figure of the foundation of a nation, existing even as late as Rousseau, but Common Law denies the role of a lawgiver in the foundation of society, instead relying on an ancient, living tradition of law (Pocock 1987, 41; Ullmann 1961, 187). This rhetorical innovation by humanist legal thinkers provided the kind of legitimacy to the Common Law in England that contributed to its ability to resist the pressure to adopt the Roman Law as occurred on the Continent.

As mentioned, the Common Law forms an integral element of the identity of the English and their successor cultures. In addition to personal identity, however, it helps form the character of the regimes founded in societies defining themselves through the Common Law. A realm is fundamentally different than a republic; the first is a territorial commonwealth which understood itself as being bounded and defined by jurisdictional markers, the latter is a polity defined by citizenship and operating under a common ideal of the *vita activa* (Pocock 1975, 335). Because Common Law describes the

boundaries of the community in jurisdictional terms, it is often called the *lex terrae*, for the Common Law delineates the extent of the country and the country is that which is ruled by Common Law. Within a Common Law country, there are two primary forms of jurisdiction, the *lex regis* and *lex terrae*, described as the written and unwritten law. The principle of the former is the *voluntas principis*, while principle of the latter is custom and usage, implying consent and a principle of representation (Holt 1972, 80; Ullmann 1966, 72). As mentioned before, the *lex regis* is supplemental to the *lex terrae*, not superior, as the *lex terrae* is a product of the whole of the realm, generally defined through the context of estates in the medieval world. The estates provide a representation of the realm through feudal bonds, thus providing the King with the court necessary to “declare” the law, in England’s case, Parliament. The problem of modern interpretation is that the Parliament is not a legislative body, and thus the coronation oaths and other elements of the rule of law do not bind the King to Parliament’s will, but to the unwritten law itself, which binds both the King and Parliament (Ullmann 1961, 187). Instead, the Parliament is the highest court of the realm, as described in the *Leges Edwardi Confessoris*, whose role is to speak the words of the law to the King as is known to them in their various jurisdictions, hence the representative element, and also to serve as judges under the King. Parliament does not make law; it only speaks the law(s) as they exist throughout the shires of England. They have no political “will” because they are not empowered to exercise will, but instead are agents of the memory of the people. As a representative legal system, these and all officers of the law are subject to the law, unlike in unrepresentative systems, namely Roman and civil law, where they are superior to the law because the law is a product of their will (Ullmann 1966, 94).

The terms for these ideas are described by Pocock as *jurisdicio*, meaning the memory of precedent, and *gubernaculum*, or the will to command law. Certainly, one can say that Common Law systems are ruled by the former and Civil Law systems by the latter, but idealized *jurisdicio* or *gubernaculum* cannot exist, as experience bridges the two: statute expands on the Common Law and

Common Law interprets the statute over time (Pocock 1975, 27). Nevertheless, the emphasis on one or the other element in a legal system helps define the character of that legal system. While *gubernaculum*, being the power of will and command, is defined as rational and noetic in character, *jurisdictio* is subrational or phronetic, dependent on opinion, custom, experience, and prudence (Pocock 1975, 15; Smith 1985, 155). Common Law, as a system heavily tilted toward precedent, is therefore deeply anti-philosophical in the classical sense because it rejects the rationalism of the philosopher-lawgiver and embraces the particularism, contingency, and prudence of a system built upon an accumulation of individual cases and whose process is built upon analogical reasoning. Common Law judges do not make decisions based on universal principles of law but on equivalence to settled precedent; the most valued attribute of a Common Law thinker is experience, not reason. Experience alone is the means by which Common Law can be judged, through the trial-and-error of history, a combination of the judgments of the generations rather than the life of one man. This makes new legislation difficult, as legislation is a rational exercise of a single actor, who can only act freely when severed from the body of traditional precedent (Pocock 1975, 18; Sandoz 1993, 76).

Thus, classical philosophy never truly crosses over to the Common Law, whose Roman influences are limited to the legal works of Cicero and Seneca and which takes for granted the questions of being and eternity, instead predicating itself on order as it presents itself in history (Holdsworth 1936, 5). What this means is that the questions of mortality, decadence, and the Imperial cycle as described by republican theorists of the classical world never come to the surface as issues in Common Law thought. The Law has always existed, and it is presumed that it always will exist; without a Founder and a Foundation, the question of civilizational demise does not become relevant, thus there is no language of a decadent cycle as in Plato or the Polybian cycle of revolution. That is not to say that classical language is not captured and repurposed at times in ways which would have surprised the original classical writers. The ciceronian axiom of *consensus utentium* was revived to defend feudal law, a most

un-Ciceronian system (Ullmann 1966, 80). Where Cicero would see feudalism as a system of clientage, which ran counter to the classical republican idea that no citizen may be dependent upon another, medieval legal writers repurposed the idea of consent to refer to the representative function of feudalism, wherein the lord has power to speak for and on behalf of his vassals before the King in Parliament. In total, training in method and principle were the primary influence of civil and canon law on the Common Law, not foundational concepts; the concept of representation present in the Common Law were drawn through the Justice of the Peace and the jury, and primarily absorbed from feudal law (Holdsworth 1936, 177; Stubbs 1979, 10; Ullmann 1966, 91). The *lex terrae* or the unwritten feudal law was truly at the root of Common Law (Ullmann 1961, 166).

Normans and the Ancient Constitution

A major factor in the way that Ancient Constitutionalism interprets English history lay in the understanding of continuity through the Norman Conquest. William's rule is not legally considered a conquest but a dispute over succession settled by battle. Insofar as there is a disruption of the constitutional order resulting from the actions of the two Williams, the coronation oath of Henry I restored the laws set aside by William I and II (Pocock 1987, 53). While this is necessary to maintain the integrity of the myth, it has the effect of obfuscating the effect of feudal institutions which are established by William I and II. Treating the conquest as a succession dispute rather than a conquest is one of the reasons that 12th Century historians as well as their successors were not able to address how feudal tenure changed the laws (Pocock 1987, 180). Treating it as a true conquest, however, would destroy the essential continuity of law from antiquity to the present, however, and therefore it is central to the Ancient Constitutional ideology that William I acquiesced to the Common Law, as quoted in the *Leges Edwardi*: "Et sic auctoritate sunt leges regis Ædwardi" (O'Brien 1999, 193).

The creation of new laws by William II, Henry I, and Stephen are minor, still set against the background of Anglo-Saxon law, especially the *Laga Edwardi*. The *Leges Henrici* as written was heavily influenced by the Great Code of Cnut, and therefore largely comprised of Anglo-Saxon law with a few sections describing feudal practice which only really applied to the highest members of society, rather than to the mass of freeholders and the unfree, who were largely governed by the same kind of arrangements as existed before the Conquest (Holdsworth 1936, 151; Larson 1902, 204; Stenton 1932, 115; Wormald 1999, 19). The author of the *Leges Henrici* admits that some law has been changed since the Conquest, but is highly critical of recent law, outright stating his preference for the law as it existed at the time of St. Edward. The source of this bad law according to the *Leges Henrici*, however, is not the King but the *animos tyrannorum* in lawyers (Downer 1972, 99). What this demonstrates is that the Ancient Constitution of the 12th Century was not understood in the context of an institutional conflict between the King and the rest of society, but deviation from the law was a problem stemming from many sources, and for the clerk writing this text, the secular law profession is one major source of tyranny in society. The author understands the problem which the constitution addresses is the spirit of tyranny which opposes the social order, of which liberty is one part, but not the whole. Tyranny destroys the whole fabric of the *communitas regni* by imposing a deviant will in the place of feudal *fidelitas*, and while liberty is a part of that fabric, the kind of order established by law encompasses fidelity and obligation as well. It should be no surprise that the propagation of the *Leges Henrici* over the 200 years after its publication was largely for political, not legal reasons (Downer 1972, 6). There are few legal innovations in the document, but its true value lay in its proscriptive value in negation of the spirit of tyranny when it emerged to challenge the established law.

The publication of the *Leges Edwardi*, however, is likely a reaction to the publication of the *Leges Henrici* rather than an independent attempt to describe the law (O'Brien 1999, 47). Unlike the broad attempt of the author of Henry's laws, this document focused on a very specific topic: the state of

the laws after the Conquest under William the Conqueror. There were two major themes which dominated the *Leges Edwardi*: it legitimized the Norman kings through a narrative describing William I as the successor of St. Edward and it assured the English that their laws would be respected much in the same way that Cnut's Great Code worked for the English a century before (O'Brien 1999, 18). One of the major themes of this work, however, is the concept of "One Law" as described in the *Instituta Cnuti* and *Leges Edwardi*. This notion does not refer to a single national custom but that the King should be the single authority of the Law, a principle dating back to the beginnings of the Anglo-Saxon monarchy under Alfred (O'Brien 1999, 62; Wormald 1986, 152). This notion serves to prepare the way for a true Common Law where the King's Court serves as a final court of appeals for all free men rather than a patchwork of local customs and courts with no grand unifying principle. The notion of One Law allows the customs of the localities to remain in force but acknowledges a higher right belonging to all freeholders and a supreme jurisdiction which encompasses the entirety of the realm, headed by the King, and ruled by a standard of law under which all free men are equally judged. The content of the document claim to form a written basis of this law, given that the written law is supplemental to the unwritten law, and like nearly all medieval English lawbooks, claiming to omit the bad laws and include the good laws (O'Brien 1999, 62).

Glanvill's work is primarily associated with the effects of the 12th Century renaissance in legal thought on the continent and the supposed influence of Roman Civil Law on the Common Law. The problem with this association is that Glanvill's use of Roman Law is primarily in borrowing Latin words which are used in a way that do not reflect their Civil Law meanings (Holdsworth 1936, 192). In this way, Glanvill is typical of late 12th Century thinkers, many of whom use language and terminology from classical authors but change the meaning of the words to suit a purpose to which they were never intended. Unfortunately, Glanvill limits the focus of his work to the laws of the King alone rather than attempting a broader study as the author of the *Leges Henrici* does. While scholars have many opinions

of the results, it does have two primary effects from the viewpoint of political thought. First, it does not discuss the relationship between the curia regis and the lower courts, which makes Glanvill's work far less useful for understanding the practical effect of the laws on the majority of cases which never reach the higher court. Secondly, Glanvill is far less a work of theory and far more concerned with the practice of law and the use of writs, giving very little information about the type of social order expressed in the laws compared to the dominance of the topic of legal procedure. To be clear, however, the principle of equity is still dominant in Glanvill as the ends of justice. The process of law, while significant, should reflect justice rather than proceduralism, and the result of reconciliation is still central to the end of judicial judgment (Holdsworth 1936, 194). Glanvill is still a product of the 12th Century and his proceduralism does not dominate the law in the way that the 14th and 15th century lawyers will practically excise the notion of equity from the Common Law.

The Political Philosophy of Magna Carta

To talk about Magna Carta is to talk about the political philosophy of Anglo-American constitutionalism, and this unfortunately muddies any real understanding of what Magna Carta has to say about the nature of liberty and the free man in 13th Century by imposing the product of hundreds of years of change back on the original catalyst. Certainly this error in thought has influenced the way that scholars have attempted to erase or minimize the influence of feudalism on the origins of Parliament in favor of an understanding of a liberal national legislature, as evidenced in Pocock's work on uncovering these kinds of scholarly errors. Although Magna Carta would go on to produce a political philosophy over the next several centuries, Magna Carta was not a product of a coherent political theory, but is a reflection of practical circumstances of the 13th Century crisis in English government (Holt 1997, 306). Therefore, Magna Carta cannot be treated like the United States Constitution or the Declaration of the Rights of Man, which are the products of a philosophical and intellectual movement which preceded and inspired the political struggle. Magna Carta is a Charter of Liberties, not Liberty, and lacks universal

statements of political philosophy which are the hallmark of ideological systems of thought (Warren 1961, 236). Magna Carta is an example of a situation where the practical self-representation of political order precedes the philosophical exegesis such that the kind of ideological language and explanation which pervades modern political analysis is largely non-functional. This is illustrated by efforts by scholars like Jenks, Pollard, and Stubbs to place Magna Carta within an ideological category whose boundaries post-date the object they are trying to define; notions of “reactionary” or “liberal” are meaningless when applied to Magna Carta because ideological language follows philosophical investigation, it does not precede it (Holt 1972, 6).

The two features which make Magna Carta distinct from all Continental grants of liberty are its concern for the *Liber Homo* and its grant in perpetuity (Holt 1997, 294). The mistake is to say that these two factors caused the divergence in political order between England and Continental Europe; they were not the cause but manifestations of the cause. Magna Carta itself is an effect of a community of men who lived their lives according to a model wherein liberty is an experience, not an abstract goal. Liberty is not sought but is preserved as an expression of the way of life which this group of men lived and how they perceived the way their ancestors lived. The fundamental struggle of liberty is not concerned with the preservation of abstract rights but with the preservation of a way of life which is threatened by political and social forces outside of the community (Holt 1972, 8). To interpret it, then, one must look at Magna Carta as not just a rebellion against King John and his abuses during his reign but against the entire Angevin reformist project wherein local government and courts were centralized under the king’s household, thus altering aspects of life as it was practiced in the counties (Holt 1985, 123; Warren 1961, 110). This understanding of liberty and the conflict in the 13th Century as a confrontation between control by the Court and the preservation of their way of life by the counties makes liberty a symbol for a way of life and rights as simply examples of how the king’s administration infringed upon customary practice. Magna Carta the product of men who were less concerned with

abstractions of law or liberty and more with specific grievances against the royal administration (Warren 1961, 180). The *Writ of Novel Disseisin* is a perfect example of a reform which technically violated the customs of the counties but was embraced because it protected the way of life of the small freeholder. Rights are understood in Magna Carta as being heuristic principles of customary order rather than fundamental axioms of justice, as rights which did not protect the way of life of the Free Man were abandoned between the writings of the 12th Century codes of law, while new rights emerged as they were found to be necessary to thwart the encroachments of the king and high nobility. The rights of a man from Mercia or Northumbria to his own law or the use of oath-helpers quickly disappear from the Common Law between the beginning and the end of the 12th Century, as do many other principles of customary law which were not suited to the new situation of the Angevin constitutional crisis.

As the rights of Magna Carta are heuristic principles of order rather than abstract universalist axioms, these rights have a history and a definite source. While the language of Magna Carta's supporters claim an origin in time immemorial, the heuristic character of these rights mean that a legislator did draft them at one point, but the way that these rights were judged and sifted through the generations by successive kings and counsellors disguises the origin and grants it the experienced character of timelessness. As to the source of Magna Carta's rights, the *Leges Edwardi* was one of the most important documents used alongside Magna Carta to support the claims of the rights of the barons (O'Brien 1999, 105). The significance of this fact is demonstrated by the nature of the *Leges Edwardi* themselves, which are not truly a code of law but an argument for a kind of government, supposing to provide proof that William I acquiesced to the Common Law and that there was no legal breach between the Anglo-Saxon kingdom and the Anglo-Norman monarchy. Many of the specific practices described in the text are no longer valid in 1215, such as the Danegeld, the retention of weregeld and manbote, and the friborg, but despite the vast difference in content, both documents contain the same essential message, namely that the king was obligated to protect and maintain the

way of life of the small freeholder and lesser nobility in the shires or counties. Other major sources of Magna Carta's understanding of liberty include the schools, the feudal contract, and the Common Law (Holt 1972, 3). While the effect of philosophers and clerics like John of Salisbury may not be evident on the surface, their understanding of liberty and social order are deeply felt within the document's unwritten assumptions on the nature and character of justice. Salisbury's conception of justice as the healing of rifts in the social fabric rather than a theoretical state of mathematical equality underlies every statement of right and redress in Magna Carta. The feudal law and the Common Law have been discussed in length already, but the fact is that they form the content of the controversies which Magna Carta proposes to close, and therefore must be understood as the source of Magna Carta's theory of liberty.

Nature of Magna Carta as a charter brings up complications in its understanding, as a charter is a grant from the King by his will, while Magna Carta purports to report on ancient laws beyond the King's authority (Sandoz 1993, 39). Certainly, one can debate the meaning of this paradox, but the truth of the matter probably lies in the nature of Magna Carta as a practical document, not a philosophical treatise. The authors of Magna Carta are not seeking to create a foundational document for the ages which will hold up to critical legal and philosophical interpretation, but instead are dealing with an issue of ending the war. A charter is a common medieval document for the transfer of property and rights, and the practicality of this means of coming to an agreement is probably the central element in the decision to use a charter. There were two major discrepancies in the way Magna Carta is presented as a charter. First, unlike a charter given to an individual, Magna Carta is granted to the entire nation, to a beneficiary who cannot die (Sandoz 1993, 43). This had been done with regards to a Church charter, but this grant forced the creation of a new terminology for Magna Carta, as the term "*tocius communia terre*" which was discussed before. Secondly, grants in *perpetuum* were usually the province of the Church, not civil authorities, with the exception of borough charters (Sandoz 1993, 48). The association of the nation

with the church and with borough government was unique, and bore consequences which would manifest themselves after Magna Carta in a way which would change the understanding of the nation and community radically.

When discussing the nature of liberty in Magna Carta, it is necessary to avoid introducing modern political ideas into the discussion which taint the way the document is understood. One of these ideas is commonly the notion of class conflict, and how Magna Carta is the product of some kind of institutional struggle between the king and the nobility. Magna Carta cannot be understood as a class confrontation but is concerned with a proper ordering the interrelationship of the classes, as the Great Barons exercised the same powers of the King, just on a smaller scale (Holt 1992, 30). A perfect illustration of this concept lay in comparing Articles 12 and 15 in Magna Carta, which show the parallelism and mutualism of feudal right from the king to the lowest of landlords. Any limit placed on the feudal rights of the king ultimately limited the rights of every feudal lord. England's particular kind of feudalism, which included such a large class of small freeholders, meant that these kinds of feudal rights would encompass a large segment of society. The broadness of the class of men who held feudal right of lordship over others certainly affected the way that feudalism was conceived of in English society. Magna Carta differed from earlier charters of rights by associating the customs of the realm with liberty rather than with the dignity of nobility (Sandoz 1993, 37). Certainly, it seems that since those who practiced the *lex terrae* were a significant segment of men in English society, the kind of limitation of liberty to a select number of aristocrats as was done in France was not possible or advantageous to the Crown. Henry II certainly demonstrated the possibility of leveraging the small freeholders and knights of the shire against the high nobility. Because of the nature of the small freeholder class, feudal liberty was minimalist and negative liberty, freedom from certain abuses (Painter 1961, 258). A class whose interest largely revolved around self-government would not develop the kind of positive liberties which defined the charters of the towns and cities.

The historical shift from privileges to rights largely occurred under Richard and John, where the constant sale of privileges was allowed to take on a permanent character (Holt 1992, 51; Stubbs 1979, 71). This is a reflection of the heuristic nature of rights in English political thought, and how practices which proved useful became integrated into the customs of the realm. Certainly, if rights were understood as universal axioms, then new innovations could not take on the character of rights in so short a time as a generation or two, but the rapidity with which these practices are absorbed into the consciousness of the free man's life demonstrate that no such "Natural Rights" theory can adequately explain the emergence of Magna Carta. What Magna Carta does is to take individual proprietary rights which were often sold by the crown and transforms them into class rights, following in the example of the Church and chartered cities (Holt 1992, 55; Stubbs 1979, 60). While modern writers like Holt use the term class rights, they were perceived at the time through the lens of customary practice; their legitimacy was based on the practice of the rights rather than any abstract notions of the justice of their practice. One of the effects of this great transformation in the way rights were understood is that by borrowing ideas of corporate rights from the Church, Magna Carta helped generate the idea of the State as a corporate body in the example of the Church (Holt 1997, 295). When a rising burghesses class would attempt to universalize their city charters to the whole of England, Magna Carta would serve as ideological ammunition.

The focus on liberties and rights in Magna Carta, however, is a product of modern interpretation and an ideological fixation on those elements of the 13th Century Constitutional Crisis in England. What must be understood is that this period is, indeed, a crisis of the entire constitution of English government and that traditional liberties were only one element. One of the great conflicts of the 13th century is between rule of law and legal procedure versus arbitrary power of royal administration (Holt 1992, 35; Ullmann 1966, 76; Sandoz 1993, 200; Warren 1961, 240). The reforms which were begun by Henry II are given the name "bastard feudalism" by some scholars, and for reason; these reforms badly

degraded both the traditional means of self-government and the dependability of the ties of the feudal law. In fact, Articles 29 and 37 show an attempt to save feudal practices from the monetization begun under Henry II. The replacement of feudal obligation and personal service with money was being derided by scholars as far back as John of Salisbury, who saw the way that basing social ties on money undermined the cohesive force of the feudal oath, led men toward lives that were both vicious and unfree, as well as degraded the capabilities and integrity of royal administration. The organization of society under the traditional feudal virtues was seen as a moral imperative in a society becoming more materialist and less just. In addition to the changes to feudalism, the immediate effect of Magna Carta is the removal of administration from the King's Court and placing it under the Law (Ullmann 1966, 74). This is understood to be a restoration of traditional powers of self-government in the counties, wherein the law held authority due to custom and longstanding usage, while the royal court was under the influence of the king's personal will. Articles 17, 18, and 48 all involve the restoration of powers of local government against centralization of the Angevins, including the causes which can be heard, place where the courts would sit, and an acknowledgment of the authority of county law over questions of the forest.

In addition to the crisis over law and the courts, Magna Carta brings up questions of representation and consent, especially having to do with the role of Parliament. What a modern reader must fully understand is that Parliament is not a legislative body but a court of justice, giving form to the "trial of peers" and forcing disputes to come out publicly to be resolved with finality (Maddicott 2010, 186). Magna Carta will attain the name of "First Statute of the Realm," but Parliament's nature as a primarily legislative body is an artifact of early modern theories of government and the Stuart Constitutional Crisis. Evidence of this understanding of Parliament can be found in the body of the "25 barons" in Article 61. The role of the barons is primarily judicial, not legislative, as their function is to determine when the terms of Magna Carta have been violated and to submit their ruling to the king.

Should the king fail to respond, then the responsibility to distrain him falls upon the barons in conjunction with the "*totius communia terre*," or the whole of the participants in Magna Carta's coalition. Article 61 is not the only place which shows the judicial character of Parliament. In Article 52, *disseisins* during the war are overturned, while in Article 55 all fines and amercements which violate the law of the land are to be remitted. Both of these actions are subject to appeal by the 25 barons, who are tasked with ensuring that all these actions conform with the law. This does not seem to reflect any concept of Parliament as a legislative body, but instead as a highest court with the ability to make judgment over the king. The problem of all medieval thought is the question of who may judge the king to be a tyrant, which is generally determined to be an unsolvable question (Ullmann 1966, 26). The answer of Magna Carta is to create a court which represents the whole of the realm.

Article 14 of Magna Carta gives the definition of Parliament, which includes archbishops, bishops, abbots, earls, and greater barons by personal writ, and all others who hold in chief of the king by general writ. In short, Parliament is composed of the feudal assembly, such that its members are summoned by virtue of their tenure, and by means reflecting their relative feudal status. Not only does tenure define the means by which members of Parliament are summoned, but the form of representation is based on tenure; Parliament contains the King's vassals-in-chief who are empowered to speak on behalf of their vassals through the authority vested in them by the feudal oaths of their vassals (Maddicott 2010, 193; Stubbs 1979, 130; Ullmann 1961, 190). The feudal oaths form the core of the representative process, where absolute consent is given because all members of society are bound by homage. Glanvill is explicit in this requirement because of the nature of this kind of representation; as every person has sworn to a lord, every person is represented in Parliament through his liege or through the liege of his liege. Because the nature of this representation is through the act of homage, the theory of representation in Magna Carta is not liberal; the representative acts alone for his constituents, who surrender their power to act to the representative (Pocock 1975, 518). The act of

homage is an act of submission to the will of the representative, not a conditional act or the imbuing of an agent. The representative of the vassal speaks for him because he has been granted the authority to make decisions on his behalf, bound by an obligation to respect the vassal's well-being but not accountable to him in the way that a modern elected official is understood to be accountable. One last comment on Parliament must be made regarding the constitutional arrangement and the nature of Parliament as a court. While the King-Lords-Commons trifecta resembles Mixed-Republicanism, that symbolism failed to materialize so long as *auctoritas*, or the legislative power, rested in the King alone (Pocock 1975, 354). As Parliament is a court, not a legislature, Magna Carta preserved a system of government wherein the *regnum politicum et regale* exist in parallel, not mixed in any real form (Pocock 1987, 306). Power is defined jurisdictionally, not constitutionally or politically, such that power is never balanced or mixed, but instead divided on the basis of the notion of *coherentia* and customary law. Parliament has no constitutional role in the exercise of political power, so the classical notion of the mixed republic fails to describe the state of English constitutionalism post-Magna Carta. Powers exercised by Parliament are the personal powers of its members, often combined against the powers of the king, rather than any real institutional powers which would indicate that the constitution grants certain authority to the Lords and Commons.

The central argument of Magna Carta about the nature of just government is the supremacy of *Nomos*, the hidden king behind the king (Ullmann 1961, 19; Ullmann 1966, 48, Ullmann 1975, 153). The Law is the highest authority in the realm, above even the king himself, and serves as the true, undying ruler. *Nomos* must be understood in its divine character; this is not just any law but the Law of God which forms the essential character of just social order. The result of this is that any political philosophy which is based upon Magna Carta as the foundation of a free and just society must necessarily deny the existence of any sovereign power or body, as sovereignty is in the Law alone (Sandoz 1993, 239; Stoner 1992, 46). This fact necessarily brings Magna Carta into conflict with early modern conceptions of

government wherein a particular individual or body is invested with the power of ultimate sovereignty, such as in the writings of Hobbes, Locke, and Rousseau. Coke recognized this fact in his statement that “Magna Carta such a fellow that he will have no sovereign” (Holt 1972, 114). This sovereignty of law forms the basis of Anglo-American concepts of Rule of Law and Judicial independence, wherein the law is supposed to be free of political interference in the process and integrity of its proceedings. Magna Carta expresses this understanding of sovereignty itself when it denies that liberties were grants of the king’s grace but instead that they were part of an unwritten law binding on both the king and all free men of the realm (Ullmann 1975, 219). Nevertheless, despite the inclusion of the council of 25 barons in the 1215 Magna Carta, the document is not structured in such a way to be understood as a “bridle of the king” or any other kind of constitutional limit to his authority. Customary law and Ancient Constitutionalism enables the king to expand his powers just as much as they limit his power, as the tools of the court may just as easily be exploited by a clever king like Henry II or Edward I. In the end, all government rests on the assumption of self-restraint by the ruler, whose moral character is deeply consequential to the practice of good government (Painter 1961, 272; Nederman 1990, 23). No law can truly be a fetter to a true tyrant.

Chapter 3

The last two chapters discussed the life of the *Liber Homo* and the philosophy of liberty and law which dominated the 12th Century's understanding of the Free Man. While this is important, there is one last major topic which requires explanation: what of the rest of the nation? *Liber Homo* is used to refer to small, freeholding tenants, but the realm also contains a monarchy, great lords, and the unfree. As mentioned, *Liber Homo* is a concept that exists within a broader community, not as a modern liberal atomized individual. While the radical autonomy of the modern individual engenders a levelling equality that reduces all members of society to the same level, medieval thought accepts a dispersion of power and differentiation of status which can only exist under a conception of liberty that accepts and embraces teleological arguments within a community founded upon ideals of fidelity and obligation. Rather than institutionalizing conflict as the center of the community, be it the class conflict of Marxism or the state-individual conflict of liberalism, medieval thought is premised on the understanding of realm as a set of interrelated, asymmetrical communities called estates whose default is cooperation rather than conflict. This interrelationship does not dissolve the identities of the estates into a single national character but instead values their diversity and disparate capacities by attributing to each the powers, authority, and institutions to which they are suited. This is not to say that the medieval realm is the same as an Aristotelian mixed republic; the realm in its English incarnation is a dualist construction wherein the *dominium politicum et regale* exist in parallel based on jurisprudential principles rather than mixed in any real way (Pocock 1975, 354; Pocock 1987, 306). *Auctoritas* belongs to the King alone and is not shared, although *potestas* is divided among the estates as their virtue merits. As the sole representative of the realm, the King-as-Crown is the symbol of the nation, while the King-as-Lord is the first among the peers of Parliament. The Aristotelian mix of monarchy with aristocracy cannot explain this phenomenon, as in the first case the King stands alone and above the realm of his subjects, while in

the second case the monarchy disappears into the constitutional structure of the feudal representative body of the *communitas regni*.

For this reason, the rest of the estates and classes in society must be explored to truly understand the meaning of liberty in the context of the *Liber Homo*. Within the type of society described above, the powers and liberties of any one class can only be defined in relation to others: the Crown, the Church, Great Lords, and the Free Men (Holt 1997, 301). Given the definition of liberty as an element of social order in English thought, it should be no surprise that the interrelationship of the estates and classes leads to liberty being understood as an element of the linkage between these major communities within the realm. England had a unique monarchy in that each individual owed an oath to the king above and beyond his immediate lord, whose terms were the only bond which superseded feudal homage, a practice dating back at least as far as Cnut if not previous Anglo-Saxon kings. The unique role of the King in the life of every Englishman, then, certainly affected the way the English understood liberty. Likewise, the Church provided more than mere spiritual solace, but provided the basis of England's classical inheritance, a language and example of liberty, and the philosophical grounding which provided the symbolism of a free society. Lastly, this chapter will reflect on the role of the burgesses in English liberty, their influence on Magna Carta, and propose a hypothesis that they were not, in fact, free men but instead a special class of dependents of the King whose rise after Magna Carta would change the way liberty was understood in the early modern period and beyond.

The Prince in the Realm

The most important role of the king in the realm is that he is the representative of the whole of the nation. All other roles, constitutional, political, or legal, are secondary to this idea. Without the king the 12th Century concept of the realm ceases to exist, as the king provides the ultimate point of reference as to the nation's self-interpretation of its own being (Voegelin 1952, 46). Until England

begins to interpret its existence in terms of a constitutional community in which the law takes the role of essential representation once held by the king, it is the monarchy which forms the fundamental identity of the English nation. This representation took the form of an Imperial civil theology wherein the people and realm are given to the King in trust by God (Ullmann 1966, 19). This trust assumed that the subjects of the king existed in a special kind of minority, wherein the king took a role of patriarch over the whole of the people. This duty of the king to care for the people is the counterpart to the authority of rulership, not a right of the people to any form of good government (Ullmann 1966, 24). The entire focus of this understanding of rulership is on the king alone and above the realm rather than on an understanding of the king within a realm. The King stands above the realm as a figure of instruction and discipline, explained through the metaphor of the king as *tuitio*, or the teacher of the realm (Ullmann 1975, 66). The means by which the king exercises his tutorship over the people was through the concept of the king's grace. Grace refers to the authority of the king to grant or withdraw benefice at his will, parallel but inferior to the authority of God to grant benefice. Both God and the king are understood within the context of the Hebrew scripture, as extending grace to those who demonstrate fidelity and devotion, while denying grace to those who rebel against their rightful authority. The essential parable given in Hosea as to the covenantal relationship between God and Israel is extended here to the relationship between the king and the realm. The royal covenant, like the divine covenant, did not refer to a contractual kind of relationship where fidelity deserved reward, however. The king's grace was granted by his discretion, as fidelity and devotion were expected as a part of the individual's duty, not from desire for compensation (Ullmann 1966, 30). This essential viewpoint is necessary to comprehend because it is from such an understanding of kingship that Magna Carta as an event in history ultimately emerged as a rival. When John and Pope Innocent III declare Magna Carta to be an affront to the dignity of the King and to God, it is based upon such a "theocratic" monarchy that Magna Carta can be seen as literally blasphemous.

The sphere of the king is nearly universally described as dominium in medieval thought, even as late as Fortescue. The meaning of dominium has three distinct roles, that of patriarch, seigneur, and king. These three roles are distinct in the medieval mind but ultimately merged into the sovereignty of the state by the reductionism of liberal thought beginning with Hobbes (Pocock 1987, 168). Patriarch refers to the paternal, moral, and spiritual authority of the ruler based upon symbolisms derived from early Hebrew scripture, and serves as the justification behind the notions described in the last paragraph of the king as *tuitio*. In this capacity, the Patriarch is the judge of the people, speaking through the *lex regis* to maintain discipline and punish those who overstep their position. Seigneur refers to the power of the ruler derived from the feudal contract, as the highest lord. In this capacity, the ruler's power is derived from his status as the only lord with no lord of his own and his role as the head of the *communitas regni*, often described as the King in Parliament. The role of king referred to the ruler as the representative of the community (or the Latin gens) whose authority is derived from his natural position at the head of the people as their leader. Certainly at the time of Cornelius Tacitus, one could draw a distinction between rex and dux as the symbolic head and the military leader, but this distinction seems to have disappeared beginning with the Carolingians, who merged these two Germanic positions into the early medieval monarchy. The king provides the point of identity for the people, as a visible and tangible representative of the realm itself, as well as being responsible for maintaining the unity of the people in his role as guardian of the *lex terrae*. This character of the monarchy as Patriarch over subjects, feudal lord over vassals, and king over countrymen is insoluble in the medieval mind, such that they cannot be divided into multiple persons, but this is not to make the error of liberal thought and assume them to be essentially the same (Ullmann 1966, 69). Each element is delineated by jurisdiction under the higher law which provides the essential order of society. The Patriarch may no more command soldiers in battle than the feudal lord may punish his vassals for private vice. This was the essential problem of King John: he used the powers of the feudal lord to pursue the goals of the king all

the while asserting the authority of the patriarch. The barons did not deny King John's authority to levy amercements and aids; they objected to the way he used them and the ends to which they were put. These multiple roles mean that feudal right never approaches republicanism in the medieval mind (Ullmann 1961, 154). The essential question of the meaning of justice in society, Cicero's *ius commune*, lay outside the feudal law and belongs to the roles of Patriarch and King. The definition of justice is not up for debate in the agora, but a product of precedent and the judgments of ancient kings and parliaments. Feudal law and its successor Common Law takes these judgments to be granted a priori, as mentioned in Chapter 2 and are concerned with the diminished sphere of the customs of the land.

Because of the insolubility of these roles of the king, the early medieval monarchy places no line between the king's personal and political powers (Pollock and Maitland 1898, 231). This distinction requires a notion of the state which exists apart from the king, which as described before is impossible when the king is the essential representative of realm. This produces a difficulty in medieval thought which is addressed at first by thinkers like John of Salisbury who posit theories like the annihilation of the private will of the king. This solution ultimately makes way for the division between the person of the king and the office of the Crown, but the new theory is not without its own price; the royal role of patriarch is damaged by this division because the position is incapable of being severed from the person due to the notion of divine selection. The powers of the feudal overlord are assimilated to the private powers of the person of the king due to the personal nature of the feudal oath, while the powers of the national representative (or *rex et dux*) are easily associated with the Crown, due to the Germanic king being an elected position to begin with. The erosion of the patriarchal role of the ruler strips away elements of priesthood from the monarchy which ultimately make theo-royal absolutism an untenable theory. In England, this division between the person of the king and the office of the Crown is first evidenced in writing during the reign of Richard I (Holt 1985, 67). While the transition will not take place immediately, it is certainly present in the baronial reaction to Pope Innocent III's Bull *Etsi Karissimus*.

Henry III will use the legal rule that a minor cannot consent to a contract in order to annul royal charters granted during his minority, but this seems to be the last gasp of unity between the person and office of the king.

This decline in the patriarchal authority of the monarch is one of the sources of the great 12th and 13th Century conflict between the barons and the king in England. Even at the height of the understanding of the King as a patriarchal figure during the Carolingian era, absolutist theories of monarchy were largely confined to universities and the royal court (Ullmann 1966, 54). Maitland's criticism of the laws of Æthelred the Unræd exhibit the characteristics of a Common Law thinker exposed to a body of law coming from a king and court which understand themselves in the context of the great Hebrew Patriarchs and the king as a figure of spiritual authority as the mediator between God and the nation in a kind of covenant. What Maitland calls "moral sermons" (Pollock and Maitland 1898, 21) are exactly the kind of language and principles one would expect a spiritual leader would use in his commandments to a nation. Æthelred's laws focus on the moral shortcomings of his subjects because those are the problems most pressing when a nation is being punished by God for breaching the covenant. This concept of the patriarchal king, or "Rex Dei Gratia" is oriental in origin, especially stemming from Byzantine political theology and spreading west through the Carolingian Renaissance (Ullmann 1961, 117). It should be no surprise then that the 12th Century Renaissance, which was a rediscovery of the great Latin literature of the Classical era, should generate conflict with the ideas inherited from the Byzantines during the Carolingian Renaissance, as this clash in English thought mirrored the greater conflict between the Greco-Roman inheritance and Perso-Asiatic forms of government and religion. Although these eastern ideas penetrated all the way to the Anglo-Saxon kingdom in the early Middle Ages, their isolation within the universities and royal courts was assured due to the barrier of distance and administrative technology which kept court theories from having any real effect on life in the provinces. Furthermore, these barriers interacted with the early influence of

Roman law to prevent theo-royal theories from developing the kind of comprehensive secular-religious law one sees in the Muslim world. The laws never touch on individual actions or “rights” because government neither could nor desired to regulate them: *de minimis non curat lex* (Ullmann 1966, 55)

The result was an understanding of the office of the crown in the 12th century who had two particular tools of what a modern scholar might call policy. In times of peace, the king exercised the laws and in times of war, the king exercised arms (Hall 1965, 1; Nederman 1990, 104). Certainly, the person of the king wielded powers of patronage, feudal right, and after Henry II, a powerful royal administration beholden to him for their employment, but these powers were not understood to be part of the legitimate operation of the Crown, but at best the personal powers of the individual who wore the Crown, and at worst the tools of a corrupt leader who abused his position. When the king involved himself in the operation of the administration to pursue political goals, this was seen as an abuse of the role of the king; modern praise of King John as a wise administrator of the state is anachronistic and revisionist (Holt 1985, 97). The man who held the crown was not begrudged his personal powers when used for personal goals as understood within his position as the first lord of the realm, but when feudal and personal powers were used to advance the office of the Crown against the baronage as a whole, it was seen as illegitimate. When there was a real expansion of royal power, it nearly always comes from militarily successful kings; military success allows Kings to encroach on customary limits without inciting resistance because conquest enriches the whole of the *communitas regni* in plunder, lands, and prestige (Stubbs 1979, 22). A king with a surfeit of land and wealth to distribute among his followers will always face less resistance in his goals than one with a court full of angry courtiers deprived of their patrimony because of a failure to repel a foreign invader. This is an illustration of why there is no such thing as revolution in medieval thought; the conflict between the King and Barons is not institutional but a result of an imbalance in their relationship (Holt 1985, 126; Maddicott 2010, 106). When a king fails, this is the cause of resistance against the crown by the

baronage, who must fight all the harder for a diminishing sphere of goods. This failure need not be understood as military alone, but any condition wherein the king reduces the ability of the baronage to seek out their goals. Kings that conquered little territory like Henry I were still understood as successful, while bad kings like William II did not have to lose land to diminish the prospects of his barons; the definition of success and failure was comprehensive.

Due to these characteristics of English monarchy, tyranny carried a specific meaning in England: substitution of the King's will for law (Holt 1997, 293). This has already been discussed in the section on *Policraticus* to some degree, but the understanding of the role of the king in the law is a contentious issue among scholars of medieval law due to the language that seems to grant absolute authority over law to the king. Foremost among these is Glanvill, which states, "Quod principi placet, legis habet vigorem⁷" (Hall 1965, 2). Like the priestly role of the monarchy described before, absolutist concepts of the king as lawgiver were absorbed from Byzantine writers through Carolingian scholars, but the notion of King-as-Lawgiver was not in conflict with the Roman tradition, hence the lack of any serious opposition to this idea from 12th Century thinkers outside of England. On the continent, the primary way that scholars interpreted the lawmaking power of the king is through the primacy of the Pope; law is the will of the king, but the king's will is under God's will, hence subject to the interpretation of the Pope (Ullmann 1961, 139). England, with both a strong *lex terrae* and a tradition of powerful, independent bishops, never incorporated the Pope as the highest interpreter of law, as documents like the *Leges Henrici*, *Glanvill*, and *Magna Carta* make little if any reference to the Papacy at all. England's solution tends toward dividing the personal will of the king from his duties, either through the division of the person and crown or through Salisbury's destruction of the king's personal will. The author of *Leges Edwardi* goes so far as to argue that a king loses the name of king through neglect of the law, but whether that meant formal deposition is in doubt (O'Brien 1999, 175). The root of the matter seems to

⁷ What is pleasing to the Prince has the force of law.

be that until the famous Article 61 of Magna Carta, and, practically speaking, after the document the primary real restraint on royal power is moral rather than legal (Maddicott 2010, 97).

The Angevin Monarchy

The beginning of a rapid and fundamental change in the nature of the English monarchy occurred during the first three kings of the Angevin Monarchy. Many sources of this evolution can be cited, including the Anarchy, the personal genius of Henry II, and the rise of an educated class of secular civil servants associated with the 12th Century Renaissance, but the cause of this movement is more a question for historians than a proper subject of this dissertation, which shall focus on the way these changes affected the English understanding of liberty, tyranny, law, and constitutionalism. The transformation of the *lex terrae* into a true Common Law through the creation of functional circuit courts, the professionalization of the judiciary under Henry II and the resulting expectation of a real rule of law rather than corruption and political favoritism, and the effects of Henry II's sons and their attempts to monetize the new system to their advantage are important topics which deserve some discussion in the context of the monarchy. While much of this was discussed in Chapter 1, this section will identify the role of the king in this changes rather than focusing on the freeholder class.

The true beginning of the Angevin era lay in the Anarchy and the resultant collapse of the Anglo-Norman system of governance which had maintained the successors of William I as powerful monarchs amidst a centralized and wealthy nation. As Wormald argues, the court system in the time of Edgar the Peaceable was not significantly different than that of Henry I's time, as the Anglo-Saxon legal system heavily influenced the Common Law, which did not arise with the "miraculous suddenness" often attributed to it (Wormald 1986, 168). The shire court under the Anglo-Normans was not the kind of ancient Germanic moot as described by romantic images of 19th Century scholars but a wholly royal

jurisdiction. The presiding officers of the Shire Court, the *ealdormann* or *bisceop*⁸, held the court by the command of the king on the dates he proscribed, and the *scirgerefa*⁹ served as the king's representative to at least witness, and possibly participate in the proceedings (Wormald 1986, 162). The Anarchy disrupted this process through the natural effects of civil war, but it was Stephen's policies regarding the Courts which proved to be the blow which shattered the old system. Stephen's reorganization of the Shires into Counties changed the sheriff from a royal agent into a *vicecomes*, or servant of the local count (Warren 1973, 22). William I had taken great trouble to retain the sheriff as an agent of his will in the shires and a permanent presence of royal administration maintaining influence in the distant reaches of the realm, but Stephen's reforms destroyed this potent tool of the crown. Part of Henry II's great legal reforms was concerned with restoring the king's law to a truly universal and common state around the nations, hence his invention of the Common Law circuit court, or in the language of the time, the circuit Curia Regis.

The courts were not the only tool of royal influence which was destroyed or squandered by Stephen; the Anarchy deprived the crown of many of the traditional levers of power of the Anglo-Saxon monarchy, forcing Henry II to innovate in order to exercise power and raise revenue (Holt 1992, 40; Maddicott 2010, 402; Stubbs 1979, 396). One such tool that was lost was the Danegeld, a land tax which originated as a means to pay the Viking invaders but was restored by William I as a means to raise revenue for the crown. This tax disappeared through disuse during the wars and Stephen's propensity to grant exemption in exchange for support against Matilda. In addition to the loss of this major source of funding, the Norman dynasty lost the Anglo-Saxon king's greatest source of income. The erosion of the King's *demesne* is one of the major factors leading to the collapse of the Anglo-Norman monarchy and made it necessary to institute the Angevin reforms (Holt 1992, 46). Without resort to the Danegeld

⁸ *Ealdormann* is a position which became earl under Cnut and count under the Normans. *Bisceop* is Anglo-Saxon for bishop.

⁹ Literally, Shire-Reeve, the precursor to the Norman Sheriff.

and with a personal *demesne* diminished by Stephen's profligacy, Henry II inherited a monarchy which was as weak as it had even been since the Vikings. It should not be assumed, however, that Henry II imposed a new type of administration upon an unwilling nation, as some scholars seem to argue. Despite major changes at the top of royal administration, the Angevins relied heavily on local cooperation with national administration just as the Anglo-Norman monarchs (Holt 1992, 47). It was not possible for any medieval administrative system to operate without broad cooperation by local authorities. Henry I's court system relied on the cooperation of the earls, bishops, and freeholders in maintaining the Shire Court system, and likewise Henry II's reforms relied on local officials and local plaintiffs choosing to bring their suit to the circuit courts rather than the aristocratically dominated county courts.

Despite the great works and reforms of their father, Henry II's sons quickly began to unravel the system they inherited. Just as Stephen had squandered the assets of the Norman kings, the sale of royal prerogatives and powers were greatest under Richard I. Where Henry II had accumulated power to the monarchy, his sons sold it for cash payments for their many costly campaigns from the Crusades to John's failed French wars (Holt 1992, 51; Maddicott 2010, 135; Warren 1961, 147). The sale of royal assets was not the only way in which Richard I undermined the power of the monarchy. His frequent absence from the realm changed the relationship between the great lords and the king in the favor of the former. While Henry II had often gathered the Great Council to legitimize his policy goals, the greater prominence of the Great Council before Magna Carta was largely a product of the absences of Richard and the resultant void in English politics (Maddicott 2010, 109; Warren 1961, 132). An absent king whose powers were generally executed by the petit council of regents naturally brought up the question as to whether the king was necessary to perform certain functions of the state at all, especially those functions related to the administrative state and the maintenance of justice in the court system. Certainly, it is in this period that the division between the person of the King and the office of the Crown

is first evidenced in writing (Holt 1985, 67). If the functions of the monarchy can be performed in the absence of the monarch himself, whether he be in France, the Levant, or imprisoned in Germany, then this distinction between the office and person must be evident to those who exercise power in the king's stead.

King John, of course, is one of the more infamous kings in English history and his name is deeply connected with the idea of tyranny and injustice, as typified by the attachment of the Robin Hood legends to his name in the 16th Century by John Major and subsequent literature in the Tudor and Stuart eras (Holt 1982, 40). While some modern historians like W. L. Warren have attempted to rehabilitate the figure of King John, and others like A. F. Pollard describe him as a protector of "true liberty" against the "false liberties" of Magna Carta (Holt 1972, 153), this dissertation is primarily concerned with the way that King John was portrayed by his contemporaries and successors and how those portrayals express theories of liberty and tyranny. Earlier contemporary accounts of John do not associate him with tyranny but simply being a bad lord (Holt 1985, 93). He is described in terms of his abuses of feudal privilege and authority which are primarily personal, not political, as well as an emphasis on his personal vices and character flaws. In addition to personal vice and abuse of his privileges, John's poor military ability is the one of the major sources of his legitimacy problems, hence the nickname he is given: John "Soft-sword" (Holt 1985, 130). As mentioned before, the fact that a king was successful, especially in battle, made it much easier for the realm to tolerate abuses of power and expansion of royal authority, and a king who failed was much more likely to face internal dissent. John's reputation for failure in his military affairs as well as the loss of nearly all of his continental possessions made him ultimately more vulnerable to baronial attempts to wrest back powers which his father had accumulated and less able to get away with some of his more abusive personal behaviors. Lastly, John was criticized not only for his personal behaviors but for that of his close counsellors as well; John is repeatedly referred to as "one who takes evil counsel" (Maddicott 2010, 111). Counsel is deeply significant at this time because the

responsibility to give good counsel is an intrinsic part of the feudal contract. All free tenants bear this responsibility to advise the king, a duty which can be traced back to the Anglo-Saxon kingdom and the witan. What is significant in King John's case is that evil council often used to refer to a King's favorites, especially when drawn from outside the baronage (Maddicott 2010, 114). His counsellors were not merely wicked, but drawn from outside the body of men who bore the obligation to give him good counsel, and therefore the men closest to the king who advised him on matters central to the realm were not bound by the feudal contract which held the rest of society together, but were mercenaries, flatterers, and dependents on the King's largesse. These favorites were the very people who could be depended on to never give correct advice because they were essentially self-interested, unbound by honor, and bore no relation to the realm or its members, the *communitas regni*.

The criticism of John is primarily of these kinds of feudal complaints until the loss of Normandy and his excommunication, after which they become more severe (Maddicott 2010, 112). At this point, the language turns to one of tyranny due to his antagonism of the bishops and abbots, who had greater access to the classical writings which could inspire such language, as well as a surfeit of educated writers to propagate anti-royal themes in written form. The language of the Norman Yoke, indeed, first appears as an argument by clerics against John, comparing him to the worst offenders of the Norman dynasty in his oppression of the Church (Holt 1985, 8). It is from the Church, then, that the source of the ideals of Magna Carta can be found, as well as many of its staunchest advocates who braved the excommunication threat of Pope Innocent III to ensure the document survived the conflict and would take root in the reign of Henry III and beyond.

Free Men in a Free Church

One of the most ignored sources of the English constitutional tradition and English political philosophy is the Christian faith and Church. A largely successful attempt by early liberal thinkers like

Hobbes and Locke to excise Christian thought from political philosophy has obfuscated the depth of Christianity's influence and support for early constitutionalism in England. Part of this dissertation is an honest look past the claims of early liberal thinkers to seek the origins of ideas like rule of law and the abolition of serfdom in the teachings of the medieval Christian Church. It will be demonstrated that the liberties found in the Common Law were heavily influenced by both the religious teachings of medieval Christianity and the institutional liberties of the Church itself. Liberty as it was understood by 12th Century thinkers was not a product of classical republican philosophy but of Christian theology and any classical Stoic ideas evident in medieval thought was a product of Christianity absorbing the Stoic literature beginning with and epitomized by the treatment of works like Boethius's *Consolation*. There was an unparalleled influence of clerics on the court system in England, which began as a product of the fact that English national identity formed subsequently to its ecclesiastical identity (Holdsworth 1936, 22, Wormald 1994, 16). From the earliest Anglo-Saxon written doombooks, the clergy was deeply entwined in both the writing and the administration of the law. The very books that contain the surviving copies of the Anglo-Saxon laws are ecclesiastical works, and the Church's early role in compiling the Law came from the widespread use of clerks by kings as their secretaries and scribes (Holdsworth 1936, 14).

It was not only in terms of the law that the Church influenced the course of English constitutionalism. The Church provided the only source of civil servants and administrators until the beginning of the 12th Century Renaissance, thus maintaining a near monopoly on the workings of government. Even after a body of educated lay lawyers arose, the 12th Century saw the rise of major church reformers who understood themselves to be affirmative critics of government and politics like Peter Abelard and John of Salisbury (Morris 1987, 53). It is through these kinds of scholars that the bulk of political and philosophical literature which influenced English thought arose. John of Salisbury, whose works were described in the previous chapter, was the secretary to two Archbishops of Canterbury as

well as being an active member of Henry II's administration at times in his life. As the largest and best educated body of literate men, the Church was necessarily dominant in many matters involving literacy, especially having to do with government, and more so during the Magna Carta crisis when the liberties of the Church were under attack from King John. Let it not be forgotten that the most likely author of Magna Carta was Archbishop Stephen Langton (Stubbs 1979, 345; Warren 1961, 213). In conclusion, to look at Magna Carta, English liberty, and the Common Law without recognizing their roots in the Christian Church is to sever from this tradition the seed from which it sprouted. An attempt to derive liberty from abstract reason necessarily requires an imaginary state of nature, for the only other option is to look back at the history of liberty to see that the *Liber Homo* begins by kneeling at the altar of Christ the King.

Liberty as a Christian Ideal

When discussing the influence of Christianity on philosophy and political theory, one must first recognize the nature of the faith. Christianity is an "interior" faith, concerned with the state of one's soul, and therefore it mixes individualist and communal elements in its formulation of order (Morris 1987, 11). While the community of faith and the body of Christ are powerful symbols, the nature of Christianity as an essentially self-reflective religion whose concern is with saving souls rather than dominating bodies means that the goods sought by Christians will inevitably be other-worldly rather than this-worldly, and this other-worldly orientation has little use for communal structures, be they social or political. Other-worldly goods are intrinsically individualist since they are concerned with the health of the soul, which manifests only in the interior world of self-reflection. It is this other-worldly focus on the health of the soul which drives the Christian understanding of the individual being derived from the immortality and uniqueness of every soul (Morris 1987, 3).

Aelred of Rievaulx, an influential Cistercian scholar and historian of the 12th Century, describes the soul in this way: the soul is a simple substance, neither composite nor divisible, and uniquely rational (Talbot 1981, 39). This rationality is the highest faculty of the soul, which gives it the ability to interact with the spiritual world and spiritual goods. Reason is the avenue to the approach to God who is understood as the divine Logos, as well as being the *differentia specifica* of man in regard to the rest of creation. Although the soul is the font of reason, it must not be assumed that the soul can be identified with reason, any more than other faculties of the psyche define the soul. While the soul contains memory, reason, and will, it is not exhausted by these but bears an ineffable characteristic which cannot be fully known or described in this life (Talbot 1981, 50). While the soul is the *differentia specifica* of mankind, the human person cannot be reduced to the soul, for human nature is broader than the spiritual soul and stands astride or between the spiritual and material worlds. Humanity is a unique creature that belongs to both worlds and unites body and soul into one creature. The unity of soul and body is through the personality, so that human nature is comingled in the same way that Christ's nature is fully divine and fully human (Talbot 1981, 21). The character of humanity being between the two worlds, called *Metaxy* by classical philosophy, means that a set of special, possibly contradictory demands are made on human nature which is drawn between the two realms but must necessarily be suspended between the two opposing poles.

The 12th Century is a period of reform and change in the teachings of the Christian Church. One of the major changes is the emphasis put on the soul by theologians of this period. The new emphasis is illustrated by the fact that the bodily resurrection of the dead falls out of favor of this period, in favor of language in which the soul is distinct from the body and is resurrected apart from it in a "new body" during the end times (Morris 1987, 147). This is part of a movement in Christianity toward abandonment of residual eastern thought and a renewed emphasis on the Greco-Romans as the central metaphysical tradition. Western Christianity truly becomes distinct in this period not only from earlier

manifestations of the faith but also from the Eastern branch which remains fully wedded to certain Perso-Asiatic metaphysical and political theories like Caesaropapism. The Cistercians are foremost in a movement in Christianity toward emphasis on the encounter of the individual soul with God and a personal rather than corporate salvation (Morris 1987, 148). Devotional literature was a product of the Cistercian movement's conceptualization of the Christian life as a kind of pilgrimage and the inner life of the soul as a journey toward God through self-examination. This resulted in a de-emphasis on the *corpus mysticum* as the unit of salvation and a unitary bride of Christ; 12th Century thinkers turn from the themes of Christian restoration of community to a more individual form of devotion (Morris 1987, 12). Through the reconciliation of the individual soul to God, the old will to self-love is destroyed and a new will to love God is imbued in the Christian who is born again. This necessarily challenged the old theologies based on the idea of the individual becoming one with the body of Christ and submerging themselves into the greater Church; the individual is capable of approaching God alone without the corporate body of believers in this formulation of the Christian life.

This is not to say that the *corpus mysticum Christi* is lost in the 12th Century, only that its meaning and significance in the Christian life changes for these new theologians. None of these theologians, before or after the 12th Century Renaissance, deny that the body of Christ is fully spiritual and fully temporal, or that it bears a single essence in the model of both Christ and human nature (Ullmann 1961, 34). The body of Christ, being made up of the redeemed, shares in the perfected human nature of the reborn Man and exists in the metaxy, between the two worlds but of both. The effect of this theological concept on the faith is that the notion of the *corpus mysticum* limits individuality in Christianity and prevents it from evolving into atomism and solipsism, which would deny the existence of a fundamental community of the faithful (Morris 1987, 12). Even after the 12th Century, the notion of the *corpus mysticum* is a powerful symbol which brings the individual mystic from straying too far away from notions of community which form the essential character of ecclesia. As the ecclesia is the

community of all Christians, there is an essential commonality among all people aside from the Jews, who belonged to a single body across the whole of Christendom (Ullmann 1961, 32). Because of this community, medieval Christians are able to conceive of a *salus commune* in the Ciceronian sense across the whole of Christendom, thus a kind of super-national commonwealth that was nearly universal, with a few notable exceptions. The very notion of universal human dignities stem from this understanding of the Church as a common body of all mankind, thus justifying the limits on warfare which the Church repeatedly asserted throughout all Western nations (O'Brien 1999, 14). If all men belonged to a body called *ecclesia*, and were spiritually united with Christ through a shared membership in the *corpus mysticum*, then the evils of war were redoubled because the members of the body were striking at their fellows; doing harm to another was doing harm to oneself and the whole of the community, even to Christ himself.

According to the earlier doctrines, the body of Christ was understood as a transformative entity; baptism changed the individual into a new creature by destroying the corrupted human nature of mankind (Ullmann 1966, 9). This is the essential Pauline doctrine of the *renatus* (also *renovatio*), or the state of being born again, wherein *homo naturalis* dies with Christ on the Cross and *homo spiritualis* (or *homo fidelis*) is born in the place of the old nature. There is certainly a great deal of confusion about how the adjective *naturale* is used in this context, which is contradictory in many accounts. It can be used to refer to the "fallen" nature of man as used by St. Paul or it can be used to refer to the pre-Fall paradigm of humanity as manifested by Adam in Eden. Augustine, for example, uses human nature to refer to pre-Fall Man, not Man as he currently is, such that post-Fall Man is possessed of a corrupted form of this nature has no recourse to a good nature without the *renovatio* or rebirth of the Spirit (Ullmann 1961, 239). Augustine's usage makes the act of being born again a restoration of the true human nature and the destruction of the corrupted nature of post-Fall Man. Until such time as the individual is restored to his true nature, he is subject to the injustice of the City of Man because he is

incapable of living in the kind of order which the City of God entails. The true natural society for Augustine is Eden, wherein power and government are unnecessary because the whole of mankind is united in the body of Christ and transformed by the power of the Holy Spirit into *homo fidelis* (Ullmann 1961, 240). The just social order is fully dependent on an act of God, for only the complete transformation of the world into the new Jerusalem populated by the redeemed is enough to banish the necessity of civil power.

There is a deep divide, in this understanding of Christianity, between the order of the secular state and the order of the Church, based upon a religious culture of Christianity defined by the pursuit of values distinct from secular order (Bolgar 1977, 203). This divide in values comes from the before mentioned nature of Christianity as an interior religion. While Christian ethics are composed of virtues which are useful to society, in contrast to classical political ethics the bulk of Christian ethics puts a focus on virtues with no seeming use for society but only help the self, such as moderation and hope (Voegelin 1975, 27). This is derived from Christian and Stoic teachings regarding the worthlessness of secular goods due to their nature as perishable and the validity of eternal goods alone due to their timelessness. As Christianity is concerned with the soul, the eternal part of the human being, it is reasonable for it to adopt Stoic ideals regarding the comparative value of goods. As Huntingdon says in his writings, earthly goods end in corruption and decay, so heavenly goods are the only ones worth pursuing (Greenway 2002, 67, 110). This emphasis on heaven as the only true good, due to its nature as the essence of eternity, leads Christian thinkers to largely abandon the secular world and emphasize the spiritual character of human life. Understanding Man for the medieval thinker relies on the right ideas about God because the essential character of the nature of Man is theomorphic (Sandoz 2013, 7). Understanding the social character of humanity, the Ciceronian "*animal politicum et sociale*" becomes inconsequential until the rise of the 12th Century Renaissance and the recovery of Aristotelianism.

The new theologians who are inspired by classical philosophy in the 12th Century begin to challenge the way that early Christian defined concepts like human nature. 12th Century Humanists, especially, challenge the notion that *homo naturalis* is destroyed by the generation of *homo fidelis*, positing theories involving a dualism of nature and spiritual order in the life of the individual (Ullmann 1966, 116). The older notion, that the individual is incapable of doing good without the aid of the grace of God, and that all social order is thereby incapable of being just from the eternal standpoint, clashed against a rediscovered Aristotelian literature which allowed for a separation between political and moral virtue. This resulted in a newfound interest in the principles of a just social order as distinguished from the moral principles of Christian theology, wherein the latter could be identified as goods in and of themselves, despite their lack of anything which Christian ethics would identify as an eternal good. Cistercian thought, especially, sees secular life as a pilgrimage through which one reaches God at the end; as a journey, the value is not solely in the destination but in the path that leads to the destination as well. Due to the construction of this symbol, the Cistercians are able to derive meaning from what Augustine called the “interim,” or the earthly life, history, and goods which lay between the Ascension and the Apocalypse (Freeland 2005, 7). Where earlier Christian thinkers treated this period as a time of waiting and pointed to the Imperial symbols of the Daniel prophecies as evidence for the meaninglessness of secular change, 12th Century theologians began to stress the importance of the current period of history as a manifestation of God’s will rather than a random or meaningless cycle of doomed empires ruled by the wheel of fate.

The importance placed on secular life and the recovery of Aristotle led to a new emphasis on reason as a guide to the good life. Cistercian thinkers like Aelred understood reason as a function of distinction, by which a natural philosopher could take objects or ideas and separate them into categories by their characteristics, such that reason was intimately involved in the ability of the individual to distinguish between sinful and virtuous actions and choose the right (Talbot 1981, 79;

Morris 1987, 75). It is in this way that 12th Century scholars go about discussing the notion of the free will, which becomes the dominant paradigm of their formulation of the problem of sin and evil in secular social order. Reason united with will is the source of the Free Will in the function of observing, distinguishing, and finally choosing. Evil is a perversion of the free will in which reason's ability to distinguish between good and evil is clouded by the passions. Because the overpowering strength of the passions, good is not possible by Man's nature alone, but only through God's grace granting the strength to overcome them (Talbot 1981, 13). The Cistercians portray the human struggle as a war between the will and the body for mastery, in which only the will is free, while the body is enslaved by the passions. The role of God is not transformative in this description but a source of support which elevates the will toward virtue. Liberty is understood to be the condition wherein will rules the body, but when the body rules the will, Man is voluntarily enslaved (Talbot 1981, 88).

It is important to note that medieval notions of Church liberty are not a prefiguration of Protestantism but a distinct tradition dating from the Carolingians (Williams 1951, 10). This includes some of the doctrines surrounding church government like episcopalism and the proprietary church system, which derive from the particular way in which social and ecclesiastical order was reestablished in the wake of the Germanic migrations. There are two major understandings of Christian liberty in the medieval world. The first is that of John of Salisbury, who argues that Christian liberty is a life lived under the law, by which he means the unwritten natural law. Christian liberty is freedom from vice and sin and a life lived in accord with a natural order. Let this be clear, however, that Natural Law is not a concrete set of axioms that exist in the spiritual realm, but instead an abstract concept whose purpose is explaining the experience of moral order in the universe. The act of conforming to Natural Law is not the discovery of laws as such but the experience of living one's life under God. The second understanding of Christian liberty according to the Norman Anonymous is freedom above the Law, where the individual is led directly by the "evangelic spirit" and the law becomes irrelevant (Williams

1951, 150). Norman Anonymous uses the word law to mean the written laws, both Mosaic and Canon. Christian liberty frees the individual from sin by making the “exterior” laws defunct and placing the Christian under the “interior” law of the evangelic spirit, as described in the Book of Hebrews as the law “written upon the heart”. These two theories of Christian liberty mirror the conflict between the new Aristotelian interpretation of Christianity arising in the 12th Century and the older Augustinian orthodoxy, but it is Salisbury’s conception of liberty which will exert the most influence on English law. As mentioned before, classical philosophy is not a source of influence on the Common Law, but through Christian understandings of liberty, Salisbury’s Aristotelian moral theory, and 12th Century formulations of human nature, Aristotelian thought is indirectly introduced into the conceptual framework of Common Law theory. Classical paradigms of moral and ethical thought are used to describe institutions and practices in English Law after they manifest in society, but never to justify new ones or reform the old.

On the question of equality, however, there is little controversy in medieval Christian thought. Despite Christianity being a force encouraging the kind of legal rules which eventually would produce equality before the law, the essence of Christian equality was spiritual, not political, legal, or moral; people were equal before God’s judgment and before the authority of the Church’s officers, but people make themselves unequal in society through their vices and virtues (Pratt 2007, 197). As mentioned before, positions of great power, especially that of the king, was understood to be an endowment of God, therefore based upon the will of God and assumed to be a product of virtue and Godliness in the example of the Davidic monarchy. Just as God elevated David from a shepherd to the king and cast down Saul, so it was expected that God acted in history with regard to the European monarchies, casting down the wicked and elevating the righteous.

The Christian understanding of equality being limited to the spiritual realm was part of the metaphysical understanding of human nature that dominated the period. The equality of human beings was only relative to the unbridgeable distance between God and Man, such that the greatness of God made all differences among human beings seem insignificant by comparison. This did not mean that the differences were inconsequential in actuality, only *sub specie aeternitas*, from the standpoint of God's eternal justice. From the standpoint of earthly government, the differences between individuals are of the utmost importance because of the principle of *coherentia*, wherein each power (*potestas*) ought to be granted to the person or office most suited to the exercise of that power (Stubbs 1979, 204; Ullmann 1961, 67). This principle in medieval government made institutionalized inequality a central component and virtue of politics, wherein those unsuited to power were deprived of it and those best suited to power had great authority to rule. How is it, however, that this kind of inequality can be seen as Christian, much less interpreted by medieval thinkers like John of Salisbury to be essential to a free form of government? This emerged from the particular way that human nature and individuality began to be expressed in Christian thought in the later Middle Ages. The human nature of Adam and the restored nature of the redeemed soul was made in the image of God, but this nature was a blank image which lacked individuality. Into this blank human image was poured the creative work of God, who made each individual distinct through a unique *haeccitas*, or a "this-ness" which distinguished an individual from all other individuals. This understanding is best explained through metaphor: all the leaves of the oak tree are made in the image of the oak, in that their form and function are defined by the oak. Each leaf, however, contains an individual character such that every leaf is completely unique, but the *haeccitas* or unique essence of each leaf does not interfere with its function to perform photosynthesis or its basic character as an oak leaf. No oak leaf's individual essence can make it a maple leaf, so that its nature is unaffected by its *haeccitas*, but the exact pattern of veins and particular shape of oak leaf cannot be replicated by any other leaf. In this way, the basic function of all men, the pattern in which they live

their lives and eventually die, is dictated by nature. The things which every person has in common are universal among all people, so these elements of human life should be identical and deviations from them are unnatural, or in the Christian language, sinful. It is in the *haeccitas* of the individual, in the elements of life which are not universal, indeed which are not and cannot be experienced by all, that individual differences become the dominant factor. Such non-universal elements of life like political office, social authority, and divine appointment, which are by their nature the province of a few rather than the province of all, are the place where individual differences become most important. One is led to these positions because of a unique element in one's character, or *haeccitas* which distinguishes one from another, thereby elevating one and subjugating another. Equality is the injustice, then, because it ignores the unique "this-ness" of each individual and diminishes them to the "blank" nature which contains no personality. Rather, the rule of equity is adopted from classical political thought, wherein virtue is made the criterion for power and vice is the criterion for subjugation, relating to the philosophical definition of virtue as liberty and vice as slavery. As the vicious man is incapable of being free and is utterly subject to sin, he is also incapable of performing the functions of civil office all the way down to the level of citizenship, thus being unsuited to membership in the polity under the conditions of *coherentia*. The inequality of political life was often contrasted to the equality of spiritual life and medieval scholars were cognizant of the contrast, but as spiritual life was universal, equally accessible by all due to the greatness of God, these two realms were understood to be completely distinct; the equality in Christ cannot cross over into politics without a millennialist immanantization of the Christian apocalypse and a translation of the Kingdom of God into secular political politics, an idea which would emerge with Gnostic movements like the Albigensians but never displace orthodox thought during the latter Middle Ages.

It is important to remember that the principle of *coherentia*, while it granted great authority to those who wielded power, was not a form of royal absolutism but a principle of limited government

bounded by the unwritten law of God. It relied on an understanding of the limits of each position through what modern scholars might call an unwritten constitution, such that the powers of those given office were great but specified by custom and religious doctrine. The very principle which placed great authority in the Crown also limited the Crown because the defining feature of social order was justice as equity rather than early modern conceptions of national sovereignty and royal representation which undergirded theories of royal absolutism by making the King the sole voice of a corporate nation. *Coherentia* demands that power be given to the person and office suited to it, such that a proliferation of offices arises from a proliferation of political powers and the King, while the chief of the officers, was required to defer to others when they were better suited to the particular exercise of power than he. The modern Christian doctrine of subsidiarity shares deep roots with this medieval concept of *coherentia*; powers which were best suited for local authority are many, while national powers are few, and the many powers in the hands of many local officers are balanced by the concentration of the few national powers in the hands of one king. Medieval thinkers were not consciously attempting to create the kind of “Newtonian” balance of powers as described by early liberal thought, but a balance of power rose organically out of the practice of medieval government and the kind of common sense principles of order in society like *coherentia* which placed amity and practical cooperation at the center of the relationships between political actors. As mentioned before, the notion of justice as being more concerned with repairing relationships than with a theoretically rational distribution of goods lay at the root of medieval government and at the core of *coherentia*.

Thus, some of the earliest restrictions on the power of the monarchy came from the Church through its role in propagating these principles of theology and philosophy in medieval Christendom (Maddicott 2010, 34). As the largest and best organized body of literate, learned men, the Church held a special role as the guarantor of the principles of justice and order in society. In addition to their role as the spiritual leaders of Christendom, clerics were the protectors of the literary and scholarly tradition

inherited from the classical world and therefore had the kind of knowledge or “*scientia*” of the principles of order and justice from centuries of philosophical and political thought as well as from the study of scripture and sacred law. In terms of the practical application of these principles, the Church is necessary to the administration of justice within secular government because the King lacks this *scientia* and thus is incapable of interpreting God’s Law and instituting just relations among men (Ullmann 1961, 64). While the Church does not claim the authority to carry out the law, being that this power is unsuited to the clergy and therefore denied to them by the principle of *coherentia*¹⁰, the Church does have an important role, which is the provision of wisdom and counsel to those who are better suited to exercise the power of government. Through the role of counsel, the Church provides its knowledge and thereby fulfills the function best suited to it in government, but this also set an example which would grow with the rise of feudalism; the provision of counsel would grow from a function of the clergy into a universal duty of all free men. The requirement of the King to seek the counsel and consent of Parliament arose from the duty of the wise to serve as councilors, as a result of the religious moral tradition epitomized by clergymen like Archbishop Wulfstan of York (Maddicott 2010, 35). From these roots, the feudal relationship would place this duty as a core element of the obligation of each man to provide good counsel to his lord. In England, as every free man bore a special relationship to the King through his personal homage, this obligation to provide counsel became a universal element of English self-identity and eventually became an obligation of the King as well.

These principles of justice and social order were not solely aimed at royal power, as described by later Whig historians, but universal principles which applied to every level of social and political authority. Specifically, the liberties of the Church were not understood to be merely a defense against the King but also against Papal infringement of the rights of the bishops of England (Maddicott 2010,

¹⁰ This position is explicitly stated by John of Salisbury and Norman Anonymous; the Church is unsuited to the direct exercise of political power and their role is limited to that of providing counsel to secular leaders and critique when the king deviates from the law.

196; Warren 1972, 414). From the time of Bede, the English understood their church to be in many ways distinct from those of the Continent, with a special authority and hierarchy established by the grant of the British Isles to St. Augustine of Canterbury by Pope Gregory the Great. England was at once part of Christendom but under Canterbury rather than Rome. In this, not only the Archbishop but all English bishops were deeply concerned with the growing power of the Papacy beginning in the 12th Century and in many cases cited constitutional principles to defend their authority against Papal overreach. Bishops from the time of Henry I cited the ancient laws of England to demand that limits be placed on the powers of Papal legates and their ability to freely enter the country, much less carry out their planned reforms to English Church government (Warren 1973, 416). England was one of the last countries to hold on to the Carolingian episcopal system, where bishops were largely independent of the Papacy and where secular lords had control over appointments of clerks on their lands, a position called the proprietary church (Ullmann 1975, 127). This system as it struggled in the 12th Century with greater Papal centralization was just as keen to draw upon principles of medieval government and justice to deny the Pope powers to which the English bishops felt he was not particularly suited, making arguments which would influence the way that both the clerics and the barons of 1215 would address the King and the Pope, who together opposed Magna Carta and the formulation of principles of just government contained therein.

The Church and the Ancient Constitution

To discuss the role of the Church in Magna Carta, first one must understand its role in previous legislation. The Church was deeply involved in English law from the very beginning of its formulation under the Anglo-Saxons. Like Magna Carta, the *Leges Edwardi* begins with an article on the peace and liberties of the Church, thus showing the centrality of the Church to English law is not merely a result of clerical opposition to John but an integral part of English legal thought (O'Brien 1999, 159). It is also important to note that the period in which there is the greatest proliferation of English legal texts after

the Conquest, the 12th Century, is one of great reform within the Church as well. The Clunaic model of the Prince-Bishop goes out of fashion during the 12th Century, replaced by the Cistercians who reject the worldliness of the Clunaic model (Warren 1973, 41). It is almost certain that the Cistercian and other 12th Century reformist ideas were greatly influential on the relationship between secular and ecclesiastical authorities when it came to the administration of law and justice.

An early example of English legal thought as found in the Church lay in the works of Archbishop Wulfstan of York, who is known for his work as both a theologian, political philosopher, and as the probable author of the law codes of both Kings Æthelred the Unræd and Cnut the Great. Wormald states that Wulfstan's *Sermo Lupi* was a precursor to Hooker's Laws of Ecclesiastical Polity, as it claims an essential unity between the English nation and an English church which mirrors the 3-fold division of the nation into a civil, natural, and ecclesiastical state propounded by Hooker (Wormald 1993, 18). This unitary understanding of Church and State as insoluble elements of English nationhood forms a central argument regarding the role of bishops and other religious leaders in the maintenance of justice in the realm. Thus, the relationship of institutions of both bodies was necessarily defined by their cooperative and complementary nature as participants in a greater English realm defined by a single unwritten law. The unity of the English Constitution formed the basis of Archbishop Theobald's argument that lay and ecclesiastical jurisdictions were complimentary rather than exclusive, so that the exercise of one does not infringe on the exercise of the other but contributes to the propagation of the Law to which both courts are beholden (Warren 1973, 442). This principle is present throughout the history of 12th Century law, as described by the author of the *Leges Edwardi* in a more poetic form; royal justice works in harmony with ecclesiastical justice through the metaphor of the two swords: "*Et sic iuste gladius gladium iuuabit*¹¹" (O'Brien 1999, 161).

¹¹ And thus the sword will justly help the sword.

The English understanding of the role of their Church in the creation and maintenance of the Common Law stemmed from the unique self-interpretation of the founding of the English Church at Canterbury. Canterbury stood heir to a tradition that the British Isles was separate from Europe, and that Gregory the Great had endowed them to St. Augustine of Canterbury and his successors (Warren 1973, 414). This church was not merely one of the many national churches under the authority of Rome but under an independent Church government centered at Canterbury and tasked with a specific identity. Gregory the Great sent St. Augustine of Canterbury in order to establish a unified “*angel cirice*” over all the kingdoms of the British Isles, who were at that time broken into a large number of petty monarchies (Wormald 1993, 12). The Church was a force that united the many Anglo-Saxon peoples into a single nation long before the Wessex dynasty would begin their conquest and unification of England under Alfred the Great and his successors. It is the unity of the Church which provides the example for the Anglo-Saxon monarchy’s claim to Imperium over the British Isles and the use of the Roman language of the Empire by rulers like Æthelstan and Edgar the Peaceable. Even after the Anglo-Saxons are conquered and both crown and archdiocese pass to Normans, Lanfranc’s claim to Patriarch status in Canterbury was used to support the rights of the Archbishops, citing Bede’s description of the delegation of Papal authority to Canterbury (Warren 1972, 415).

This expression of English identity through a uniquely English Church was not confined to the legal arguments of the Archdiocese of Canterbury, however, but was reflected in the practices and lives of English Christians throughout the Middle Ages. One manifestation of this identity was an English unity reinforced by a unique cult of English saints with pilgrimage routes crossing tribal and ethnic boundaries across England (Wormald 1993, 13). The present boundaries of England can largely be traced to the pilgrimage routes, with Northumbria becoming English rather than Scottish like the Lothian Anglo-Saxons because of the cult of St. Cuthbert and the Lindisfarne pilgrims. It is no coincidence that Bede himself served in the Lindisfarne monastery, as its inclusion into the greater English network of

sacred sites was largely a product of his work. Bede's *Historia Ecclesiae* could be considered the founding text of English nationhood, establishing the concept of a nation where there were only tribal warlords, and endowing this nation with the theme of England as the new Canaan (Wormald 1994, 14). If one understands the origins of English self-interpretation in this manner, the peculiar elements of English identity begin to become more clear. The English Church began as an aspirational movement to unite a people under Christ who were riven by conflict. Throughout the Middle Ages, the pursuit of peace was a major objective of the English Church, largely through the Peace of God and the Truce of God, as well as through clerical intervention in the secular law-making process (O'Brien 1999, 14). By understanding the nature of the English Church as one uniquely concerned with the English people in a way that Continental Christianity was not, it illustrates the distinctive role that the Church played in English justice and law as well as why the Church did not play this same role in other nations. As the Church was a part of the nation rather than a super-national organization which represented Christendom as a whole, it could cooperate and coexist with royal power in a way which would seem threatening to the jurisdiction of both if attempted in a place like the Holy Roman Empire, where competition between the secular state and the ecclesiastical state was more the norm. Although the Normans largely cooperated with the Papacy's campaign to stamp out the distinctive character of the Anglo-Saxon cult of saints and other Anglo-Saxon characteristics, the character of the English as a people who were defined in part by their Church had already been established, and with the popularity of the cult of Edward the Confessor, there is certainly a push against Romanization by the time of Henry II. The canonization of St. Wulfstan and his life as described in Aelred's *Vita Edwardi* demonstrated a concession by later Popes toward English religious tradition. The story of Wulfstan's staff in the *Vita Edwardi* is a strong rebuke against the Normans and Rome, whose hostile attitudes toward the English cults in the 11th Century is reproached by St. Wulfstan and by Aelred the author of the text. The Normans and Lanfranc are described as mocking towards the simple faith of Wulfstan, but God humbles both and even the learned Italian

Archbishop bows before the piety of the English saint at the end of the tale (Bertram 1999, 103). This story mirrors how the English understand their distinctiveness and special relationship to God, as well as the English Church's traditions and connection with the nation. As an integral part of the realm, the Church shares in the English identity of its lay members.

Part of this shared inheritance is the way in which the English Church acknowledges the authority of the Ancient Constitution on its own institutions. Just as the King and baronage do, the Archbishops and bishops define and defend their liberties and authority on the grounds of ancient custom and law, and like its secular application, the Ancient Constitution is not merely a defense against royal power but a kind of order which empowers the Church while protecting it against all possible infringement. One specific example of the clerical use of Ancient Constitutional theory is how it is used by Archbishops against the Pope, especially the custom that Papal legates were not welcome without the invitation of the King (Warren 1973, 416). This custom was useful for bishops whose practices or powers had begun to come under assault from the Papacy in the 12th Century, as an invigorated Papacy attempted to centralize Church authority under the Vatican bureaucracy. Very often, Papal legates used canonical appointment to bypass customary election of bishops, which had the effect of bypassing the Archbishop's means of influencing the outcomes, as well as infringing on the electoral rights of local church officials and the traditions of dioceses going back centuries (Warren 1961, 212). The fluidity of the relationships and conflicts between the King, the Pope, and the Archbishop of Canterbury is clearly illustrated by the events of the first two decades of the 13th Century. The Archbishop was deeply involved in the events leading up to John's excommunication because of the way John used the event to loot the Church of its wealth, and although one can certainly argue to what extent Langton was siding with the Pope or to what extent he was opportunistically allowing his enemies to fight each other, the Church was using the laws of England to oppose the King's confiscatory actions against clerical holdings. However, Langton immediately turns to opposing the Pope after the 1213 submission of John to Rome

in order to defend Canterbury's rights against Papal, rather than royal intervention (Warren 1961, 211). This shift did not come with any change in the tactics or language, as the Archbishop continued to accuse John of violating the customs and laws of England, but simply added the Pope as his accessory after 1213. In addition to the Archbishop's use of the law to defend his prerogatives, the Archbishop of York and other bishops also cited English law to defend their powers. The parity of all bishops is a principle cited by the Norman Anonymous, whose works were used to justify the rights of the English bishops against Papal interference and against the supremacy of the Archbishop of Canterbury (Williams 1951, 133). Royalist interpretations of the Ancient Constitution like the Norman Anonymous which preserved the older, Carolingian notions of the sacral kingship gave rhetorical ammunition to bishops wishing to buck the authority of both Pope and Archbishop by appealing to the King as the ultimate authority over an English state which included the Church. These bishops saw themselves clearly within the context of membership in an English community governed by English law, as their authority stemmed from the Ancient Constitution and the long-standing custom of English self-governance, both ecclesiastical and civil.

Indeed, the very language of the Norman Yoke, which became a powerful critique of Stuart government by Whig thinkers, derived from the Church rather than secular political usage. The language of Norman Yoke first appears as an argument by clerics against King John, comparing him to the worst offenders of the Norman dynasty (Holt 1985, 8). This refers to the way that John used the period of the interdict and his excommunication to plunder the Church and enrich himself through punitive taxation on Church property and outright confiscation of the Church's wealth. The details of these actions do differ, as many accounts may have exaggerated the depravity of John's mercenaries, but frankly are irrelevant. The actions of King John, whether relatively restrained or absolutely depraved, led to the application of the title of tyrant to his person by clerical writers and the maturity of a new kind of literature in which the Norman dynasty becomes synonymous with tyranny. The Normans

become a contrast to the Anglo-Saxons, especially Edward the Confessor, who largely and with a few notable exceptions are associated with just government. Histories from the 12th Century are used to support this new literature, such as the example of Alfred the Great who displays secular leadership but submits to the authority of the Church. Aelred portrays Alfred the Great as declaring that the King is first among the citizens of the secular state, but in the eyes of the Church is but an equal citizen (Freeland 2005, 78).

What is not in question was that King John claimed the authority to appoint bishops in his own right, in the practical example of his father but without bothering to follow the legal fictions that made Henry II famous: such statements as “I order you to hold a free election, but I forbid you to elect anyone but Richard my clerk” (Warren 1961, 166; Warren 1973, 312). This was understood by the English bishops to be a conflict between themselves and the King, however, not primarily between the King and the Pope, who was as much an interloper infringing on English rights as King John. Evidence of this is found in the reactions of the high clergy to the Pope’s declaration of interdict and excommunication against John. While a handful of bishops actively resisted the king on behalf of the Pope, the vast majority of them, along with abbots and other religious leaders, were largely unmoved by the Pope’s actions against the King (Warren 1961, 169). As the English Church was part of the realm ruled by ancient English custom, the conflict between the bishops and King John often arose not from their actions on behalf of the Papacy but from typical English politics and personal conflict between the bishops and the King; many of the bishops were forced into exile as a result of a disagreement regarding taxation rather than their zeal in enforcing the Interdict and King John’s excommunication (Warren 1961, 170). What the evidence seems to demonstrate is that the English clergy, while willing to respect the authority of the Pope to discipline King John, did not see this power as affecting the administration of the English Church beyond the ban of the sacraments. Few bishops renounced their fealty to the King and fled into exile, and none disputed John’s right to the crown. The arguments of the bishops and

monastic leadership were solidly premised on the ancient rights of the English Church rather than the authority of the Papacy, who was understood as an ally rather than the leader of their cause. The goal of the English Church was that the Pope force the King to restore their rights, not that the Pope bring King John to submission, and when John paid homage to the Pope, it was the English Church who loudly opposed the new situation (Warren 1961, 211).

It should not be surprising, then, that the English Church and Archbishop Langton should be central figures in Magna Carta in a way which many modern scholars seem to deny by omitting their contributions. The Church was central to English lawmaking throughout the history of the nation, from the earliest laws of the Anglo-Saxons to the laws of the 12th Century. The Church under Langton was deeply involved in the conflict between King John and the barons due to the fact that the clergy and the baronage shared similar issues regarding taxation and used similar language based on the ancient laws and customs of the realm. Not only did the clergy participate in the barons' struggle against King John, but many of the baronial ideals, language, and strategies were borrowed from the Church, either from their philosophical and theological literature or from the Church's history of institutional liberties. It should be obvious that without the English Church, there would be no English liberty and no Magna Carta. The roots of liberty are often traced back into the Anglo-Saxon past, but deeper roots of liberty can be found in the Gospels of Jesus Christ and the Christian Church in England.

Liber Homo and Burgesses Citizenship

The question of the treatment of the Burgesses is central toward understanding Magna Carta because of their role in the subsequent history of English history and their leadership in the cause of the Old Whigs. Whig history, especially through the lens of post-1688 liberals, portrays the Burgesses as the first class of free men who stand for liberty and against Royal authority throughout their history, but a closer examination of the facts reveals a startling conclusion; not only is Whig history deeply flawed

from a historical standpoint, but the elevation of the burgesses to Free Men distorts their role in the conflict over Magna Carta and disguises the way in which materialist and reductionist Burgesses thinkers redefined the very meaning of the word liberty itself. In truth, the burgesses were a class of highly privileged clients of the King whose royalist loyalties are manifest throughout the 13th century and who consistently support the power of the centralized state (Kamenka and Neale 1975, 5). The image of the burgesses as the vanguard of liberty is not based in any truth but instead is a justification given for a shift in the political coalitions of early modern English politics, wherein the burgesses became strong enough to abandon their alliance with the King and assume power independently through the House of Commons. Their basic position never changed; wherein the burgesses previously supported centralizing power under the King their patron, after the Commercial Revolution they supported centralizing power under the House of Commons. The nature of the burgesses as a client class, the role of urban economics and its reliance on government coercion of markets, and the commoditization of both liberty and property in burgesses thought serve as the central departures of burgesses society from the free community of the realm and the markers which distinguish the free man of Magna Carta from the urban burgesses.

One of the first problems to confront in the study of the medieval burgesses is the radical change in the use of language and terminology over the last the several centuries which distorts the definitions of the very words necessary to distinguish among these groups of the people. This distortion occurred as early as the 15th Century, wherein the terms for tenure are replaced with language of class or economic function which do not reflect the usage or practice of the 12th and 13th Century (Holt 1982, 117). This effect was only amplified by modern political and economic theorists who denied or downplayed the significance of feudalism in the way that medieval people understood their social position and economic role. The works of Karl Marx on feudalism introduced a new Marxist language

which tainted the meaning of feudal language and obfuscated the terms for class and caste as they were understood at the time (Painter 1961, 3).

The definition of tenure in burgage is that it is a type of tenure by socage, but with labor requirements replaced by monetary rents (Pollock and Maitland 1898, 293). To clarify for those who are unfamiliar with the terminology of tenure, tenure in socage was a type of nominally free tenure whose terms varied widely. In some cases, it was a true free tenure wherein land was granted in exchange for a non-military service. This service could be symbolic, such as the provision of a rose once per year, or it could be significant, such as the provision of farrier services for a lord's mounts. The lands granted could be significant or the equivalent of an unfree cotter. In other cases, especially in shires where unfree tenure had been abolished, tenure by socage was little more than villeinage with nominal free status, such that significant labor services were required and the land granted was divided in the same way as the unfree peasantry. This dissertation argues that tenure by burgage is most similar the latter form, wherein the burgher's free status is superficial before the time of Magna Carta. Evidence for this conclusion can be derived from Glanvill, demonstrating that as late at the reign of Henry II, lands held by burgage tenure were still outside of Common Law jurisdiction despite the fact that Common Law was clearly defined as the national law of all free Englishmen within the same legal text (Hall 1965, 155). This distinction between the jurisdiction of the *liberos* and that of the burgesses is a common feature throughout 12th Century law. In the *Leges Henrici*, the jurisdictions of the borough courts are considered to be distinct from the county in which it lay, and there existed no understanding of inferior or superior relationships between these courts (Downer 1972, 123). They were completely separate in the understanding of 12th Century lawyers, such that only the Curia Regis could accept an appeal from the borough court and only by the express will of the King, just as it would an appeal from the manorial court systems. Only certain Common Law cases in the county courts were granted automatic hearings by the king or one of his judges.

There were other distinctions that demonstrated how the burgesses were understood as less than free. A great deal of feudal land law is concerned with the right of a free heir to his inheritance, and therefore the ability of a landholder to alienate his patrimony is largely restricted by both custom and explicit written law. A freeholder was able to distribute a “reasonable” amount of his land in his lifetime, but this was largely limited to acquired rather than inherited land and further burdened by the customs of the shire, especially in gavelkind shires (Hall 1965, 70). In contrast, the heirs of a burgher were entitled to no such right, as they had little claim to a patrimony; land held by burgage was mostly commoditized within the bounds of chartered cities, and thus subject to sale or distribution by will at the pleasure of the proprietor (MacFarlane 1991, 103). In addition, other legal rules set the burgesses apart from those subject to Common Law jurisdiction. One example is how tenants by burgage have a distinct rule of majority, namely when the child can practice the art of the parent (Hall 1965, 82). Where free men who hold by military tenure are considered to be of age at 21 and sokemen at 14, the burgher is considered to be of age when he is able to count money and practice his father’s craft. The fact that they are thus distinguished demonstrates a legal categorization that sets them apart from the rest of society outside of the chartered towns.

To understand the difference between the class of free men and the class of burgesses, the nature of medieval community must be made clear. The 13th Century was a period where communities defined by tenure and those defined by contract exist simultaneously and parallel to one another but without formal or legal connections binding them into one society (Bolgar 1977, 135; Holdsworth 1936, 404). Early modern thought is incapable of comprehending this way of dividing groups of people, as evidenced by the works of Hobbes, Locke, and their successors who insist on a single national society at the core of their political projects. Whether the unifying symbol is the king or the market, all individuals within the nation are bound to one another through their shared participation in the social contract in early modern thought, while this idea is utterly foreign to the medieval mindset. The individual’s loyalty

is to a community which exists within a network of communities united in the symbol of the realm. The County and Borough are understood as two distinct types of these communities, the first based on land tenure and the second based on commerce and money (Holdsworth 1936, 387; MacFarlane 1991, 15). The *Communitas Regni*, or what modern scholars have interpreted as the national community, was not the whole of society but the body of free landholders in arms, excluding those who did not hold their land by military tenure and basing their community on the common culture of war. Even in the realm of the law, an understanding of the existence of multiple distinct communities within the jurisdiction of the King is not questioned by 13th Century lawyers (Holdsworth 1936, 401). The association of the realm with a universal community of the nation is a distinctly modern phenomenon based on the works of early modern political theorists; the realm was understood in the Common Law as primarily a jurisdiction under which, as the author of the *Leges Henrici* states, there was a multiplicity of customs and laws, while communities were defined by their own distinct shared customs and laws. A grand jury could be called to declare the law of the county, but as introduction to the *Leges Henrici* states, to do so for England would be impossible.

Where the community of the town is defined by the territorial expanse described by its charter of incorporation, the vill is defined by the people making up the community and the character of tenural relationships between landlords and landholders (Pollock and Maitland 1898, 563). This point is incredibly important: the community of the burgesses is defined in terms of place and geography while the community of the land is defined in terms of relationships among people. This demonstrates the reification and commoditization of the central concepts of liberty and community that was present even as early as the 12th Century. Wherein community is a relation among men, the burgesses transform it into a characteristic of a place and of the market activity which occurs in that place. Rather than being defined by obligation (*fidELITAS*), the burgesses community is defined by commerce and arbitrary geographical borders.

The *Communitas regni*, however, was based on a common chivalric culture of the landed members of society and was the common dividing line between the burgesses and the freeholders (Maddicott 2010, 312). In this way, the *Communitas regni* was an extension of the vill on a national scale. It was defined by a relationship, specifically a military relationship, between lords and vassals, which mirrored the relationships of the landholders and landlords in the counties. Geography was secondary to the bonds of personal fealty, as evidenced by the trans-national nature of the realm demonstrated by the English king's holdings in France or the Scottish king's holdings in England. It is no coincidence that the language of the Community of the Realm first appears in Henry II's 1181 Assize of Arms (Maddicott 2010, 142). His reforms of the military system of England were central to the character of this community, whose bonds were based upon service in arms. Furthermore, in England the military aristocracy was largely members of the rural communities of the shires, lending weight to the notion that the national community was a feudal rather than corporate community. Unlike France, the aristocracy did not live in the boroughs but distributed across the countryside and took part in the rural community of landlords and landholders in a more direct way, holding their lands in personal *demesne* rather than renting them out (MacFarlane 1991, 181; Maddicott 2010, 296). In addition to cultural differences, the law recognized the community of military tenure as distinct from the community of the burgesses through its procedure for the grant of lands. Letters of enfeoffment took the form of a writ, thus feudal lands and rights were recorded in this manner, not a charter by which borough lands were disbursed and burgesses privileges were granted by the king (Stenton 1932, 153). Certainly, medieval lawyers saw enough of a difference in these two types of communities to establish legal distinctions in their treatment before the court.

For the feudal community of free men, the military relationship is foremost while commercial and productive relationships are incidental to the feudal oath and community (Pocock 1987, 333). The result of the dominance of feudal ties among the freeholder class meant that there was a steep divide

between the classes who participated in rural life and the burgesses. Burgesses values were quite distinct from the larger culture of agricultural society and were more reliant on classical models than the feudal culture (Bolgar 1977, 138). These classical models of citizenship, especially, influenced burgesses culture but did not have much effect on the way that rural landholders understood their position vis-à-vis their neighbors. As mentioned before, the large medieval culture often borrowed the language of the classics but rarely used it in a manner consistent with its original meaning, instead using the classical authors as a veil to cloak their indigenous reforms with the mantle of antiquity. Instead, the productive and commercial relationships dominate the self-interpretation of burgesses culture, who perceive of themselves as defined by their economic function and class membership. The towns function as urban islands that draw upon the surrounding countryside to provide resources and use the country as a market for its goods, so that the only real relationship between the town and county is economic (Kamenka and Neale 1975, 18). This functioned as a powerful segregating effect which ensured that that the relations between town and country would be minimized. Whereas the town functions with the countryside through the medium of currency, a barrier is formed between the two due to the fact that the rural Community is not monetized, and therefore the relationship cannot be mutual (MacFarlane 1991, 22). The burgesses, as the possessor of currency, have the power to define the nature and occasion of any interactions with the county. However, since money is not the currency of relationships in rural county society, this also blocks burgesses ingress into the rural community, whose self-interpretation places emphasis on kin, soil, and long-standing personal relationships. Therefore, human mobility is unidirectional, peasants move to boroughs, but burgesses cannot migrate to the country, while the power to control the relationship between the town and county lay in the hands of the monied burgesses (MacFarlane 1991, 25). At this point, it should be pointed out that Marxist analysis, in labeling this as “exploitative,” fails to determine why this relationship and segregation between town and county was sustainable so long as feudal institutions remained healthy. While the

burgesses controlled the flow of money and therefore were the gatekeepers between these two communities, the county as a non-monetary economy was functionally independent and did not rely on the burgesses, whereas the burgesses were utterly dependent on the flow of trade with the county. So long as the institutions of the county retained their independence and the rural economy remained non-monetized, the power of burgesses interests to manipulate the rural economy was nonexistent.

The invention of the legal fiction of corporate personhood was first established by boroughs to justify their franchises and liberties under their charters (Pollock and Maitland 1898, 635). As the charter was originally a means by which an Anglo-Saxon king would grant benefices to individuals, the definition of an individual would have to change in order to justify the kind of group grants of rights that the burgesses desired. This change in the definition was borrowed from the Church, which through the doctrine of the *corpus mysticum Christi* had a ready-made conception of how a group of individuals might form a single body for the purposes of law and collective action. Guilds, merchant groups, and boroughs are the earliest corporate bodies other than the Church, and their incorporation predates and inspires the emergence of the idea of the corporate state (Painter 1961, 255; Ullmann 1961, 217). These bodies took advantage of the new legal form of incorporation to advance their positions through the later Angevin kings' willingness to sell charters, thereby securing lucrative privileges in the form of monopolies, trade concessions, taxation relief, and rights to election of judges and sheriffs. These concessions must not be understood as modern rights; privileges is the word that best describes them as they were exclusive, often temporary, and acknowledged to be a grant of the king's grace. A. F. Pollard went so far as to declare that these concessions were not liberties, but the privilege to infringe on the liberties of others (Holt 1972, 153).

It must be stated that there were no uniform constitution of the boroughs; each one was unique and had a different charter, some ruled by election, others by magnate families (Stubbs 1979, 263).

Those who would attempt to describe the burgesses as the vanguard of English liberty would be hard-pressed to explain away the fact that borough constitutions were often as inequalitarian and oppressive as the worst of feudal landlords. In addition to the authority of ruling councils, families, and guilds, most towns were wholly or partially under the jurisdiction of the royal *demesne*. The royal *demesne* was considered to be a county of its own under the law, such that it followed a unique set of customs and laws which contained a strange mixture of royal authority and individual privileges. As the boroughs were on royal land, excessive grants of privileges would necessarily infringe on the customary rights of the King as landlord, and so Henry II attempted to curtail borough autonomy to preserve the unity of the realm under the crown (Warren 1973, 376). Certainly, one can find exceptions to these generalizations about the nature of borough government and community order. For example, there was a unique kind of relationship between the king and certain leaders of the Cinque Ports, who held by naval military tenure rather than burgage tenure (Warren 1961, 121). These ports would have leadership who were understood to be free military tenants, but a populace which held under burgage tenure, thus a peculiar constitution.

The population of the chartered towns were of a distinct type from that of the rural communities. They were largely craftsmen and merchants instead of peasant farmers, as well as much more likely to be migrants or descendants of recent migrants. From the point of view of the rural populace, the boroughs were comprised of the “nameless multitudes,” of people without community, lord, or connection to the land (Ullmann 1961, 225). The borough communities put little emphasis on the kinds of familial connections, love of the land, or connection to place over time that defined the way the rural communities interpreted their history and foundation. In fact, the boroughs did the opposite through their policies of encouraging immigration from the countryside; migration to a chartered town is one of the few ways to change one’s estate under the feudal system of the county (Ullmann 1966, 59). This policy of welcoming even those who were fugitives from their tenural obligations made the towns

an effective release valve from the tensions created by those who could not or would not accept their role in their natural community. This feature becomes deeply embedded in English law, wherein the towns are understood as places where the social order of rural society could be escaped. In Glanvill, this privilege of the towns becomes embedded in the Common Law. Any *nativus* who stays a year and a day in a *villa privilegiata* becomes a *civis* in their *communam* and is free from *villegnagio*. *Communam* is also called *gildam* (Hall 1965, 58). Thus, a person is able to join the corporate body of the town through having their old identity and legal obligations obliterated in the process of merging into the community or guild of the charter. The landlord no longer has claim on the labor of the *villein* because his old legal identity is destroyed in the process of amalgamation to the corporate body of the community.

It is important to remember that the Burgesses are not merged into the class of the Commons until Edward I, when they are first given a permanent place among the seated House (Holdsworth 1936, 303). While one can debate as to whether or not the Great Assembly of Henry II is a true Parliament or whether the invitation of certain burgesses to Parliaments counts as the first burgesses seated in the Commons, the fact of the matter is that burgesses representatives do not sit in Parliament by right until Edward I, for before that time they only attended by the will of the King and through his good graces. It is only after Edward I's reforms that one can say that the Burgesses become true members of the Commons. Likewise, it was not until Edward I's legal reforms that the borough courts are granted a dual jurisdiction of Common Law and Merchant law by the king (Holdsworth 1936, 307). Before that time, the borough court system dealt exclusively with the merchant or borough law while they themselves were outside of the Common Law jurisdiction. Edward I was the grandson of King John and great-grandson of Henry II, so if one is looking at Magna Carta, there are two or three generations dividing the formulation of the document and the beginning of the incorporation of the burgesses into a broader class called the Commons, generations which are particularly known for the rapid rate of reforms which occurred under their watch. One cannot assume that the burgesses are meant to be understood as

Liber Homo in Magna Carta when the bulk of the evidence demonstrates their disparate character. It was the Montfort Parliaments which set the precedent that the burgesses are members of the realm and that their consent is required (Maddicott 2010, 260). The unfree tenants, however, were understood to be members of the realm far longer before this period, however, as they unlike the burgesses were connected with a broad national community through homage to their landlords in the *communitas regni*; the communities of the counties overlapped with the community of the realm through feudalism where the community of the borough did not. The representation of the unfree and the counties was achieved through their landlords, to whom they granted the authority to speak on their behalf in their oaths of homage (Maddicott 2010, 207; Stubbs 1979, 212; Ullmann 1961, 190). The primary factor preventing the burgesses from turning the Commons into a special interest of the urban merchant class during the Edwardian period is the same factor which prevented the great magnates from usurping Magna Carta into a symbol of aristocratic privilege as was done with other charters of liberty throughout Europe. The existence of small freeholders and knights of the shires who retained the power to hold a balancing point between the major factions of English politics throughout the Middle Ages and until the early modern period ensured that the principles of English liberty would not be subverted for the purposes of either burgesses wealth or aristocratic privilege (Stubbs 1979, 239). Magna Carta's Free Men would continue to keep the balance of power between the classes which would make liberty possible in England.

It is clear from what has been presented that all boroughs existed as special protectorates of the King, under a royal charter whose rights were under the grace of the King (Ullmann 1961, 219). This made the burgesses a client class rather than a free class because they lacked the element of land which made the feudal contract mutual. Where the feudal landholder had the means to support himself independently, the burgher is at the whim of the king, if not other burgesses as well. The granting of a Charter is a display of royal *auctoritas*, wherein the King freely concedes rights but retains the authority

to withdraw them at his pleasure (Ullmann 1975, 199). Both Richard and John were infamous for their threats to withdraw the rights of the towns unless further payments were forthcoming, and the charter did not have the weight of law in their defense. There was no *Writ of Novel Disseisin* for the resumption of charter rights, nor could the *Writ of Right* be used to restore a monopoly or trade concession since that writ was concerned with land, not abstract liberties. Even as robust a body of liberties as that of London's was not secure from royal infringement, despite the fact that London's rights were not reflective of boroughs in general, but an exceptional example of royal privilege (Stubbs 1979, 194).

The history of the burgesses demonstrates that the urban classes were overwhelmingly monarchist, due to their reliance on the King's good will to maintain their mercantile security and privilege (Stubbs 1979, 355). The myth of the burgesses as devoted fighters for the cause of liberty is just that, a myth, derived from the circumstances of the Stuart Constitutional Crisis, wherein the burgesses happened to find themselves on the side of a Parliament that was more malleable to the interests of the financial and business class than the King. If one looks at the Barons' Wars of the 13th Century, there is no evidence of resistance to the arbitrary power of the Crown by the burgesses because that arbitrary power largely served their end, which was restraint of the great magnates who were jealous of the wealth of the towns. London fell to the Barons by trickery and was held through bribery (Holt 1972, 29). The inclusion of the burgesses in Magna Carta seems to be a product of practical coalition building, which the City of London joined due to opportunism and circumstance. In the 1215 document, the Magna Carta has one clause related to the cities and one for merchants (Holt 1972, 31). Furthermore, Magna Carta does not treat the burgesses as members of the *Liber Homo* class, but clearly and explicitly distinguishes the two groups. Clauses 20, 21, and 22 draw the distinction between *Liber Homo* and the burgesses and *villeins* in regards to the limits on amercement which demonstrates that the three classes be treated differently by the courts of law (Holt 1972, 33). Despite

their participation in Magna Carta, however, after the death of John, the chartered towns would be strongholds of the Royalist party against the Parliamentarians for the conclusion of the Barons' Wars.

It is clear that the larger culture of England in the 13th century did not understand the burgesses as either free men or members of the larger community of the realm. Both of these concepts were deeply tied into tenure, such that landholding was a prerequisite, if not the most important factor, for liberty (Painter 1961, 248). It is not simply the legal form of the feudal oath that was central to English liberty at the time of Magna Carta but the moral character of the relationships formed through feudalism and burgesses citizenship. The burgesses were seen by thinkers like John of Salisbury as replacing obligation with money at the center of the social order, which he finds so repugnant that he declares that substituting wages for fealty is the greatest evil (Nederman 1990, 93). It cannot be stressed enough that medieval liberty is a moral characteristic, not a material state of being, and the moral character of the burgesses is found lacking because of their distinctive modes of association. Salisbury argues that wage labor is related to servility, as the wage laborer is subjected and dependent on his employer in a way that a landed tenant whose estate is legally protected by a writ of *enfeoffment* is not. This kind of dependency demonstrates character unsuited to liberty, and therefore the burgesses cannot be admitted to the community without doing grave damage to the national character (Nederman 1990, 110). It is this servile and materialist disposition which permeates all burgesses politics and demonstrates their unfitness to join the community. By replacing loyalty and obligation with wages, the burgesses introduce factionalism and institutionalized class conflict into the realm which relied for its stability on the cooperative nature of feudal relations; the nature of feudal politics is patriotic, based on love of one's people and *patria*, while the nature of burgesses politics is selfish and discordant (Smith 1985, 200). Burgesses cannot be considered a free people, even were the Common Law to declare them so, because they did not practice the kind of life that made one free. Their way of living, associating with others, and practicing politics made them characteristically unfree in a way that

no changes to the law could change, and with the rise of the burgesses in the 14th and 15th Centuries, it is not they who become free, but liberty itself which begins to lose the meaning that Magna Carta endowed it with.

Community of the Realm

One of the great problems in the study of community as it existed during the Middle Ages is the inconsistent use of the word community. Depending on the author, context, and time, it can refer to the three estates, the barons, the commons, or the members of Parliament (Stubbs 1979, 213). Part of the story of the free man in Magna Carta is the story of the evolving ideas about the nature of the community of the realm and its relationship to both liberty and feudalism. Magna Carta, when understood as a document of individual right, loses the depth that it, as both document and event in history, can bestow on understanding liberty as a *habitus* and a way of life for a free community. Much of the story of Magna Carta is involved with how the regnum evolved from the royal “regnum nostrum” of a proprietary monarchy to a sense of national community where free men are participants in a body defined by a shared identity who pursue liberty and the good life together (Holt 1985, 212). This is not to claim that medieval England fully achieves this goal, or that they alone of all societies manage to perfectly adhere to their highest ideals. Magna Carta is, as Holt argues, an argument about just government, and so in interpreting the community of Magna Carta, it too should be interpreted as an argument about just communities. *Communitas regni* not a corporate body of the state in the modern sense, but an argument as to how the realm should be governed (Holt 1972, 46).

The earliest theories of social order and community in the Middle Ages stem from the works of Christian thinkers like Pseudo-Dionysius. The word “hierarchy” is coined by Pseudo-Dionysius, who formulated the essential medieval understanding of social order recognizing the fundamental inequality of individuals (Ullmann 1966, 14). Mature theories like the Great Chain of Being and theocratic

monarchy all stem from the works of Pseudo-Dionysius in formulating an order of Being which is tiered and unequal at its core. The principle of *coherentia*, as discussed before, is a product of these kinds of theories, especially works like Pope Gregory the Great's *Moralia in Job*. The Pope argues that Man is created equal by God and is equal at the final day before the judgment seat, but in his earthly life he makes himself unequal by the diversity of his merits and sins (Pratt 2007, 197, Ullmann 1966, 14). The root of inequality, then, is the sinful nature of Man and the equals (*pares*) within society are formed by an equality of virtue, of which the king is foremost (*praeesse*). By placing the righteous on the same level as the wicked in society, one would be creating a community of fundamental injustice, such that the king's role is to help (*prodesse*) those who seek to become good by including them in the community of the good while suppressing those who seek unrighteousness. In order to perform this function, the king must be understood as above the three estates, such that he can be a proper judge and teacher to them, but is simultaneously the head of all three (Stubbs 1979, 214). The equality to which the king elevates the righteous man is limited, a personal but not institutional equality. Community, then, must be comprised of individuals who are deeply unequal and therefore a form of government which does not recognize these inequalities in virtue would fail to adhere to the Order of Being. Hierarchical community, then, is the natural expression of human nature, as the commonalities between men are of the other world, while the inequalities between men are of this world.

From this basic conception of political community derived from Christian thought, another thread of theory arose not from the halls of the learned but the practical experience of political life in the courts of the realm. Feudal conceptions of the community arise out of the bonds of friendship and fidelity which emerge out of the practical experience of tenure and local government. The *Communitas regni* is common phrase which expresses the community of feudal tenure-holders, of which the King is first among equals rather than a superior over the community of landholders (Ullmann 1961, 175). The ideals of the feudal community reach back to the days of the great migration period, when the ancestors

of the European aristocracy emerged from beyond the Rhine to settle large swaths of the Western Roman Empire. Hence, feudal ideals and ethics emerge from the warrior-aristocracy and describe a particular set of relationships that reflect a society built upon the expression of the warrior band becoming stamped into all aspects of community life. From the application of these principles to land tenure and social status, these feudal ideals and ethics spread to a broad class of free men (Painter 1961, 1). One of the most important ethics in feudalism is the concept of *fidelitas*, which means that obligation serves as the foundational concept of social order. The bonds of fidelity hold one person to another, so that all members of society exist in a state of obligation to one another through their feudal oaths to their lords and vassals. Because of this idea, there is no such thing as revolution in medieval thought; conflict between the King and Barons is not institutional but a result of an imbalance in their relationship, wherein one or the other have failed to live up to the *fidelitas* expected of them (Holt 1985, 126; Maddicott 2010, 106).

Feudal ideas of community were not universal, however, as were the Christian notion, but only referred to one part of society, that of the rural free men. There were three distinct communities in traditional peasant societies with very little overlap: rural aristocracy, urban market communities, and rural village communities (MacFarlane 1991, 13). Feudalism was the basis by which the former was organized, but not the latter two. In England, however, a unique situation occurred wherein the “linking” class between the aristocracy and rural village communities was particularly strong. This class, the small free landholder, had elements of both classes and served as the agents between the peasant community of the vill and the aristocratic community of the *communitas regni*. Among the former, they were called the “lesser vassals” in contrast to the other two classes of King’s tenants: barons and knights (Stenton 1932, 84). In the village economies, they took the name of *husbond* early on and later such terms as franklin and finally yeoman described the landholding free men of the counties (MacFarlane 1991, 176). The distinction between baron and “lesser vassal” was not defined by birth or even land

under the Constitutions of Clarendon and later Magna Carta, but by the kind of summons to council, either personal or general (Stubbs 1979, 224). The difference was not understood economically because economic factors were subservient under the feudal system to military and social measures. Certainly, the Norman Conquest and other events changed the relationship of this middling class and caused it to grow and shrink in importance and size. The 11th and early 12th centuries saw a trend of downward motion from freeholder to villain, but this was not a result of some great act of the Norman Kings, but slow responses to the expansion of manorial court and pressure from local barons, just as the opposite occurred in the 12th and 13th Centuries due to the expanding powers and access to the Common Law (Stubbs 1979, 36). Nevertheless, even at their height in power and influence, the small landholder never completely bridges the gap between the two communities of the *communitas regni* and the vill. While they may stand partially in both, the two are always understood to be distinct. In fact, the phrase “*Tocius Communia Terrae*” in Magna Carta was likely inserted by clerical or burgesses writer, as it is an outlier in the text, unlike the rest of the document (Holt 1972, 44). This concept of a truly national community encompassing all three traditional groupings is a product of a system of thought foreign to feudalism and more similar to the kind of universalist community advocated by the Church or classical philosophy as appropriated by medieval urban writers.

To claim that Magna Carta was the product of a community striving towards liberty would be a gross misstatement of the fact. In truth, the dynamics of Parliament arose from a multiplicity of groups, each seeking their own interest, not an abstract desire for liberty (Stubbs 1979, 353). Throughout the Barons’ Wars, the great lords were ambivalent toward Magna Carta, as the abuses of the King were mirrored in miniature by themselves. As mentioned before, the feudal bond and the nature of its obligations ensure the reciprocity of all powers, as each person is both *dominus* and *tenens*, such that one’s own liberties reflect the liberties of those above and below. The core of Magna Carta’s supporters seemed to be the lower levels of the landowners, especially the knights and freeholders of the counties

far from royal power, especially in the north (Maddicott 2010, 221; Stubbs 1979, 355; Warren 1961, 229). To approach the way that liberty emerged from the community of the realm as its central organizing principle means to look at the practical elements of the lives of the Free Men, not at broad principles of political philosophy. The way they lived their lives, their obligations, their ideals, and their relationships to other members of the community form the liberty of Magna Carta. Where the interest of the king lay in increasing his authority, the interest of the great lords lay in making themselves over-mighty enough to resist the king and gain hegemony over their neighbors, and the interests of the burgesses lay in using political power to privilege themselves and their businesses towards the accumulation of wealth, it behooves one to look at the small freeholders and why liberty should be the ends of their politics. The shires were the proponents of liberty because their interests lie in self-government, rather than factional interests of the barons and burgesses (Stubbs 1979, 355). They had no use for the accumulation of power like the king, for hegemony over their neighbors like the lords, or for economic privilege like the burgesses. These things did not contribute to their well-being, nor were they compatible with the ethic and way of life they practiced. The free men of the shires, then, sought liberty because they were already living the free life, and therefore needed only to protect themselves from the overreach of others.

Conclusion

The effect that Magna Carta had on English Constitutionalism was felt on multiple levels. Certainly, it changed the way that the government was conducted almost immediately, or at least beginning with the death of King John. By the time that Henry III reached his majority, the government and administration of England was far different than that which his father had inherited from his uncle. More importantly, it embedded a certain understanding of right political order within the political culture of England, similar in some ways to a modern ideology. What Pocock calls the Common Law “ideology” is an aspirational norm in English politics toward a way of living and thinking centered on the *Liber Homo* and his deep connection with the legal system and local government (Pocock 1987, 279). Magna Carta forms the nexus in which Common Law, Ancient Constitutionalism, and English political thought became intertwined into what will become Anglo-American constitutional thought, or the Common Law Constitution. This constitutional mode of thought is described as *lex terrae* by medievals like Fortescue, although the modern term which best describes the essence of Common Law Constitutionalism would be closer to the Rule of Law (Holt 1985, 4). What is important to remember is that Common Law Constitutionalism is not a constitutionalism in the Enlightenment sense of an institutional arrangement but rather in a Ciceronian sense, wherein the constitution is the common language, common right, and common weal which form the character of the bond between the people which creates a commonwealth (Cicero 1999, 18). In this way the Common Law constitution does not describe the form of government but the character of government; feudal monarchy, constitutional monarchy, or republic make no real difference under the Common Law understanding of just social order in history, concerning itself with questions of continuity, liberty, and justice as amity within the community. In one sense, it has already been said that post-Magna Carta state is not a classical “mixed monarchy” because the political and royal dominion exist in parallel, never mixed (Pocock 1987, 306). In addition to this fact, however, is the notion that the Common Law constitution is not a form of

government but a culture of order in history wedded with a philosophy of law. The claim that the United States Constitution is the culmination of Magna Carta's argument on government is as fallacious as claiming that Fortescue's monarchy or Selden's Mixed Constitution are the ultimate expressions of Magna Carta, especially given that, despite the claims of Whig historians, the Mixed Constitution first appears in "His Majesty's Answer to the Nineteen Propositions" (Pocock 1975, 361).

It should be no surprise, then, that Magna Carta does not change the form of English government in any real significant way. The 25 Barons and all other attempts to provide a council with institutional checks on the king fail with Henry III's majority, and real institutional change will not occur until the next generation, when it is spearheaded not by the barons but by Edward I. There was real change in English government, but not in the institutions. Massive reforms of the courts occur in Henry III's minority, especially with regards to ending bribery, corruption, and violence as remediation for political disputes (Holt 1992, 170). To see the real effect of Magna Carta, however, means to look beyond the institutions of government and instead approach from the viewpoint of the culture of politics. The real history of English law in the aftermath of 1215 is of the blending of feudal rights beyond the lord-vassal relationship into all relationships in a new concept of a national community (Ullmann 1966, 75). The feudal relationship, tied to a particular kind of community defined by military tenure, begins to lose its authority before a new conception of community which encompasses all Englishmen, derived from the enfranchisement of the burgesses. This new understanding of community, derived from burgesses thought and modelled on Magna Carta as a kind of town charter for the whole kingdom, radically changes the meaning of Magna Carta, especially after Edward I's political and legal reforms. One of the major signs of this transformation is the expansion of *Liber Homo* into practically meaning any Englishman in the 14th Century (Sandoz 1993, 63). By abolishing the distinction of status tied to tenure, it demonstrates that the notion of a community based on obligation of service has been abandoned in favor of the universalism of a national charter. By the time of Bracton, freedom

of status and freedom of tenure are wholly distinct ideas (Holdsworth 1936, 264). This concept posits that Magna Carta was a document that created a kind of community among its adherents rather than the feudal notion of Magna Carta as a contract of fealty between disparate communities, and arose quickly after the majority of Henry III. As early as 1225, Magna Carta had taken on this latter aspect, not just a feudal grant of right anymore but also the first statute of Parliament (Holt 1972, 53; Sandoz 1993, 51). The language of "*tocius communia terre*" was an outlier in Magna Carta, at odds with the language of the rest of the document as well as previous usages, but prefigures this development in political thought. This should not be confused with the social contract theory of the 17th Century; just as the national charter is an abstraction of the town charter, the social contract is a further abstraction of the kind of social order which appears in the 14th and 15th Centuries. The other major sign of the dissolution of the feudal *communitas regni* is the abolition of feudal representation in Parliament. The Parliament of 1254 first elected knights of the shires, rather than simply knights who were vassals-in-chief of the King, changing the meaning of representation from tenural to territorial (Maddicott 2010, 216). What this means is that the notion of consent by representation inherent in the feudal community is lost; no longer is absolute consent given through the web of feudal relations, such that every person is represented through his lord, but instead implied consent is given through representatives elected from geographical districts, in the manner of the burgesses. This new form of representation relies on the myth that the electors are consenting to the system rather than to the person of the representative, creating a division between the office and the man similar to that of the king in the previous century. Edward I's Parliamentary reforms go further, establishing the first real institutional changes after Magna Carta by removing the general summons to lesser vassals-in-chief in Article 14 of Magna Carta and replacing it altogether with a summons to the elected knights of the shires and burgesses, thus creating a divide between Lords and Commons where no such concrete division existed before in English history. What this accomplishes is that it maintains tenural representation only for the great lords, while

disenfranchising the lesser vassals-in-chief, the core of the old *Liber Homo* class, and replacing them with representatives on the basis of election from the counties and boroughs.

The dominant legal theorist of the 13th Century was Henry de Bracton, whose *De Legibus* forms the core text of post-Magna Carta Common Law. His text was immediately adopted after his death, such that Bracton's *De Legibus* largely makes the medieval law books prior to Magna Carta obsolete (O'Brien 1999, 120). Until the antiquaries of the Stuart Constitutional Crisis, the *Leges Edwardi*, *Leges Henrici*, and Glanvill's *Tractus de Legibus* are largely abandoned in favor of the new text. In many ways, Bracton is a quintessential Common Law thinker in the mold of the writers who come before Magna Carta. Bracton retains the contradistinction of the personal will of the king and the law as seen in thinkers like Salisbury. As he states in his *De Legibus*, "*Non est enim rex ubi dominatur voluntas et non lex*¹²" (Holdsworth 1936, 253). On the other hand, however, Bracton abandons the law-making authority of the king so clearly stated by Glanvill's claim that, "*Quod principi placet, legis habet vigorem*,¹³" which even Salisbury grudgingly accepts as a part of the king's divine appointment by God (Hall 1965, 2). Instead, Bracton posits a role of the law which makes it the "Bridle of the Prince," such that the king's powers were firmly bounded by the law, both written and unwritten, and which he was powerless to change, at least in theory (Maddicott 2010, 98). The kind of reforms of the law which Henry II had produced were, at least legally speaking, forever out of bounds to the king and were only hypothetically possible with the consent of Parliament, which retained its character as a court, not a legislature under Bracton's watch. While powerful kings like Edward I and Edward III would make great changes to the Common Law, they required the cooperation of Parliament and tended to affect their changes indirectly. One such change was the rise of legal proceduralism and the collapse of the feudal concept of personal judgment. By the time of Bracton, equity is overshadowed by the use of precedent

¹² For there is no king where will commands and not law.

¹³ What is pleasing to the Prince has the force of law.

as the primary factor in the determination of rulings (Holdsworth 1936, 243, 592). Part of this was the drive during Henry III's minority to root out corruption and patronage from the legal system, and this certainly led to the use of precedent to maintain legal neutrality, but it was also the product of a changing attitude towards law which separated the person of the judge from the position, thus depriving the man of a will with which to exercise equity. While Bracton still tended to privilege the broad principles of justice in law, the form of customary law or precedent would be taking priority over the substance, which would later be taken to an extreme during the "Dark Ages of Magna Carta" beginning with the Wars of the Roses (Holdsworth 1936, 287).

The distortion of Magna Carta into a guarantee of individual liberties is due to the nature of Magna Carta as both a document and an event in history, such that those invoking Magna Carta in successive political controversies would interpret the document to serve the purposes of the current dispute (Holt 1972, 5). Each iteration of this process shed elements of Magna Carta's original understanding, such that its character as a symbol took priority over the actual content of the document. This is not to say that the writers who appealed to Magna Carta were deceptively manipulating the text to their purposes, but that the greater the distance from the original experience of Magna Carta, the more was lost to the interpreter. One clear example comes from Coke on Littleton, who said that Magna Carta is the fount of the Law of the Land, called free because it produces free men (Holt 1972, 17). This statement is not untrue, but it is an incomplete description of how Magna Carta relates the *Liber Homo* to the *lex terrae*. The practice of the *lex terrae* produces free men by teaching them the behaviors which are practiced by a free man, but free men also produce free and just law through the practice of the customary life of the free man. The causation in Magna Carta and earlier legal and philosophical text is circular, not directional as Coke puts it. Men like Salisbury and the author of Glanvill understand this process as a self-reinforcing cycle of liberty, deeply integrated with the law and with the virtue of justice. The free man is the just man is the lawful man. In fact, it is law's identity

with justice and liberty which is a core element of medieval legal thought which descends to the Whigs of the 17th and 18th Centuries, standing against the legal positivism of Renaissance civil jurists (Sandoz 1993, 18; Ullmann 1966, 147). Despite the attempt by Thomist thinkers to divide the good man from the just man, it is this very identity which forms the core of Common Law constitutionalism, which retains the notion that all law is subject to the Higher Law of God and that no sovereignty exists which can declare law by its own will. Legal positivism conquers civil law during the Renaissance but makes few inroads into Common Law until the beginning of the modern age.

The Medieval Aristotelianism of St. Thomas and Fortescue

The ideas associated with St. Thomas Aquinas serve as a gulf separating the 12th Century from the modern world; by segmenting Man's natural element from his spiritual element, it opens a space for politics distinguished from spirituality (Morris 1987, 161; Ullmann 1966, ix). Thomist Medieval Aristotelianism distinguishes ethics and politics so that the ethical life and political life are distinct modes of life (Ullmann 1961, 234; Ullmann 1966, 119). The result of this is that religious authority is removed from the sphere of the political, such that freedom of the Church is radically altered in its meaning and application within the whole of the realm. First, the essential unity between the civil, ecclesiastical, and natural state as embodied in the Norman Anonymous is broken by St. Thomas's division between civil and religious life. Essentially, the realm of the virtues as described by the classical philosophers is removed from religious life, whose jurisdiction is limited to the realm of spiritual goods. St. Thomas's synthesis conceives of the Church as a purely mystical body without need for church government or canon law, depriving it of authority over social life, as evidenced by the reaction of Popes like Boniface VIII who defended the older understanding of the Church's role in the world (Ullmann 1961, 99). The ability of religion to influence and critique civil values and goods, a core element of the 12th Century Renaissance and Cistercian reform movement, is deeply limited by the double-ordering, such that St. Thomas found it necessary to find a wholly new justification for religious critique of civil

injustice. Whereas Salisbury and St. Aelred are capable of saying that earthly injustice and tyranny are sinful in and of themselves because the secular virtues, especially liberty, are undifferentiated from the reborn *homo spiritualis* of St. Paul, St. Thomas is forced to make an indirect argument against tyranny, namely that earthly oppression hinders spiritual virtue, as the suppression of civic virtue in men makes them slavish, and therefore less likely to exhibit spiritual virtue (Talbot 1981, 13; Bigongiari 1953, 183).

An important fact to consider regarding Thomism is the role which medieval Aristotelianism played on the meaning of St. Paul's *homo naturalis*. Aquinas's synthesis, the "double-ordering of things", creates a parallel "*regeneratio civis*" to St. Paul's *regeneratio hominis*, so that *homo naturalis* is no longer destroyed in the *renovatio* but is instead reformed and exists in parallel to the new spiritual nature of redeemed Man (Ullmann 1966, 122; Ullmann 1975, 269). This radical change in the understanding of human nature and the role of the Church allows the possibility of a just social order distinct from the Church, and although St. Thomas himself will not consider this outcome, many of his successors do just this. Dante's interpretation of Thomism is that man pursued two distinct ends, natural and spiritual, each ordered by a separate law, thus opening the realm of human goods as legitimate ends of liberty in their own right and elevating secular liberty to the highest function of government (Ullmann 1966, 134). For Dante and other Italian Renaissance thinkers, Thomism and medieval Aristotelianism allows them to understand a politics completely divorced from Christianity, wherein one truly left faith behind when entering the public square.

One major influence of Thomism is the change in the way law is understood by medieval Aristotelians. St. Thomas rejects the idea that the order of God is manifest in the order of creation through an examination of the nature of Man, as opposed to the Cistercians who argued for a parallel in the divine and political order, and claims that through a rational investigation of creation, that Man can only know that God is, not what his character is (Talbot 1981, 9; Bourke 1956, 169). The result of this is

a distinction between the powers of revelation and reason in Christian thought, such that revelation played little or no role in the formation of civic order. This division carried into his discussion of Law, wherein St. Thomas divides revelation from the Natural Law, describing it as an order for secular politics and removing the role of scripture in governance, as opposed to Salisbury who sees reason and revelation as joint or even interrelated sources of insight into the Natural Law (Bigongiari 1953, 53). The notion that revelation is the “greater reason” than the limited faculties of human reason, the centerpiece of 12th Century political order, is abandoned for a differentiation of reason and revelation into sources of distinct virtues and goods which exist in parallel. For civic virtue and order, reason is the sole justification, and therefore human law is the product of reason alone. Based on this understanding, St. Thomas rejects customary law in favor of law based on reason alone, in the tradition of Roman Law, and only acknowledges custom as a support rather than justification for law. “All [human] law proceeds from the reason and will of the lawgiver,” (Bigongiari 1953, 82). This notion is completely opposed to the very existence of the Common Law, which is explicitly a product of custom and lacks any claim to a single lawgiver in the tradition of the Roman Law. The populist fashion of the late 13th Century is the combination of the Aristotelian *societas humana* with the *lex regis* by making the King the voice of the whole people with the power to make positive law, and thus the king is understood to be sovereign over law as the representative of the entire realm by incorporating the symbol of the people under the crown (Ullmann 1961, 209). It is in this way that medieval Aristotelianism evolves into the early modern doctrine of absolute monarchy through St. Thomas’s articulation of the king and lawgiver as the ultimate rational will over the civil state.

Because of this understanding of law as statute, St. Thomas describes law as the basis of the regime type rather than a Ciceronian constitution of a peoples’ character (Bigongiari 1953, 25). Law is not the expression of the whole of the people, as Common Law thinkers assert, nor can it serve as the foundation of a nation in an unwritten form. St. Thomas does not seem to accept the validity of

unwritten law as a kind of human law at all unless it can be traced to a lawgiver. As the product of a lawgiver, however, the very notion of *lex terrae* is untenable, as law is attached to the civil state rather than to a community or a feudal realm. One could say that St. Thomas is the first of the post-feudal legal thinkers, whose philosophy aided the demolition of customary and national systems of law in favor of Roman-style systems centered on the *lex regis* and the king as sovereign lawgiver. An example of this shift is his writing on tyrannicide, which undertakes the abolition of the feudal understanding of the *communitas regni* in favor of the state. He advises long-suffering under a tyrant as a virtue, against Salisbury, but most importantly, he distinguishes between public and private force against the king, where feudal law denies the difference between these two at all (Bigongiari 1953, 190). The feudal oath is enforced by personal arms as its ultimate security because it must parallel with personal military service as the foremost obligation of the vassal. St. Thomas places the first in the realm of the private and the latter in the realm of public force, breaking the rule of mutuality in feudal relations and creating what would seem to the feudal thinker as an arbitrary distinction between the king and other lords. Taking up arms on behalf of the king to avenge a broken treaty with a foreign king is considered a public act, backed by the legitimacy of St. Thomas's vision of the state, but taking up arms against the king who violated Magna Carta, either in one's own right or on behalf of one's liege, is declared by St. Thomas to be a private act of violence.

The English name most associated with Thomism is Sir John Fortescue, the legal writer whose text forms the basis of the "Lancastrian Constitution" and one of the few political thinkers from the period of the Wars of the Roses. The problem with this association is the fundamental incompatibility of Aristotelian and Thomist thought with the Common Law; the nature of the Common Law as unwritten, customary, and timeless places it outside of Thomist rationalism and constitutionalism. Fortescue seems to remedy this conflict through the association of the law of nature and customary law in the unwritten law of England, and then to follow in St. Thomas's footsteps by associating constitution with

written law alone (Lockwood 1997, 24). The problem with this interpretation is that the division of the written and unwritten laws deviates sharply from every Common Law writer up until this period; Hall 1965, and Bracton's discussion of the written law emphasize its supplemental character to unwritten law, while Fortescue's system places it in a superior position as constitutional law. Furthermore, the very association of unwritten Common Law, based on the analogical association of past precedent with modern controversy, with Natural Law stands in stark opposition to how Aristotle and St. Thomas describes the Natural Law, which is the product of rational (noetic) exploration of universal principles. The result of Fortescue's system is not Aristotelian but borrows Aristotelian language to describe a most un-Aristotelian system; Aristotelian republicanism is impossible under Common Law (Ullmann 1975, 300). Where those who attempt to interpret Fortescue through Thomism fail is that they miss the influence of burgher politics which have already put deep roots in the post-feudal philosophy of the Common Law which emerged after Magna Carta. The reversal of precedence between the written law and unwritten law in Fortescue is not a result of Thomism but of a legal theory revolving around town charters, wherein the ultimate source of law, or the constitution of the town, is derived from the written law, to which the unwritten law is supplemental. Fortescue's system is still deeply indebted to the Common Law system, but more through the Borough Courts which merged the Common Law with the Merchant Law than through the County Courts which still often carried a feudal interpretation of Common Law. The influence on Thomism on Fortescue does not lie in his use of Natural Law but instead in the Christian symbols imported to the realm. Fortescue was the first author who transfers the Christian symbol of the *corpus mysticum* to the realm, thus justifying the creation of a type of polity which would replace the parallel authorities of Empire and Church with a closed national community unified by a common *intencio populi* (Voegelin 1952, 42). Fortescue's *populi* should not be associated with the liberal symbol of The People, however, since it does not refer to the sum of an external body of people but to the concept of that which belongs to the *gens Anglorum*. The body of the people for

Fortescue is has a mystic quality, in that the nation takes on the characteristic of the *corpus mysticum Christi* of unity without physical or earthly incorporation, forming the root of what Hooker would call the “natural state.” In this way, despite the fact that Parliament had devolved into a forum of over-mighty lords who battled more often with armies than debate, Fortescue could still claim that statute, the written law which formed the English Constitution, was made by the king with the assent of the whole realm (Lockwood 1997, 27).

When looking at Fortescue’s famous division of the realm into a *dominium politicum et regale*, the most important fact to understand is that the realm is not a mixed regime but two regimes operating simultaneously (Ullmann 1961, 192). This fact demonstrates that Fortescue is most certainly not an Aristotelian thinker, as this division violates the essential unity of a classical republic. The dual regimes retain a feudal character in the sense of being defined by jurisdiction and in retaining the medieval distinction of man as simultaneously both subject and citizen. Fortescue’s *dominium regale* retains the theocratic elements of monarchy but confines them to a particular jurisdiction (Lockwood 1997, 6; Ullmann 1961, 191). This jurisdiction is defined institutionally by Fortescue, but clearly derives from the personal powers of the king which remain in the wake of feudalism’s collapse. Wherein the king once exercised certain powers by right of his personal lordship and feudal oaths to the great lords, by Fortescue’s time these powers have been circumscribed by Magna Carta and charter law theory until they are understood to be rights of the king’s office. On the other hand, the *dominium politicale* is the realm ruled by law, based upon a conception of the national community under a great charter, whose terms serve as the constitution of the realm. As Fortescue retains the association of law, right, and liberty from Magna Carta and Bracton, Fortescue’s *dominium politicale* binds the king from doing evil, which he compares to the value-neutral *lex regis*, which does not permit association of law with good or evil, but the king’s will alone (Lockwood 1997, 22; Holdsworth 1936, 435). This association is one of the most important influences of pre-Magna Carta thought on Fortescue and the later writers; by retaining

the moral character of the law against the legal positivists who were overtaking the civil law, the Common Law managed to retain the connection between higher law and human law which would form the foundation of the Rule of Law. The Rule of Law hinges on the nature of liberty as a state of living virtuously, and slavery as of living viciously, such that liberty is lived under law rather than outside of the boundaries of law as described by Hobbes (Lockwood 1997, 133). Without this notion that the law is a force for justice, law can have no normative power against the claims of those who would do without it in the name of libertinism. The ultimate foundation of law would be nothing but brute force and the habit of obedience, and the respect for the process of law which undergirds the Rule of Law could not flourish.

One of the results of the incorporation of the whole realm into a single community is, ironically, the dissolution of the realm into competing interests and factions. This national community under Fortescue no longer acknowledges the counties and boroughs as disparate communities united only by the king and the law, but instead envisions it as a corporate whole comprised of three estates (Lockwood 1997, 86). The language of the estates certainly is not new, as they appear as early as Wulfstan of York in the 1020's, but they never reflected any such reality in English society until after Magna Carta. By severing the connections among free men and the nobility with their counties, rather than a national community, the nobility turned to a romantic facsimile of feudal ethics based on a cosmopolitan vision of a European community of nobility by blood, as evidenced by men like the Black Prince and Edward III (Holdsworth 1936, 124; Painter 1961, 15). It is not only the nobility who defect from this new national compact vision of the realm, but also the Church, in the throes of a conflict between Thomists and their opponents. Under the influence of Popes like Boniface VIII, who advocated for greater civil authority in the hands of the Church, the Archbishops of Canterbury began to break their alliance with the great barons, to pursue their interests separately and sometimes in opposition to the great lords (Holdsworth 1936, 304). Boniface VIII's *Unam Sanctam*, which boldly asserted the

plenary power of the Papacy over secular leadership, served as an assault against both Thomism and the older tradition of relations between the Church and the king which undergirded Magna Carta.

The Rise of the Burgesses and the “Dark Ages of Magna Carta”

While Magna Carta primarily influenced the philosophy of government, it was not without some institutional effects. One such lasting institutional effect of Magna Carta was to make government less dependent on the personal genius of the King, but more susceptible to corruption through faction and party politics (Stubbs 1979, 354). The power of a king to radically change government and society in the model of Henry II was checked by the formalization of the king’s powers through written law like Magna Carta; while it enabled Parliament to oppose the actions of bad kings, it also introduced an avenue to power by those who were capable of using Parliament to their own ends. Among these groups, over-mighty lords and burgesses factions were prominent over the next few centuries in the chaos which would envelop England. What do these two groups have in common, however, that would make them beneficiaries of the new system of government during the “Dark Ages of Magna Carta?” Simply put, it was the rise of commerce and monetization of the economy which served as the major factor leading to the decline of Magna Carta liberty, especially the substitution of money for service (Painter 1961, 11; Pocock 1975, 431). What writers like Salisbury most feared, the dominance of monied groups and their ability to gather large bodies of paid, dependent clients, served as the death knell to a social order revolving around the small freeholders in the counties, what would become known in the 15th Century as the yeoman-farmer. The freeholders based their political strength around their status as members of county government and the core of the armed forces of the realm, but when feudal service is replaced by pay, professional soldiers replaced their role in the military, leaving them without national clout. Furthermore, freeholders lost their political status when money replaced tenure as the source of political legitimacy in county government, as large bodies of newly-enfranchised burgesses and “free” clients of the great lords are capable of placing local government in the hands of the high nobility and

wealthy aldermen, either within the law or by threat of violence (Holdsworth 1936, 352). Certainly, it would be wrong to say that Magna Carta caused this decline, as it was clearly an attempt to save feudalism. Magna Carta did attempt to institutionalize the mutualism of royal and seigneurial powers, as in Articles 12 and 15, by which Magna Carta as intended would have limited the great lords in the same way that it limited the king from abusing the feudal contract. However, Magna Carta was designed for a dying political system, as money had already replaced military tenure as the sinews of war by the time of Henry II (Painter 1961, 246). By institutionalizing the feudal ethics and norms of the unwritten *lex terrae*, Magna Carta unwittingly weakened them by turning them into technical legalities to be avoided by means of an empty compliance in form but not in substance. The mutuality and amity which made up the feudal relationship became understood as a kind of social contract or national charter, and like all good businessmen, the great lords and burgesses sent their attorneys to find the small print.

One of the features of post-Magna Carta English government was the rapid decline of tenure as the basis of the *communitas regni* and the expansion of legal freedom to the bulk of the male English population. This expansion of the Free Man class was due to the decline of villeinage in favor of a monetized lease in land, intermarriage among free and unfree creating confusion in the courts, and the precedent of disregarding status in criminal prosecutions, among other causes (Holdsworth 1936, 212). Certainly, some of this was an inevitable outcome of Common Law's response to England's chaotic status system in the wake of the Norman Conquest; without a clear law of status, the law was unable to sustain the kind of institutional legal inequality that one finds in Germanic and Continental legal systems and thus free status slowly expanded to include nearly all men. On the other hand, the only clear marker of status after the Norman Conquest, free tenure, was a casualty not of law, but of the economics of the land market. Through the monetization of the land market as a form of personal property, the connection of land to inheritance, political status, community, and military tenure began

to unravel. It was Edward I's court which finally replaced feudal law with general property law, translating free tenure and its military requirements into estate in fee simple (Holdsworth 1936, 347). This was far more than a simple change in the way property was bought and sold, but a complete reformation of the English system of government, tied in to his changes in the way which Parliament was summoned. Edward I's land reforms dissolve the difference between lesser tenants-in-chief and mesne tenants, thus transforming feudal representation into geographical representation (Stubbs 1979, 275). Thus, as mentioned before, the disenfranchisement of the small freeholder-in-chief is a product of the land reforms which inaugurate the capitalist understanding of land ownership.

After Magna Carta, the obvious avenues to the expansion of royal power are closed to the king's administration. Kings like Edward I turned to a new tactic in order to expand their influence, which contributed to the breakdown of feudal system: the royal administration coopted feudal lords and urban burgesses into dependents and agents of central power (Kamenka and Neale 1975, 59). Through the promotion of royal clerks to abbeys and dioceses which carried feudal obligations and the selection of lords to offices which were often lucrative, kings turned his political opponents into his own partisans through the power of patronage, which reduced these lords to a state of dependency on maintaining the good will of the king, much as the burgesses. In addition the rise of the burgesses as a part of the king's core constituency continued after the conclusion of the Barons' Wars, based as well on concepts of patronage and dependency. The rising urban influence over politics at the national level, especially over law and property, introduced a trend against traditional feudal ethics and landholding liberty. Urban forms of property generally involve dependency in the forms of salary, patronage, and public debt (Pocock 1975, 464). These notions of social order, already at work in the land law as has been mentioned, offered an alternative vision of liberty which was based on urban goods and materialist conceptions of the common good. Edward's Parliamentary reforms placed the burgesses in the Commons with the representatives of the counties, under an assumption that they held a shared a

political bond. It was not completely untrue that they shared some interests in common; political accord between small landholders and burgesses could be founded on common desire for good governance in the counties (Maddicott 2010, 349). On the other hand, their basic conflict over the nature of politics and liberty made their alliance dependent on a powerful king who could smooth over the differences. In addition to the cultural divide, basic economic s made the political bond between burgesses and small landholders under Edward I far more fragile than the bond between lords and landholders during the Magna Carta crisis, as it was riven by the rural-urban divide between agriculture and trade (Maddicott 2010, 321). In short, the unity of the Commons was doomed from the beginning by a fundamental incompatibility between feudal and landholder notions of liberty and the burgesses way of life which centered on notions of liberty as economic privilege and dependency on the crown.

One way in which Magna Carta's system of free government was undermined by Edward I's reforms of law and government was the loss of the notion of consent through representation. The Edwardian Parliament mixes two principles of representation: feudal representation in the Lords and geographical representation in the Commons (Stubbs 1979, 207). As mentioned before, feudal representation worked on the premise that when one swore homage to a lord, that oath gave authorization for one's lord to speak for his vassals. Since any person who held or let land was required by law to have a liege lord, this meant that everyone from the smallest cotter to the greatest earl owed homage to someone, and as all land was held of the king, those relationships terminated with a vassal-in-chief of the king. For this reason, Parliament was originally comprised of the vassals-in-chief of the king, along with other people who were summoned by the discretion of the kings. For example, originally the Knights of the Shire do not represent smaller tenants-in-chief of the King but other free men of the counties, namely those with the right to sit in the Shire Court (Stubbs 1979, 231). While burgesses technically held of someone, they generally understood themselves within the context of the town charter rather than tenure, such that their means of representation in local governments was

geographical, based on the idea that a representative stood for a district rather than a body of individuals. This idea was tenable only so long as geographical representation assumed a single community of the shire or borough (Stubbs 1979, 212). With Edward I's reforms, however, Magna Carta's distinction between those summoned by personal writ and general writ became the distinction between those represented feudally and geographically in Parliament. Rather than perfect consent as obtained through feudal representation, the elected knights were elevated based on assumed consent to their election, which was a practical disenfranchisement of the free vassals-in-chief of the king in the counties. In this way, County communities were treated as if they were simply rural boroughs, bound together by a charter government rather than the social bonds of tenure and fealty. Edward I's reforms reduced the diversity of communities in England down to two types: a community of the nobility and a community of commons made in the image of the burgesses. The unique character of the *Liber Homo* as a "bridging class" between the nobility and the commons is lost under this system. As a result the new "yeoman" class, a term which applied to both very poor and very rich small farmers by the 15th Century, fell entirely into the Commons and largely outside of political participation until the early modern period (Holt 1982, 119).

Representation was not the only principle of government demolished by Edward I's reforms. Bracton and Magna Carta were diminished by 14th and 15th Century legal thinkers who reject broad principle in favor of narrow legalisms, a legal philosophy which would dominate England until the Stuart Constitutional Crisis (Holdsworth 1936, 287, Sandoz 1993, 57). The notion of the courts as arbiters of justice and equity were largely abandoned in favor of a focus on precedent without consideration for the medieval principles of amity and peace. One of the great drivers for this was the royal regulation of the bar. The bar is closed to amateurs beginning in the reign of Edward I, leading to a system where judges have no political experience, having only been lawyers (Holdsworth 1936, 229). One can easily see how a system where judges have neither understanding of nor accountability for the results of their

decisions could lead into a system where a simple scribe's error in a writ, such as stating that Henry I was Henry III's great-grandfather, could serve as the center point of an entire case, leading to its dismissal. The closing of the bar leads to French becoming the major language of law until Edward III reintroduces English to the courtroom (Holdsworth 1936, 479). One major effect of this is the removal of the yeoman class from the practice of law and participation in the county courts beyond the jury. What was once a central element of the life of the free man, the experience of practicing law in the shire, became the exclusive preserve of trained, French-speaking lawyers.

In addition to the closure of the bar, Rule of Law and Fortescue's ideals of justice become unenforceable during the civil wars, where law becomes a tool of the great magnates (Holdsworth 1936, 408). Narrow legalism combined with over-mighty earls and dukes led to justice becoming the preserve of the great lords, much as was done during the Anarchy. Where the old feudalism resisted the central authority of the King in favor of a liberty for local self-governance, 14th Century lords subverted the royal administration to serve private purposes, leading to the law being dominated by politico-legal cronyism (Holdsworth 1936, 417; Stubbs 1979, 464). Monetization of the rural economy, the sale and dismemberment of family lands, the rise of burgesses modes of administration, and the disenfranchisement of the small landholding class created a system wherein dependency on the great lords or powerful aldermen became the rule of county government rather than the feudal liberty of Magna Carta. While the language of private interest versus the interest of the realm first appears during the reign of Henry III as a condemnation of the King and his favorites, it becomes the dominant language of English politics after Edward I (Maddicott 2010, 229). What Holdsworth calls the "Dark Age of Magna Carta" is an era where society is epitomized by self-government by small landholders in the County Court is nearly completely lost before the onslaught of noble ambition and burgesses greed, culminating in the Wars of the Roses and Tudor absolutism. The *Liber Homo* class of small freeholders reaches its lowest point in the 14th Century, when military tenure is transformed into a closed aristocratic caste

which excluded the small landholders and added requirements to knighthood beyond the £20 of Henry III's reign (Bolgar 1977, 245). Equality with the *villeins* comes at the cost of reducing the freeholder to the level of the *villein*, wherein the new yeoman class is legally free, but arguably less free than the *Liber Homo* of 1215.

Liberal Thought and Magna Carta

Tudor absolutism is the dominant ideology of government to emerge from the chaos of the Wars of the Roses, and another text is necessary to make a true contrast between the Angevin and Tudor dynasties and the effect of civil war on the reestablishment of social order by the new dynasty. What can be stated here, however, is that the rise of the Hobbesian "Leviathan State" of the Renaissance is permitted because of the relaxation of feudal ties from Edward I to Henry VII (Pocock 1987, 115). The breakdown of the concept of mutuality in the feudal agreement led to two potential states, one where the tie between lord and vassal dominated that between subject and king, or the inverse. Absent the mutualism of feudalism, both states relied on an essential dependency of the inferior member on the superior member which was incompatible with liberty as understood through Common Law constitutionalism. The form of dependency which emerged from the Tudor hegemony over the great lords was termed sovereignty by thinkers like Thomas Hobbes.

The rise of absolutism in the 15th Century begins with an attack not just on feudalism but on all forms of corporate or territorial autonomy (Holt 1972, 141). It was at this point in history that the burgesses change from a dependent client of the monarchy into a faction of Parliamentary power, as the monarchy's assault on local government began to infringe on the immunities and privileges of the town charters, thus cutting into the profits of burgesses merchants. Local self-government was not sustainable under a system of government which privileged the king-subject relationship over all other social bonds, an ideology promoted by the Tudors to undermine the power of the nobility in the wake of

the wars. The early modern doctrine of Sovereignty abolished all customary and legal limits on the lawmaking authority of the State, denying any role of the counties in the creation or maintenance of the law (Holdsworth 1936, 445). In this way, the county governments become a competitor to the State which demands absolute control over all jurisdictions. Whether royalist or parliamentarian, the rising theories of government insist on asserting central control over all means of government, through collapsing the *Nomos* into the State, either in the Divine Right of French law or the Parliamentary authority of Blackstone (Ullmann 1966, 102).

Sovereignty isn't the only idea by which early liberal thinkers attack Common Law theories of government. Locke and most post-1688 liberals reject history as the basis for liberty and claim a justification based on reason alone, with the pre-Burkeans as the exception to this general rule, who retain liberty by inheritance and argue that universal reason leads to radicalism, not liberty (Pocock 1987, 236). This attack on the notion of precedent and the collective wisdom of generations of judges is not an innovation of the Lockean, however, but part of a wider tradition which began to cross from the continent in the Enlightenment. The understanding of the law as custom justified by usage came under siege beginning in the Renaissance, with the "Law of Reason" being used to overturn long-standing laws based on a single judge's declaration of "reasonableness" (Sandoz 1993, 107). Common Law and Ancient Constitutional notions of liberty relied on settled precedent and customary usage to preserve the way of life of small communities when confronted with royal power. Now, armed with new legal doctrines, royal judges had the power to outright abolish local governments and ancient institutional arrangements which had governed the counties since time immemorial. It was not local government alone which would face centralization and standardization under liberal judicial regimes. The Natural Law tradition of Hobbes and Locke destroys the basis for any Common Law based on precedent, as both demand a system of Positive Law based on abstract reason alone (Holt 1992, 16). The concept of continuity in time which connects the Common Law to the English people and land through the notion

of a community of the generations is made obsolete by liberal thought, whose universalism is fundamentally at odds with any particularistic system of law.

It was liberal thinkers who began to interpret the English constitution through the universalist paradigms of classical political theory. The Polybian element to English constitution was not part of medieval thought, but introduced by Stuart-era thinkers, both royal and parliamentary, who desired to find a justification for their theories of government grounded in universal reason rather than English history (Pocock 1987, 309; Sandoz 1993, 132; Stubbs 1979, 204). As mentioned, the *dominium politicum et regale* was not a classical model of mixed government but a patently medieval concept of a dual regime divided by jurisdiction. The medieval symbols of indivisible *auctoritas* and divisible *potestas*, distinct in the mind of Fortescue, are unified in the modern symbol of sovereignty, and then shared between the three branches of the King, Lords, and Commons. Liberal thinkers reinterpret this as a system where the core element of medieval *auctoritas*, the lawmaking authority, is divided between King and Parliament in a way which the medievals would find impossible. The rise of classical republican thought and symbols in England, epitomized by thinkers like Selden and Harrington are a response to the failure of Common Law and Ancient Constitutional theories to resist the rise of Liberalism during the Stuart crisis and an attempt by rural Whigs to avoid the dominance of the cities in the new post-crisis government (Pocock 1975, 365).

To summarize, the Enlightenment claim that the State is the direct agent of the public interest served as the death knell of medieval representative government (Holt 1972, 142). The new theories of the early modern period relied on a symbol of the People which was both corporate and reified, as without either of these characteristics, the notion of a single will of the People would be impossible. In contrast to early modern thinkers, Fortescue's notion of *populi* was conceptual rather than concrete; the *intencio populi* could never be manifest in something as crude as public policy nor put down in written

form in a constitutional document. Like the Natural Law, Fortescue's *intencio populi* was unwritten and fundamentally ineffable, a concept to help understand a social order which he experienced in his practical life rather than an ideal object to pursue. The result of this reification of Natural Law and its association with a corporate People embodied in a single representative is the modern doctrine of sovereignty, which collapses *Nomos* into the representative of the State and makes the Will of the People a reflection of celestial order. Blackstone's assertion of Parliament over the Law is this assertion of arbitrary power in a democratic form, an example of modern liberal thought which places sovereignty over law (Sandoz 1993, 248). Parliament assumes the position of the king in early medieval thought as vicegerent of God in effect, if not in name, and takes upon itself the whole of medieval *auctoritas*, meaning the right to declare law. In contrast to these theories, however, the medieval notion of supremacy of law is preserved by Coke against a rising liberal theory that posits the supremacy of the sovereign body over law, be it royal or representative (Sandoz 1993, 3). The theories of law and government which derive from Coke and other Common Law theorists contrast with the notion of the sovereign people as they maintain the supremacy of law itself, especially the unwritten *Nomos* of higher law. The division between Coke and Blackstone is the division of constitutionalism and liberalism, Rule of Law and Rule by Law, centering on whether law is subject to higher Law or to a political body (Sandoz 2006, 56). Any attempt to draw Magna Carta into a discussion of either the American founding or modern English Constitution must confront this idea, lest one fall into simply assuming that constitutionalism and liberalism are identical.

The Meaning of Liberty in Magna Carta

Of any of the mythological English characters, from King Arthur to Hereward of the Wake, it is Robin Hood who best represents the *Liber Homo* of Magna Carta and the way of life of the small freeholder of the 12th and 13th Centuries. Of course, the legend has changed over the years, but the essence of the story remained. The original Robin Hood was a yeoman, not a member of the nobility,

and the Earl of Huntingdon is one of those Victorianisms which color all English mythology (Holt 1982, 12). His band was described with feudal language, focusing on the bond of friendship between the characters and their loyalty or *fidelitas* to Robin Hood himself, who was in many ways their liege lord. The earliest tales show Robin as a partisan of the knights and yeomen in the North against rapacious authority of royal and ecclesiastical governors from the South (Holt 1982, 39). The first villains were greedy abbots, sheriffs, usurers, and moneylenders, generally who threatened to deprive a knight or freeholder of his ancestral lands. Early stories never show Robin Hood robbing a secular landlord. The treatment of the abbots should not be taken as a sign of medieval anti-clericalism, as the abbots and rich monks were contrasted to the poverty of other religious characters and Robin's personal devotion to St. Mary (Holt 1982, 15).

The association with King John arose with John Major's version of the story, where Robin Hood existed during Richard I's captivity and John's regency. The role of the king in early Robin Hood legend is the ultimate authority, granter of pardon, and the only one to whom Robin submits (Holt 1982, 21). This reflects the ethic of the free man as one who is only subject to the law, and therefore to the law's representative in the crown. The evils he fights are not portrayed as the kind of feudal inequalities which modern storytellers attribute to the character but with the threats to the way of life of the northern free man found in corrupt royal officials and the rise of debt and the resultant commodification and monetization of land. Robin Hood character is about justice, but not revolutionary justice; he opposes the corruption of the elites who violate the norms of society, but not the elites themselves (Holt 1982, 10). Robin Hood's liberty is not comprised of documents or lists of rights but is embodied in his way of life, the way of life of his landed allies. Sherwood Forest is liberty, and those who challenge the right of the outlaws to life in their own country by their ancestral customs are tyrants and enemies of England and the true King.

The center of Magna Carta's conception of liberty, then, must be understood as a way of life which was epitomized by the small landholder of the North. Liberty understood as a *habitus* meant that the truth of liberty is one writ upon the heart of a free man, to borrow the metaphor from the Book of Hebrews, and is deeply tied to a life which embodies liberty in its practice. The result of this conception is an understanding that any attempt to dogmatize liberty or reduce it to a set of laws or maxims will necessarily fail, much as Magna Carta failed in its goal to protect the way of life of the small freeholder against the rise of dependency as a way of life in the "Dark Ages of Magna Carta." Any attempt to preserve liberty through politics or positive law is fundamentally compromised by the difference in the means by which these are practiced. The law of liberty, understood symbolically the way that Salisbury understands Natural Law, is necessarily heuristic, based on the experience of the life of the free man and subject to reformulation as the experience finds itself articulated within changing contexts.

Because liberty is an internal virtue rather than an external exercise, the center of liberty is the soul rather than the law. Culture and law change, but the cosmos never change, and therefore the soul as the element of the eternal in man does not change. The study of liberty, then, must focus on the lived experience of liberty and seek the common element within disparate cultural expressions. This lived experience, however, has an objective existence and nature which is distinct from the language symbols by which it is expressed, creating an opening for the corruption and deformation of the symbols in service to political or ideological ends. This corruption takes the form of the ideological definitions of liberty which ultimately serve to define liberty as its opposite and destroy the possibility of understanding liberty by depriving the language of politics of sufficient terminology. Orwell's use of the phrase "liberty is slavery" in Ingsoc's doctrines demonstrates the character of ideological thought which seeks to appropriate this symbol to its own ends. Ideology is the very opposite of liberty; as liberty is the experience of a free soul and its desire to seek the eternal good, ideology is the force which compels a conformity of spirit, such that all are truly identical and equal in their subservience to ideological ends.

The essential understanding of liberty beginning with *Policraticus* derives from Salisbury's link between the Pauline *renovatio* and Aristotle's transformative *hexeis*. By finding an equivalent of experience in the formation of virtue and the rebirth of *homo spiritualis*, Salisbury manages to tie together the experience of Christian renewal with experience of liberty. He identifies the Good Man, the Free Man, and the Wise Man as a single archetype in the person of the Redeemed. The *corpus mysticum Christi* becomes synonymous with the community of free men, wherein spiritual and ethical freedoms are simply two expressions of a unitary concept of Liberty. The essential medieval problem of differentiating the membership of the Church with the membership of society, arising from the transition of Christianity from a volitional faith into a hereditary faith, is served through both St. Augustine and Salisbury's distinction between the heavenly, spiritual church and the earthly institution of the Church. As both authors describe, the earthly institution of the Church is split into two parts, the Church of God and the Church of Satan, wherein the former are true Christians who have received the *renovatio* of the soul, and the latter are imposters who seek to undermine the faith through corruption. Likewise, by linking these two concepts, this division also exists in society between the Free and the Unfree, the former who live their lives in virtue and order, and the latter who not only live in disorder but seek to subjugate the Free to their own vice. A free law, then, must necessarily discriminate between these two groups and protect the exercise of virtue and liberty from the attempts of the vicious to destroy it. Equality before the law does not refer to individuals, but to jurisdictions and judgments; the evildoer is not treated alike to the righteous man, but like cases should be treated alike.

Common Law must be understood phronetically rather than noetically as a result of this understanding of liberty. Common Law thinkers of the 12th Century understood liberty as an expression of customary law which emerges organically from the practice of the free life. The relationship between the internal experience of liberty and the external behaviors called "rights" is tenuous, such that law must be made and interpreted through prudential rather than rational means, such that Common Law

understands its relationship to universal truth through precedent or analogical treatment of issues through comparison to past judgments. As Salisbury describes, the golden mean between servility and libertinism is necessarily relative to the individual, as with all other virtues, thus making a kind of civil tolerance essential to liberty. As with Salisbury's definition of tolerance, however, this extends to those whose external manifestations of liberty differ while remaining fundamentally true to the ideals of liberty, not to those who devote their lives to slavishness or libertinism. This civil tolerance, or the culture of liberty, cannot be fixed in written law by its very character as a product of prudence, and therefore any system of law based on reason alone must necessarily fail to capture the essence of liberty through dogmatization of its externals. This is the essential failure of all attempts to preserve liberty through constitutional thought; one cannot write down a way of life or a prudent arrangement between communities. At best, constitutionalism can deflect or slow movements opposed to liberty, but it can never protect liberty from a society which desires to abandon it.

Therefore, to understand the liberty of Magna Carta, one must understand the lives of those who Magna Carta was enacted to protect. By rationalizing away the particulars in search of a universal liberty, the actual content, or *haeccitas* of liberty is lost, leaving meaningless exterior forms devoid of the experience of liberty which animated the men who fought and died against King John. The manifestations of their opposition to dependency and arbitrary power, in their advocacy for feudal norms of property, opposition to the replacement of the county government and muster by salaried administrators and soldiers, and their role as warriors, judges, and practitioners of the law demonstrate the character of their liberty. These manifestations are not strictly necessary to the free life; the times do change, but the cosmos do not. The experience of liberty as understood by the small landholders of the North of England in the year 1215, however, cannot be dispensed with.

Epilogue

This study spent a great deal of time discussing the “Myth of the Free Man” without discussing what exactly the Myth was and is. Part of this was due to the fact that the dissertation is aimed at members of a culture who would not need such a description, as the myth forms an integral, if not the central, symbolism of their self-identification. The whole of the work would be largely meaningless to a reader outside of this tradition, as demonstrated by deeply flawed attempts by foreign scholars to interpret the myth in early modern and modern contexts, and so an attempt was not even made to make it intelligible outside of its cultural tradition. The other part of the reasoning behind this exclusion is that the language of liberty is an obscuring rather than clarifying literature due to the ideological capture of the language. Liberty has as many definitions as there are politicians and ideologues who see benefit in warping language to their own ends. The modern insensitivity to transcendental meaning makes any discussion of liberty like a debate between speakers of mutually incomprehensible tongues. Therefore, any attempt to explain the myth is inseparable from an explanation of its culture in time, and therefore will be unpersuasive to those alien to the culture from which the myth emerged.

In the most abstract way of describing it, the Myth of the Free Man is an ideal form of life impressed back on mythological history, which both reflects contemporary values on the past while simultaneously preserving ancient values in the present. The function of the myth is that it explains the present-day experience of liberty within the context of mythological imagery, both religious and historical: what Allen Tate called the “greater myth” of divine history and the “lesser myth” of a “People’s History” (Arbery 2010, 68). This is not to say that the myth is a lie or an untruth; such thinking is a vice of modern positivism which lacks an ability to comprehend any part of reality shrouded in symbolism or parable because of the degeneration of the power of imagination in the modern mind. The myth is true insofar as it reflects a truth about liberty, relying on a symbolic language of transcendent experience which stands for a parallelism of experience in its interpretation; the

symbolism is neither universal nor particular, but intelligible to those with a comparative symbolic language born from participation in the full range of human capability. Attempts to grapple with this language through individualism alone therefore ultimately fail due to the limited horizons of materialist thought. Individualism is simply difference, which may just as easily be due to eccentricity or perversity of character rather than completeness of personality, while a true individual personality is a private inner space where one is conscious of oneself as a self and one's relationship to both transcendent Being and a community of other selves (Weaver 1948, 181). Therefore, the experience of liberty incorporates the whole personality of the individual, given the fact that religious, political, social, and economic aspects of personality are largely indistinguishable through the single thread of human consciousness. This essential unity underlies the entire structure, as the personality of the individual man is mirrored at the highest levels. The greater myth of religion is tied to the lower myth of historical drama through the single train of human consciousness, and the loss of one or the other leads to the destruction of both and finds expression in violence and social chaos (Arbery 2010, 68).

The true origin of the myth was found in the Norman interpretation of Anglo-Saxon history rather than in the Anglo-Saxons themselves; no such myth existed in Anglo-Saxon society, which did not possess a language or literature of liberty. The very language found in Anglo-Saxon literature demonstrates a lack of the kind of transcendent and moral symbolisms found in later English writings on liberty. Words like *freoh man* and *freodom* refers to not-slave, while *freols* was a type of privilege and legal immunity from prosecution. The *ceorl* referred to a social class defined by birth alone, and one which lost many of its privileges and status over the course of the Anglo-Saxon centuries. The *ceorl* of St. Edward's time was not the same as it was during the *warband* era, much less a predecessor to the yeoman.

The important element of Anglo-Saxon status to remember is that Anglo-Saxon feudalism rose out of the warband system of the Germanic migrants, wherein feudalism institutionalized these relationships through the distribution of lands and heritability of rank (Loyn 1984, 32; Pocock 1987, 97). This truth is reflected in the Anglo-Saxon laws, which uniquely retained elements of antiquity into the 11th Century which had been purged from Continental laws by the introduction and assimilation of Roman law to the courts of the Carolingian successor states. Frankish laws of status represented a system of governance where hierarchy was highly nested and the king had relatively few vassals-in-chief, an outgrowth of the collapse of the Carolingian monarchy (MacFarlane 1991, 11; Stubbs 1979, 239). In contrast, the origins of the Anglo-Saxon laws of status lay in the distant origins of Anglo-Saxon society and certainly predate the settlement of the land when conditions of society were far more equal (Campbell 1982, 59). It is for this reason that many scholars like Stubbs look to the works of Tacitus, especially the *Germania*, for the beginnings of Anglo-Saxon status, and while Stubbs's Hegelian-like romanticism distorted his history, this research was not altogether fabricated. Many elements of the Germanic warband remained embedded in the law. In the earliest laws, the source of the *gesith* was as a member of the king's companions or *comitatus*, which evolved into an inherited position by the time of Æthelburh of Kent (Oliver 2002, 155; Pollock and Maitland 1898, 33). This arrangement of society as a military organization remained throughout the Anglo-Saxon period and may have had an effect on William I's choice to retain many of the military characteristics of the social order.

It was not the Anglo-Saxons themselves, but the Norman interpretation of Anglo-Saxon society which formed the basis of the Ancient Constitution and the Myth of the Free Man. The notion of the nation-in-arms as a form of community derives from the unique Norman blend of Anglo-Saxon and feudal institutions, which abolished allodial landownership but maintained the broad base of small landholders which formed the foundation of Anglo-Saxon local government. Rather than being loyal to clans or magnate families like the Godwinsons or Ælfricsons, with loyalties highly pillarized, the Norman

system led to a pattern of cross-cutting authorities which maximized the power of the mass of free landholder-soldiers in the county courts (Oleson 1955, 61; Wormald 1994, 10). In the tellings of the mytho-historian, however, this is not a new form of government but a restoration of the just government of the virtuous ancients, wherein the evils and betrayals of the regional magnates, especially Godwin, have been expunged by an act of God's mercy. The idea of the nation as a band of warrior-brothers claims to represent the authentic order of English society, which is not only expressed through law, such as Common Law equality and the ideals of Community in the Assize of Arms, but also through myth and history (Warren 1977, 379). Arthur's Round Table serves as the Normanized understanding of the Anglo-Saxon mythological social order centering on the *gesith*, or the King's companions. While the details of the various histories change, this notion of the realm as a community of friends in arms remains constant until the early modern period and the rise of contractarian notions of national community.

The role of Magna Carta in this myth is that it stands as the epitome of the free man. In its own time, it serves as both a legal charter and a rhetorical device which demands that the landholding classes be permitted political legitimacy in the manner dictated by their customs and ancient usages. In this way, the specific terms and rights of the charter become secondary in the perpetuation of the myth in favor of the understanding of Magna Carta as a symbol of 13th Century liberty and constitutionalism revolving around the Free Man (Holt 1992, 397). It is in this way that Magna Carta is truly a statement of the ancient laws, in that it represents a claim and symbolizes the legitimate political ideas of a community of men who predate historical remembrance. The positivist historian will be keen to say that Magna Carta did as much to set custom as it described pre-existing custom (Holt 1992, 300). This is not in dispute, but it is also not relevant. Its claim to state ancient and timeless truths stems from its character as a symbol and not merely as a document.

As mentioned in the conclusion, the result of Magna Carta was not a strengthening of the small landholders but instead their continued displacement by both the burgesses and the high nobility. While there were certainly other factors involved, it is important to remember that Magna Carta itself contributed to this decline by substituting the legal forms of liberty for the cultural, ethical, and social substance. By resorting to legalisms, the way of life that Magna Carta was meant to protect was instead eroded by the rise of legal formalism in the 13th and 14th Centuries, where strict adherence to legal procedure predominated over equity in judgment, admission to the bar was closed to the bulk of the populace, and royal officials began to take the place of the county jury in many jurisdictions. In the place of the Myth of the Free Man, two alternate ideals arose in the following centuries which each claimed to represent the ideal Englishman. The first was the ascendant aristocratic narrative, epitomized by Edward III, where the upper nobility attempted to sever themselves from the “linking class” of the small landholders. This “knightly culture” was a product of the aristocracy and revolved around the notion of a transnational fraternity of blood; the noble families of England had more in common with their cousins in France than the common Englishman. The rise of late medieval chivalric ethics, a product of the breakdown of the feudal system which had bound the lower levels of society to the upper, distinguished the aristocratic man by his culture and breeding from the bulk of society (Painter 1961, 15). Men like Edward III and the Black Prince demonstrated the character of this competing culture, whose pageantry and display were devices to narrow the range of the ideal to men of both wealth and proper families. The second competing narrative was that of the rising burgesses, whose culture focused around the notion of the business contract as the central social symbol, a materialist interpretation of social interaction, and a unidimensional or “flat” community structure which divided men into either subjects or sovereigns. This division will be further flattened during the Renaissance through the attribution of sovereignty to the State, so that the person of the sovereign disappears into an institution distinct from society itself. The core constituencies of these two myths

were the great estates of the English south and the coastal boroughs, whereas the periphery, the North and West Midlands, remained the home country of the Free Man myth, just as they were at the time of Magna Carta. The Robin Hood story was, after all, a product of Yorkshire, not Nottinghamshire, and the association of Robin Hood with Sherwood, like his status as the Earl of Huntington, was a product of Victorian revisionism (Holt 1982, 74).

This study has already discussed the so-called “Dark Ages of Magna Carta,” and so little more needs to be said other than that the absence of literature about Magna Carta correlates with the low-point of the political influence of the small landholder. What is important is to note the resurrection of the mythology by 17th Century Whigs, whose civic individual is armed, landed, and represented in the Commons (Pocock 1975, 450). Magna Carta’s rediscovery in this period is part of the Whig interest in the concepts of liberty and rule of law, although shorn of many of the religious and ethical implications from the original 13th Century version. By the time of thinkers like Coke and Selden, liberty has been disconnected from the life of the soul and applies to participation in politics and society alone; this is the reason that Coke’s famous dictum reverses the causality of rights and liberty, making liberty a product of rights and law rather than the other way around in his statement in the First Institutes, “And well may the Laws of England be called Libertates, quia Liberos faciunt” (Holt 1972, 18). In addition to this major difference, the emphasis put on written law by some Whig scholars distinguished them from their medieval predecessors. For example, Selden attaches feudal liberty not to Germanic tradition but the late Roman foedus, such that liberty is more related to written law and charters rather than unwritten custom (Pocock 1989, 288). By putting the emphasis on the foedus rather than custom and usage, Selden is influenced by the burgesses charter-tradition of liberty which understands liberty more as a special form of property than the moral character of an individual. This tradition emphasized abstract reason as the ultimate source of the law due to the charter as the foundational symbol; unlike the older Common Law tradition, the charter had a definite origin within history in the will of concrete actors,

thus shared more in common with Roman law than feudal law. On the other hand, Coke's "reason" was not Aristotelian nous but experience, or phronesis, better translated as reasonableness (Pocock 1989, 267). Coke affirms the medieval notion of a timeless, ancient foundation to the law which necessitates charters, including Magna Carta itself, holding a subordinate status to unwritten law.

Thus, beginning in the 17th Century, one sees two traditions of the Free Man: the agrarian myth of the periphery and the appropriation of the myth by the urban classes. "Court Whigs" reject the participatory model of liberty found in Magna Carta and the older medieval tradition, focusing on an understanding of liberty through the privatization of an individual life consumed by its financial interests (Pocock 1975, 460). This brand of early modern political thought strips the myth of its aspects of community, transcendence, and relationships to place and time, leaving only economic and materialist elements in place, in order to force the myth to conform to an urban lifestyle with which it is deeply opposed. One of the great victories of the Parliamentary partisans in the English Civil War was their appropriation of the legacy of English Constitutionalism, despite the gnostic ideology of Puritan political theory. The establishment of an earthly Kingdom of God, the regicide state, and the Puritan pre-millennial eschatology are a stark break with both the Common Law historiography and even the pre-Magna Carta post-millennial apocalypticism. English Republicanism was not the fulfillment of the Ancient Constitution but a "radical ideal" instituted at the point of the sword by Cromwell's army, severing the connection between the constitution, Common Law, and landholding (Pocock 1975, 380). Rather than a practical government looking toward the past for insight about a just social order, the English Republic was a gnostic revolutionary state seeking the fulfillment of a Puritan "Fifth Monarchy" and the government of the returned Christ in Glory. The collapse of the Puritan state with the Restoration may have limited the eschatological enthusiasms of the urban tradition, but not its reach or eventual predominance over English life in 1688. The Glorious Revolution served to cement their political philosophy in English Constitutionalism, eventually leading to the replacement of Coke by

Blackstone and the reduction of the Ancient Constitution to a simple social contract establishing a right to depose and elect kings (Pocock 1989, 231).

In contrast, the “Country” tradition maintained medieval elements of the Myth of the Free Man through this period, although their power was limited compared to the predominance of the cities. During the Interregnum, Cromwell’s advisor Ireton is one of the major spokesmen who explicitly link English citizenship with the free landholder and the land itself with Common Law (Pocock 1975, 376). This understanding of liberty and English constitutionalism, however, remained a dissenting voice under the Cromwellian dictatorship, and served as the inspiration for the pre-Burkean thinkers of the next century. The major distinction between the rural and urban political theories is the role of attachment to the soil as a conductor of memory in the form of tradition and ancestry (Smith 1985, 27; Weaver 1948, 68). Whereas English republicans would find it necessary to repudiate much of the Common Law in favor of a doctrine of Parliamentary supremacy, they would differ from the English tradition of rule of law as set down by writers inspired by Magna Carta like Bracton and Coke, which focused on maintaining the integrity of laws which represented an understanding of traditional ways of life in the counties. A way of looking at this is to see Burke and Paine as the two English representatives of the mythology in the latter 18th Century: the first retains liberty by inheritance focused on the Common Law and English identity, and the latter understands it as an element of universal reason (Pocock 1989, 236). It is a mistake to associate Burke’s Rule of Law with what passes for Common Law jurisprudence under early modern political regimes. Burke’s use of precedent is not as legal literalism but symbolic of principles of continuity and reference as the drivers of politics (Weaver 1948, 48). Burke does not substitute the exterior, procedural form of law for the constitutional principles of Rule of Law.

This emphasis on the land is central to distinguishing the tradition of Magna Carta from the early modern tradition which co-opts its central symbolisms. Property ownership serves as the basis of

political participation because it forces the individual to react to his surroundings through the lens of obligation and responsibility, as well as grounding the individual through the tutelage of experience unmediated by social buffers of urban life (Weaver 1948, 133). Property forces the individual to understand his existence in time by expanding the horizon of his expectations and responsibilities to the distant future and beyond his own lifetime to his heirs. To understand oneself as both heir and trustee is to place oneself in continuity with ancestors and descendants in a community of blood and soil which includes the living, the dead, and they yet to be born. The commercialization of property strips its moral aspects of permanency and ability to provide self-sufficiency, turning it into another market commodity whose only value is the immediate profits it can provide (Pocock 1975, 431). By emphasizing the immediate gratification of desires instead of the role of property holder as trustee for the future, commercial property becomes another means to satisfy the passions rather than a tool to focus the soul on eternal expectation. Where traditional property creates permanence and stability, commercial property creates anxiety and uncertainty, making its owner subject to the whims of the market and creating the modern paradox wherein the rich are less free than the poor. By subjecting the land to market fluxuations, the landholder becomes just as subject to the business cycle as the urban laborer, but unlike the laborer, the landholder has more to lose: his land, his traditions, and his way of life (Arbery 2010, 39).

The role of urbanism in restricting liberty is that it shelters the individual from the reality of nature and suffering, permitting the Lockean “mind of logical simplicity” which understands reality as a game of counters and becomes dismayed when reality fails to conform to its logical game (Weaver 1948, 107). Because liberty is fundamentally a matter of a truly free will, in every sense of the word, urbanism’s role in disconnecting the mind from reality forces a subjugation to a false understanding of Being, based upon abstract theories and flawed axioms. Without valid input based in reality, the individual is incapable of making rational decisions; the “rationalism” of 18th Century politics founders

on the false grounds upon which it is founded. One such flawed axiom is the artificial distinction of moral and economic life, such that what one does five days of the week is disconnected from what is done on the other two. The urban tradition of Addison, Mandeville, and Montesquieu divorce personal and social morality through emphasis on enlightened self-interest, so that the urban individual is living two unrelated lives whose moralities are fundamentally incompatible (Arbery 2010, 69; Pocock 1975, 465). Whether the pursuit of self-interest by all eventually becomes the common good or not is utterly irrelevant to the problem. The problem is that the individual is torn in two by competing and irreconcilable value systems whose effect is inevitably to confuse and obscure reality. For five days of the week, the individual follows a life dedicated to the proposition that happiness comes from material goods, while for the other two, he follows a different life with different values. In contrast, the Myth of the Free Man focuses on the role of “knowledge of the heart” or “faith of the fathers” as the source of happiness in this life, which makes the man truly free of the mob, evil rulers, factionalism, envy, and fear of poverty (Arbery 2010, 82). Only by acknowledging the unity of Being, the insolubility of personality, and a pursuit of virtues dictated by clear perception of reality is it possible to escape the schizophrenic tug of urban commercialism. Only by returning to transcendent and eternal values and reestablishing an essential unity of lifestyle within those values can one be free of the forces of materialist society and the market.

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