



Introduction

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This volume contains a collection of papers presented at the twenty-second British Legal History Conference held at the University of Reading. The conference coincided with the 800th anniversary of Magna Carta; the conference was thus concerned not only with Magna Carta itself but also with its enduring legacy. The theme around which this legacy is explored is that of challenges to authority and how these challenges resulted in the recognition of rights. Magna Carta now occupies a quasi-mythical status – particularly within common law jurisdictions – as an instrument which gave people liberty. Lord Denning described it as ‘the greatest constitutional document of all times . . . the spirit of individual liberty which has influenced our people ever since’.¹ Such a description omits the struggle which gave rise to these rights. It was the barons’ challenge to King John’s authority that gave rise to the instrument which gave them their rights. While King John only briefly maintained these rights, Magna Carta still represents a form of law created by a challenge to authority. King John affixed his seal to the draft ‘Articles of the Barons’ in June 1215 at Runnymede, not through a reflective process of law creation but because rebellious barons compelled him to do so. Their forceful challenge is apparent within Magna Carta itself; clause 61, the ‘sanctions clause’, announced the formation of a group of twenty-five barons appointed to ensure Magna Carta’s enforcement, through the very compulsion of King John if necessary.

This mechanism of legal change – a challenge to authority which recognizes the challenger’s rights whilst preserving the authority itself – forms the central concern of this work. This volume provides both a contribution to the work concerned with legal change and also

I am grateful to Charlotte Smith for commenting on an earlier version of this introduction. All errors and omissions are my own.

¹ Lord Denning, ‘Runnymede, Fount of English Liberty’, *The Times*, Wednesday, 9 June 1965, p. 13.

a range of different legal histories which explore legal changes within particular areas. There are, of course, different forms of legal change. The most obvious form arises as a result of the legislature's decision to alter a preexisting law or laws or to introduce an entirely new set of laws. To this legislative change, one must add changes brought about through the interpretive processes of a judiciary implementing legislation. Judicial decisions are another means by which legal change occurs. Legal change can also, probably, be brought about by changed practices or customs exercised under the law.² The question of why law changes has attracted the curiosity of both theorists and legal historians. Different, sometimes complementary, sometimes competing, explanations have been advanced.

Historians of English common law have traditionally explained legal change as an internal process. Frederic William Maitland, in establishing legal history as a field of study, largely assumed that the intentions behind legal change typically coincided with the changes which occurred.³ S. F. C. Milsom disagreed with Maitland's assessment that intention and effect were largely congruent. For Milsom, in considering twelfth-century English law, found that juristic accident was the principal cause of legal change. While certain regularization of the law was intended, the results were not those intended.⁴ For Sir John Baker, legal change in the common law arises, in large part, through the thoughts and actions of lawyers: '[T]he one circumstance which was undeniably unique to England' was that English lawyers were trained in 'advanced schools of municipal law' and not in academic faculties.⁵ Change was brought about as these lawyers, often imperceptibly and working together (even if unconsciously so), worked upon their political and legal systems. Examining the development of the common law of obligations, David

² These largely accord with the classic forms of change identified by Max Weber (legislation, mutation of custom and judge-made law); note, also, Wilder's four further motifs of legal change in legal deeds, voice-supersession, legal fictions and anthropological expansion: Colin F Wilder, 'Teaching Old Dogs New Tricks: Four Motifs of Legal Change from Early Modern Europe', *History and Theory* (2012) 51(1), 18–41.

³ Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 1895).

⁴ S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge University Press, 1976). On Milsom's conceptions of legal change, see John Hudson, 'Milsom's Legal Structure: Interpreting Twelfth-Century Law' 59 *Tijdschrift voor Rechtsgeschiedenis* 47 and Robert C. Palmer, 'The Feudal Framework of English Law', 79 *Mich. L Rev* 1130.

⁵ J. H. Baker, *Oxford History of the Laws of England 1483–1558*, vol. 6 (Oxford University Press, 2003) 12.

Ibbetson has offered a largely congruent analysis. A ‘principal motor’⁶ of legal change has been the need to articulate formerly ambiguous rules combined with the ‘fitting of the law into a theoretical model’.⁷ Even more important changes occurred in the common law as a result of the conceptual re-characterization of claims by litigants and their lawyers to avoid irksome procedural rules or to take advantage of a more favourable legal process. The result is not always tidy. Similarly, Simon Deakin has observed,⁸ by reference to systems theory and the economics of law, that an evolutionary model of change explains the way in which the doctrine of precedent operates to combine stability with change. In this process, though, many inefficient rules will persist to survive in the face of selective pressures. James Gordley has examined changes brought about by a different professional elite. Modern private law in Europe, he has argued, derives its structure from the work of the late scholastics, a group of sixteenth-century theologians and jurists, who synthesized the intellectual traditions of Roman law and Aristotelian philosophy and incorporated elements of the Christian tradition derived from canon law. The natural lawyers who effected a scientific rationalization of the law borrowed, in turn, their work.⁹ It is ‘hard to underrate the achievement of the late scholastics’¹⁰ in understanding European private law.

Legal historians in America, in contrast, have frequently identified factors external to the law and legal profession as responsible for generating legal change. Influenced by the law and society movement in the 1970s, historians have analysed legal change in America as driven by social and political forces in which legal change is a response to these forces. Thus Lawrence Friedman argued that law is ‘not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as the mirror of society . . . The [legal] system works like a blind, insensate machine. It does the bidding of those whose hands are on the controls’.¹¹ Societal change drives legal change. Morton Horwitz’s essential thesis is that nineteenth-century American judges,

⁶ David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 2001) 295.

⁷ *Ibid.*, 296.

⁸ Simon Deakin, ‘Law as Evolution, Evolution as Social Order: Common Law Method Reconsidered’, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2640917.

⁹ James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press, 1991) and *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press, 2006).

¹⁰ James Gordley, *The Jurists: A Critical History* (Oxford University Press, 2013) 99.

¹¹ Lawrence Friedman, *A History of American Law*, 3rd edn. (Simon and Schuster, 1973) 12.

allied to mercantile and entrepreneurial interests, directed a social change and so transformed the law of the early republic.¹² Anticommercial legal doctrines were destroyed or undermined as the legal system shed its earlier eighteenth-century commitment to regulating the substantive fairness of economic exchange; a law once paternalistically protective came to facilitate individual desires, reshaped to the advantage of men of commerce and industry. In England, Patrick Atiyah advanced a similar sort of analysis of legal change wrought by theories of laissez faire capitalism within nineteenth-century English contract law.¹³ The theses of both scholars have been criticized,¹⁴ but the attraction of their arguments and approach remains.

Another, simpler explanation for legal change lies in the accident of circumstances. This form of explanation is most closely associated with Brian Simpson. While he began his examinations of legal history with internal doctrinal studies,¹⁵ he moved away from these to undertake detailed empirical work examining the precise contexts in which law changed. These often-granular studies of particular cases presented serendipity as a major factor driving legal change. There was no theory behind the changes: ‘greater understanding of cases does not generate general theories; instead it brings out the complexity of affairs and the extreme difficulty of producing generalizations which have any empirical validity.’¹⁶

Certain legal historians have also advanced what can best be described as monocausal theories of legal change. Robert Palmer boldly challenged Milsom’s idea of internal conceptual legal development and argued that changes in English medieval law were brought about by the great changes

¹² Morton J. Horwitz, *The Transformation of American Law 1780–1850* (Harvard University Press, 1977).

¹³ P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon, 1979).

¹⁴ Simpson found that Horwitz’s propositions were weakly supported in the evidence and that the legal changes he identified in contract were illusory: A. W. B. Simpson, ‘The Horwitz Thesis and the History of Contracts’ (1979) 46 *University of Chicago Law Review* 533. On the importance of the disagreement and its consequences, see Warren Swain, ‘A W B Simpson’s, “The Horwitz Thesis and the History of Contracts”’ (2016) 35 *University of Queensland Law Journal* 115. Lobban, in turn, questions Atiyah’s thesis on the basis that changed thinking in politics and economics was not the driving force leading lawyers to rethink their subject: Michael Lobban, *The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law* (Oxford University Press, 2010) 297–98.

¹⁵ *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975); *A History of the Land Law*, 2nd edn. (Clarendon Press, 1986).

¹⁶ A. W. B. Simpson, *Leading Cases in the Common Law* (Clarendon Press, 1995) 12.

wrought by the Black Death. These great changes ‘derived not from specifically legal thought but from governmental policy responding to drastically changed social conditions’.¹⁷ The Black Death created demographic and economic problems which a ruling elite reacted to by both obliging its own class to meet their obligations while coercing lower social orders to stand by their obligations. The new regulatory and directive functions taken by government transformed the common law in the process. Another such example of monocausality is found in Daniel Klerman’s argument that the legal evolution of the common law can be explained by the financial incentives operating upon the judiciary: simply put, before 1800 two structural features of the English legal system were that judges received a fee income and courts had overlapping jurisdiction with the result ‘that competition among courts led to a plaintiff bias in the common law’.¹⁸ Institutional structure thus caused substantive legal in the English law of obligations.

No consideration of legal change would be complete without reference to the work of Alan Watson. In a range of different works, Watson advanced a variety of theories of legal change. Central to his thinking is the idea that legal transplants, ‘the moving of a rule or a system of law from one country to another, or from one people to another’,¹⁹ have been common throughout history and provide the principal explanation behind legal change. For Watson, there is no simple relationship between a society and its law because of these patterns of borrowing.²⁰ These transplant mechanisms, though, are controlled internally by legal professionals.²¹ Watson’s theory of legal transplants has not been without its critics.²² In addition to legal transplants, Watson has identified factors

¹⁷ Robert C. Palmer, *English Law in the Age of the Black Death, 1348–1381* (University of North Carolina Press, 1993) 299.

¹⁸ Daniel Klerman, ‘Jurisdictional Competition and the Evolution of the Common Law’ (2007) 74 *University of Chicago Law Review* 1179, 1220.

¹⁹ A. Watson, *Legal Transplants, An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974) 21. His theories have not been without controversy.

²⁰ A. Watson, *Legal Transplants*, 2nd edn. (Athens, GA: University of Georgia Press 1993) 107.

²¹ *Failures of the Legal Imagination* (Edinburgh: Scottish Academic Press, 1988) chs. 1 and 2. See also R. Cotterrell on this professional elite: ‘Is There a Logic of Legal Transplants?’ in D. Nelken and J. Feest (eds.), *Adopting Legal Cultures* (Hart Publishing, 2001) 85.

²² The fiercest of these criticisms has come from Pierre Legrand, who denies that a rule can be transferred from one system without changing its content: ‘The Impossibility of “Legal Transplants”’ (1997) 4 *Maastricht Journal of Comparative Law* 111; ‘The Same and Different’ in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003). Allison accepts that transplantation

both relevant to legal change and also determinative of particular change; the interaction between these individual factors are decisive in any instance in determining the legal change.²³ There are two particularly important factors:²⁴ first, the source of law available to the lawmaker for the sources available effects the pattern of legal development; the second is the pressure force, 'the organized person, persons, recognizable group or groups who believe that a benefit would result from a practicable change in the law'.²⁵

The collection of papers in this volume points to another distinct form of legal change: the challenge to authority and the resultant recognition of rights. These chapters recognize that while different forms and ideas of authority have shaped law, historically the law has also been molded by challenges to authority brought both to assert and to seek the recognition of rights. This process combines many of the different forms of legal change already identified. These chapters examine how challenges to social, economic, political and doctrinal authorities have acted to shape rights – both public and private – over time since Magna Carta. In this sense, Magna Carta represents the beginning of a process by which rights are established in a wide variety of areas, over time and place, over public and private authority. In seeking to depict the significance of Magna Carta, Surrey County Council and the National Trust commissioned an artwork by Hew Locke, *The Jurors*.²⁶ Situated in the centre of the empty meadow that is Runnymede, this magnificent sculpture constituted of twelve intricately worked bronze chairs arranged in a rectangular fashion, as if around a table, invites analysis and discussion. Upon each chair, front and back, are depicted particular individuals and groups and the rights established around the world by various challenges to established authority. The work within this proposed volume constitutes just such a form of sculpture, in literary form and composed by leading legal history scholars from many different countries.

The collection is introduced by Sir John Baker in his explanation of how a document agreed upon in a small English meadow on the banks of

occurs but is critical both of the theory (that it is both flawed and based on unconvincing empirical work) and the success of the transplantation processes: J. W. F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Clarendon Press, 1996).

²³ Alan Watson, 'Comparative Law and Legal Change', (1978) 37 CLJ 313.

²⁴ The others are opposition force, transplant bias, law-shaping lawyers, discretion factor, generality factor, inertia and felt needs: *ibid.*

²⁵ *Ibid.*, 324. ²⁶ <http://artatrunnymede.com>.

the Thames came to be so much more than the sum of its parts. Magna Carta was both produced by a challenge to authority and also gained its importance as a result of later challenges to authority made during the Stuart era. As Baker explains, the immediate centuries after Magna Carta gave little indication of its prominence. Magna Carta, particularly the due process clause, became important during the last years of Elizabeth I's reign as Puritans raised it in an attempt to protect themselves from religious challenges. These Puritan references led to the use of Magna Carta in courts. It was Sir Edward Coke, though, who used Magna Carta as a means to quiet the challenges brought about by a Stuart monarch – a Scot with absolutist tendencies – to preserve the structure of the rule of law within the common law. It was thus from the early seventeenth century that the myth of Magna Carta emerged. Baker's chapter demonstrates how a cohort of lawyers has brought about legal change, but the underlying purpose behind this change lay in their quest to challenge a new Stuart authority in recognition of rights.

Legal change, as Watson has observed, can be brought about by pressure forces. That these forces can be brought beyond the legal profession is apparent from Professor Musson's chapter. He examines an earlier period, from the late thirteenth century, to display the use of Magna Carta in the language of complaint in the later Middle Ages. Attitudes towards Magna Carta were conditioned to a great extent by the fact that challenges invoking the Great Charter were aired within the public domain. Perceptions of and responses to Magna Carta were also engendered in more rarified and private realms, notably amongst the legal profession and those involved in the administration of justice through immersion in legal texts and in the course of legal training. Bespoke volumes of statutes were produced from the early fourteenth century onwards, not only for lawyers but also for the educated peoples of England. Musson undertakes a fresh examination of Magna Carta's significance for contemporaries during the late Middle Ages, through a focus upon the illuminated miniatures contained in such statute books, and explores what the images reveal about the reception of Magna Carta and related contemporary discourses. In doing so, the essay seeks to understand the power of the image as a medium through which the law's authority is manifested to the public. Textual and visual sources are employed to explore how expectations of royal justice and the exercise of royal power were expounded and contested in the late Middle Ages. The essay examines the different ways in which challenges to royal authority and the status quo were manifested and assesses the extent to

which the invocation of Magna Carta itself created tensions between the ruler and the ruled. The conclusion considers what these sources reveal about medieval perceptions of Magna Carta and attitudes towards its inherent legal and constitutional values. While most of the images provide a positive underscoring of royal authority, there are also those that are ambiguous, satirical or leave the viewer uncomfortable and questioning the status quo. There are thus, both challenges to royal authority but also a recognition of the overriding importance to contemporaries of good governance and the qualities required of a just king. Legal changes can, thus, be slow and near indiscernible.

Professor McGlynn reexamines an important right, the benefit of clergy, thought to be provided by Magna Carta in the two centuries leading up to the Reformation. In doing so, she establishes the primacy of the common law lawyers in effecting legal change, a change that was to form the basis for some of the statutory changes of the Reformation. Chapter 1 of Magna Carta guaranteed the rights and liberties of the English church, and benefit of clergy, insofar as it applied to a clerk accused of committing a felony, was believed to be one of these rights. The benefit of clergy was further refined in 1275 in Westminster I, which provided greater guidance on its application and meant that it was also a part of the common law. In a series of cases through the late Middle Ages the practice of benefit of clergy was extended far beyond the intentions manifested in these documents. McGlynn's examination proceeds from the perspective of the criminal law and in the context of the common lawyer's thinking of the subject in the two centuries before the Reformation. She argues that it was through the efforts of increasingly active common lawyers that this extension occurred. By the late fifteenth century, though, the use of the privilege was itself questioned and then changed by parliamentary statute and became a matter clearly outside those of the Church's liberties guaranteed by Magna Carta. As this chapter establishes, the limitations to the benefit of clergy in 1536 had very different historical and historiographical implications than has been previously thought.

As McGlynn demonstrates, a right said to arise from Magna Carta was often one transformed in English law in legal challenges brought in later centuries. Professor Getzler draws attention to other rights provided by Magna Carta. While Magna Carta is usually seen as relevant in the modern world in relation to constitutional law, Getzler's essay explains the relevance of Magna Carta to private law in the accountability found in clauses 4, 5 and 6. His essay finds Magna Carta as a progenitor of modern

fiduciary principles in private law. It is Magna Carta that gave the first legislative restatement of nascent legal controls of stewardship by guardians and bailiffs which led, in turn, to the evolution of modern doctrines for the control of accountable parties such as agents, bailees, executors, guardians, trustees and directors.

The initial concern in 1215 arose from the duty of a guardian to protect the estates of his ward. Actions for account arose following Magna Carta as wards, challenging the authority of their guardians, sought to control the relationship with their guardians and to hold them accountable for the managerial control of the guardians' servants. The Provisions of Westminster 1259 and the Statute of Marlborough 1267 increased the duties applied to guardians. These feudal rights and duties are set within the greater Angevin system of accounting, which became an important part of the common law. Change occurred as the need for revenue changed and challenges were made, both directly and indirectly, to define a guardian's control over an heir's estate. Ultimately the area was transformed by new litigation procedures, but the modern law of fiduciaries is best understood with knowledge of the juristic foundations of waste and account.

That challenges to authority could occur at the highest level of state is seen in Professor Seipp's chapter. As Seipp establishes, Henry IV challenged the authority of Richard II not only in battle but also by seeking to establish a claim by law based upon inheritance. That the assertion of legitimacy by inheritance was spurious was irrelevant for Henry. The lords spiritual and temporal accepted Henry's challenge for he asserted his claim in the language of the law. The success of Henry's *coup d'état* lay in his appeal to English common lawyers: his challenge was a legal one in that he claimed a right that he had already won in a sort of trial by battle in his military success over Richard. The challenge to authority was clothed in legality, a fact that allowed England's common lawyers to rationalize and 'normalize' Henry's *coup d'état*. The nature of Henry's challenge, in other words, prevented the lawyers from entertaining 'the nagging sense that right had not been done'.²⁷ Legal change occurred, in Watsonian terms, in the form of a pressure force exerted by Henry himself as he challenged Richard's authority.

Challenges to authority, of course, continued well beyond the late Middle Ages and into the early modern period. At this point, legal

²⁷ David Seipp, 'How to Get Rid of a King', 68.

conceptions of liberty assumed a new significance. Professor Macnair's chapter reviews the reported cases before and after the glorious revolution to identify arguments based on conceptions of liberty and freedom with particular use of Magna Carta. His review seeks to establish whether or not the political ascendancy of a new ideology of English liberty and rights, summarized within the title of J. P. Kenyon's 1977 *Revolution Principles*, can be found in the cases decided by a newly constituted post-revolution judiciary. Macnair's exhaustive examination of these cases reaches the conclusion that there is a very real difference between the arguments made and the judicial receptivity to such arguments between the two periods. Simply put, 'liberty' becomes more prominent and assumes a positive value in arguments raised establishing individual rights, and there are slight analogous shifts in Magna Carta citations as the references to it rose and became more successful in terms of judicial use. This is established in a variety of different cases involving individual liberty and economic liberty. The result of these challenges, framed in the lawyers' language of Magna Carta, was, therefore, that they changed the evolution of British law.

Challenges to authority arise in different ways. Two authors within this collection, Professor Stebbings and Professor Oldham, have demonstrated the different ways and venues in which challenges can be brought. Oldham's chapter considers those challenges brought in wartime. He explores how the effects of war in the period between the 1790s and the early 1800s acted to change the way in which the rights of private parties caught up in these hostilities were recognized by English courts. He achieves this through an examination of challenges in three distinct areas of law in which wartime pressures effected a legal change: trading with the enemy, prize law and the development of *habeas corpus*. While common law judges and Parliament were, by the mid-eighteenth century, hostile to trading with the enemy, international trade became increasingly important to England's mercantile economy. The resolution of various legal challenges arising from these competing pressures effected a legal change and by 1810 trading with the enemy had, effectively, become permissible in certain instances. Prize law was an area of legal importance because of the Napoleonic wars, and the pressures of the war effected a legal change on the extent to which common law courts and the court of Admiralty were constrained by the principle of comity to honour the rulings by Admiralty courts of enemy countries. While the rulings of French courts were grudgingly honoured in the late eighteenth century, by 1810 English courts had effectively changed this position by insisting