Religious Reformation and the Law of Unnatural Death in England

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Introduction

It is no surprise, therefore, to find that "mors improvisa", sudden and unforeseen death, was universally dreaded. The certainty of death was made more terrible by the uncertainty of the labour of its coming, which might catch the unsuspecting soul unawares and sweep it to Hell.[1]

The story of how the English system of common law has confronted instances of unnatural death is long, arduous, and awkward for both general and legal historians to tell. The pinnacle of the struggle in Western legal jurisprudence to provide a remedy for premature, accidental death is perhaps best evidenced in the practice of deodand law. The word "deodand" is from *deo dandum*, meaning "to be given to God."[2] In medieval England, when an accidental death or suicide occurred by means of an animal or object, that item, or its equivalent monetary value, was turned over to the king. *Corpus Juris* described the practice as

> In English law, any personal chattel whatever, animate or inanimate, which, becoming the immediate instrument by which the death of a human creature was caused, was forfeited to the king, for sale and a distribution of the proceeds in alms to the poor by his high almoner for the appeasing of God's wrath.[3]

But the process of classifying a thing as a deodand was a serious, formal legal affair that involved inquests, juries, and judicial review.[4] Despite the ridicule it has suffered,[5] this tradition persisted in English and American common law for centuries.[6] For roughly 750 years, English communities conducted systematic legal proceedings for things like horses, wells, and ropes involved in accidental deaths and suicides before the nation formally abolished the practice in a solitary statute in 1846.[7]

This span of time obviously overlaps with an extraordinary amount of social, political, and religious change in England, as well as the rest of Western Europe. It is the goal of this paper to

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* This comment was written as a supplement to a previous article, *The Wrong, the Wronged, and the Wrongfully Dead: Deodand Law as a Practice of Absolution*, 101 Neb. L. Rev. 731, (2023).

1 EAMON DUFFY, THE STRIPPING OF THE ALTARS: TRADITIONAL RELIGION IN ENGLAND, 1400-1580, 310 (1992).

2 Anna Pervukhin, *Deodands: A Study in the Creation of Common Law Rules*, 47 AM. J. OF LEGAL HISTORY, no. 3, 237 (July 2005).

3 18 C.J. 489 (1919).

4 K.J. KESSELRING, MAKING MURDER PUBLIC: HOMICIDE IN EARLY MODERN ENGLAND, 1480-1680, 50-52 (2019).

5 The list of legal commentators who have criticized the practice is too long to include here, but Justice Samuel Cole Williams, writing for the Tennessee Supreme Court in 1916, once succinctly described the general sentiment by stating "from the outset [deodand] doctrine was deemed to be so repugnant to our ideas of justice as not to be included as a part of the common law of this country." Parker-Harris Co. v. Tate, 188 S.W. 54, 55 (Tenn. 1916). Incidentally, he was wrong on that score. *See* United States v. Cargo of the Brig Malek Adhel, 43 U.S. 210, 234 (1844).

6 Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death, and the Western Notion of Sovereignty*, 46 TEMP. L. Q. 169, 196 (1973).

7 Deodands abolition 1846, 9 & 10 Vict. c.62.

examine the historiography of the effect of changing religious attitudes, particularly those inherent in the Protestant Reformations, on the way English common law treated situations of unnatural death and, sometimes, the material components associated with the death. The scope of this examination is limited to accidental, premature deaths and intentional suicides. Other types of homicide other than so-called "self-homicides" are generally excluded, as are premature deaths from disease, non-induced starvation, and accidents not involving an object, animal, or environmental source (i.e., a tree) ending the life of a human being.[8]

Setting the Stage: A Meeting of English and Roman Law

The ancient Romans punished parricides by casting them into the sea, enclosed in a sack, accompanied by a cock, a viper, a dog, and a monkey. Can it be possible that they understood punishment any better than we?[9]

To best understand what changes in legal attitudes occurred during and after the religious reformations that took place in England and across western Europe it is essential to have a general concept of the previously existing legal scheme and, therefore, the relationship of English and Roman law that governed everyday life. The basic law of the peoples of Europe between the sixth and tenth centuries was not a cohesive body of rules imposed by a central authority, but more akin to an integral "common consciousness" of the community.[10] This changed during the eleventh and twelfth centuries with the spread of the Roman system of law that firmly adhered to the principle that customs yield to natural and written law.[11] R. W. Southern wrote of these centuries as "a time of preparation, not achievement."[12] Southern described the "big events" of this period as largely insignificant in themselves but as "conditions which made possible even more secret and momentous changes in thought and feeling and in the direction of society for both secular and spiritual ends."[13] Specifically, "personal valour, faithfulness to lord and companions, and confidence in the Christian religion . . . were the basis of all else in the development in Europe at this time."[14]

Harold Berman concurred with Southern in describing the religious demeanor of Western Christendom in the eleventh through the fifteenth centuries as a community united by allegiance to the Church of Rome.[15] Berman purposefully distinguished the legal tradition of the West (of Europe) as "not Greece and Rome and Israel but the people of Western Europe turning to the Greek and Roman and Hebrew texts for inspiration and transforming those texts in ways that would have

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[8] Deodands were, sometimes, part of legal proceedings for intentional homicides. Finkelstein, *supra* note 6 at 191 ("In all kinds of unnatural death, including intentional homicide, misadventure, suicide, and murder by an unapprehended felon, the Crown, until 1846, exacted – or was by law empowered to exact – a forfeiture.").

[9] William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995).

[10] HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION, 77 (1983) [hereinafter BERMAN I].

[11] *Id*. at 145.

[12] R.W. SOUTHERN, THE MAKING OF THE MIDDLE AGES, 73 (1953).

[13] *Id*. at 13.

[14] *Id*. at 12.

[15] BERMAN I, *supra* note 10 at 1. Berman states that prior to the late eleventh and twelfth centuries, legal rules and procedures were largely undifferentiated from social custom and from political and religious institutions. *Id*. at 50.

astonished their authors."[16] But the Romanization of English law was a slow and never fully-completed process.[17] The existing system of Anglo-Saxon customary law proved a deeply-rooted one that was only gradually infiltrated by Roman influence, largely through the introduction of writing.[18] Berman insisted that the Western legal tradition immemorially embodied a broad perspective of the sources of law which included not only the context of institutions and procedures and rules reflective of the will of the lawmaker but also "but also the reason and conscience of the community and its customs and usages."[19]

The blend of legal traditions present in medieval England has led some historians to question whether the law of deodand was a "native" Anglo-Saxon custom, an inherited aspect of Greco-Roman practice, or a characteristic of natural law universal and intrinsic to justice itself.[20] Stefan Jurasinski argued that, while Anglo-Saxon legislation generally bears no traces of Roman law, a possible exception long recognized by scholars is the practice of "noxal surrender," often cited as a precursor to deodand law.[21] The noxal surrender was the process in which an instrument that caused death without any malicious intent on the part of the owner or user was turned over to the victim's kin, not as compensation for the death, but as a ransom to prevent revenge killings and further bloodshed.[22] Roman law contained no direct parallel for inanimate objects, although it dealt similarly with living creatures involved in the death of human beings.[23] However, the Greeks did try at the Prytaneum three classes of objects: (i) unknown murderers, (ii) animals, and (iii) inanimate objects (stones, beams, pieces of iron) that had caused the death of a human.[24] Ultimately, it is difficult to say with certainty whether any Greco-Roman practice contributed to the law of noxal surrender in England, as the custom there appears to predate any written expression of the law. However, the question remains crucial, as the response of the state during and after the Reformation to deodand practice must be examined as either a response to the custom of native ancient culture or to the law of Rome.

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[16] *Id*. at 8. The West for Berman also excluded the cultures of Germanic people before the eleventh century, as he saw a radical discontinuity between European nations prior to 1050. *Id*. at 3-4. The influence of German culture, for him, was not realized in England until the Lutheran Reformation. *Id*. at 3. He described "the legal process," the legal institutions, values, concepts, ways of thought, and rules as what Germanic peoples called "Rechtsverwirklichung," or the "realizing" of law. *Id*. at 4.

[17] *Id*. at 204-06.

[18] *Id*. at 3. "The West is not Greece and Rome and Israel but the people of Western Europe turning to the Greek and Roman and Hebrew texts for inspiration and transforming those texts in ways that would have astonished their authors."

[19] *Id*. at 11. Berman does, however, go on to state that the first modern Western legal system was the canon law of the Roman Catholic Church. *Id*. at 44.

[20] Stefan Jurasinski, *Noxal Surrender, the* Deodand*, and the Laws of King Alfred*, 111 STUD. IN PHILOLOGY, no.2, 200 (Spring, 2014).

[21] *Id*. at 195. Frederick Pollock and Frederic Maitland have written decisively of the deodand's roots in this ritual, calling the original deodand the "bane," which is to say the "slayer." FREDERICK POLLOCK, & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, VOL. 2, 473-74 (C.J. Clay & Sons, 2nd ed. 1898) (1895). The bane (also "*bana*") would go to the kinsmen of the slain, the owner having "purchased his peace by a surrender of the noxal thing." *Id*.

[22] Finkelstein, *supra* note 6 at 181.

[23] Jurasinski, *supra* note 20 at 199.

[24] Walter W. Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696 (1916).

Most of the legal historians who have ventured into a differentiation of custom and law have taken an anthropologic view, considering mostly *unwritten* systems of law.[25] In his foundational piece of legal anthropology, Henry Maine rejected what had been a prevailing view (from Charles Louis de Secondat, Baron de Montesquieu) of man as a passive creature ruled by impulses except for the interference of civil law.[26] Maine categorized the development of law in three stages, with "customary" law being the second as well as the precursor to most modern codified systems.[27] To Maine, customary law was a body of observances existing as a substantive aggregate and known by the aristocratic order or caste in a society.[28] Bronislaw Malinowski called "custom" the collection of all communal rules to which an individual will conform his pattern of behavior because of various psychological and social pressures, from slight to severe.[29] He argued that the rules of law form one well-defined category within the body of custom because they are regarded as "the obligation of one person and the rightful claims of another."[30] Malinowski was perhaps the first to write extensively on the nature of custom and law as distinct but intrinsically related, particularly in primitive and ancient societies enforcing unwritten legal norms. Later, Adam Hoebel would examine, specifically, how preliterate peoples used legal ritualism to resolve conflict and preserve social order.[31]

When considering the extent to which medieval custom influenced or was itself law, some contemporary legal historians reject the earlier established dichotomy as well as the "part of the whole" narrative. Esther Cohen wrote that modern anthropologists' conceptions of the difference between law and custom are inapplicable to medieval jurisprudence.[32] Though she predominantly studies nations on the European continent, her analysis of the spread of Roman law is enlightening. Cohen argues that custom is a set of commonly shared norms, while law implied the existence of state coercive power; which is to say, laws enforced in medieval rural lands *were* custom.[33] Her work explored the difference between the emerging codified system of Roman law that spread westward across Europe and the existing customary practices of local communities which had been in place with slight variance for hundreds of years.[34] Unlike codified law, which was law merely for the sake of being consistent and promulgated, customary laws were often evaluated and selectively enforced based on their "goodness."[35] The sense of equity brought into being by these

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[25] *See* E. Adamson Hoebel's contention that "primitive law belongs to peoples without writing"). E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN, 4 (1954) ("When this area of behavior we speak of as law is found in the culture of a pre-literate people, we call it primitive law.").

[26] *See* HENRY SUMNER MAINE, ANCIENT LAW (1908). Maine argues that the introduction of formalized contractual relationships revolutionized what had been a patriarchal structure of legal relationships in favor of increasing recognition of the individual. *See generally*, *id*. at ch. 9.

[27] *See id*. at ch. 1. *See also* SOUTHERN, *supra* note 12, at 22 (noting the broad distinction between "*Langue d'oc*" and "*Langue d'oil*").

[28] MAINE, *supra* note 26 at 11.

[29] BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY, 50-54 (1926).

[30] *Id*. at 55.

[31] KARL N. LLEWELLYN AND E. ADAMSON HOEBEL, THE CHEYENNE WAY, 15 (1941).

[32] ESTHER COHEN, THE CROSSROADS OF JUSTICE: LAW AND CULTURE IN LATE MEDIEVAL FRANCE, 1 (1993) ("The history of a customary legal system became transmuted into the history of mentalities.").

[33] *Id*. at 12.

[34] *See id*. at ch. 2.

[35] *Id*. at 21.

laws, as well as their cultural roots, mean that, for many communities, unwritten customary law trumped written Roman law.[36]

For this reason, medieval canon law tolerated a significant amount of disparity between formal rule and local customary practice.[37] R. H. Helmholz argued that, on the eve of the Reformation, Roman canon law in England did not function the way we except an appellate legal system to based on binding statute to function.[38] Rather,

> [i]t left more scope for freedom in interpreting and developing legal principles. It left more room for judges whose "hands were free" from temporal bindings to follow local traditions and needs, sometimes even where decretal law appeared to direct the contrary. That sort of freedom, far from making the English Church "insular", shows that it was fully a part of Continental legal traditions.[39]

As a result, English civilians felt themselves generally free to disregard aspects of Roman canon law which were inconsistent with English customs.[40]

Whether it was for the notion of equity embedded in a more flexible system of customary law or a reluctance to embrace a system of codified law in a limitedly literate culture, the English people succeeded in preserving significant portions of their legal heritage through the process of Romanization that eventually occurred.[41] The system that gradually became English common law was developed "continuously over generations and centuries with each generation building on the work of previous ones."[42] Much of the enduring formality of proof and the dramatic character of presenting evidence was connected to the fact that the law had been, for centuries, almost entirely oral.[43] However, such a fluid, informal way of uniting custom and statutory law would not withstand the changes of Henry II. Berman notes that Henry II was determined replace "anarchy and violence" by law and order though willing to do so through political and legal institutions.[44] He used preexisting Anglo-Saxon and Anglo-Norman concepts where he could, while revolutionizing English law by imposing royal jurisdiction on criminal and civil matters that had previously belonged to local and feudal jurisdiction.[45] The state's jurisdiction, however, would only continue to expand through the process of religious reformation.[46]

Moments of Change: A Great Protest

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[36] *Id*. at 35.
[37] R.H. HELMHOLZ, ROMAN CANON LAW IN REFORMATION ENGLAND, 11-12 (1990).
[38] *Id*. at 19.
[39] *Id*.
[40] *Id*. at 150.
[41] BERMAN I, *supra* note 10 at 5.
[42] *Id*. Berman describes this conscious process of continuous development as "a process not merely of change but of organic growth." *Id*. Consequently, he also rejects the dominant theory of European periodization dividing time into ancient, medieval, and modern eras. *Id*. at 14.
[43] *Id*. at 58.
[44] *Id*. at 442.
[45] *Id*. at 442-45.
[46] MARJORIE KENISTON MCINTOSH, CONTROLLING MISBEHAVIOR IN ENGLAND, 1370-1600, 6 (1998).

Yet when all is said and done the Reformation was a violent disruption, not the natural fulfillment of most of what was vigorous in late medieval piety and religious practice.[47]

Berman argued that incremental history, or "smooth" history, was a characteristic of historical writings during the Darwinian age, while a more "catastrophic" history dominated by social conflict marks writings from the early and middle parts of the twentieth century.[48] This latter idea underscored Berman's premise that the Western legal tradition was born of "revolution."[49] More specifically, he argued that six great revolutions had served as the transforming force of occidental legal theory, including the American, French, Russian, and English revolutions, alongside the Papal Revolution and Protestant Reformation.[50] Notably, each of the national revolutions from the sixteenth century on (except the American Revolution) were directed against the Roman Catholic or Russian Orthodox Church, and, in the course of the conflict, large portions of the canon law were secularized by transferring them from the church to the national state.[51] For Berman, "revolution" included not only the initial violent event which introduced a new system but also the entire period required for that system to take root.[52] As such, understanding the failure of the old legal system was as important to studying a revolution as exploring the new. Berman believed the failure of the old system of English and Roman canon law in the fifteenth century was an inability to respond in time to the changes that were taking place in society.[53]

E.W. Ives agreed when he wrote that popular dissatisfaction with the English system of law was widespread, and the nation was ripe for legal reform by the 1540s.[54] Specifically, Ives argued, the common law needed procedural reform.[55] Legal proceedings were excessively complex, dilatory, and therefore, vulnerable.[56] Individuals within the system were easily bribed, and the vital links of the judicial chain in the sheriff and the jury were pervasively corruptible.[57] As such, reformers were quick to advocate for transformation through the highest earthly authority available – the king.[58] The changes demanded ushered in a bold policy of reformation initiated by Henry VIII.[59]

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[47] DUFFY, *supra* note 1 at 4.
[48] BERMAN I, *supra* note 10 at vi.
[49] *Id*. at 1.
[50] *Id*. at 18-19. "The most important consequence of the PR was that it introduced into Western history the experience of revolution itself," *Id*. at 118.
[51] *Id*. at 24.
[52] *Id*. at 20.
[53] *Id*. at 21.
[54] E.W. IVES, THE COMMON LAWYERS OF PRE-REFORMATION ENGLAND: THOMAS KEBELL: A CASE STUDY, 191-93 (1983).
[55] *Id*. at 194.
[56] *Id*.
[57] *Id*.
[58] *Id*. at 222. "English common law was, initially, the custom of the king's court, and the king's proprietorial interest continued long after this custom had come to be accepted as the common law of the realm." Incidentally, Ives argues that the legal profession was drawn into this political web through the hierarchy of law and lawyering propagated through the prerogative courts. *Id*. at 232. "If the king was dominant in the law, and lawyers were inexorably drawn into his service the consequence for the profession and for litigants was profound." *Id*.
[59] Jonathan K. van Patten, *Magic, Prophecy, and the Law of Treason in Reformation England*, 27 AM. J. OF LEGAL HIST., no. 1, 12 (Jan. 1983). *See also* MARTIN INGRAM, CHURCH COURTS, SEX AND MARRIAGE IN ENGLAND, 1570-1640, 6 (1987) (arguing that "effective royal control over many aspects of the church was already a reality long before

Those changes, Michael Graham has argued, were of a social, political, and religious nature and should be woven together for study rather than pulled apart.[60] This method of observation lends itself well to a study of the English legal system as law is often a reflection of contemporary social, political, and religious attitudes. As Berman argued, in 1000 A.D., there was not a concept of law as distinct from theology and philosophy.[61] The words "sin" and crime" were often used interchangeably prior to the Reformation.[62] But one of the most fundamental changes ushered into Western legal thought by the Protestant reformations was the secularization of law through the institution of bifurcated jurisdictions.[63] The dualism of spiritual and secular jurisdictions has been called the heart of the formation of the Western legal tradition.[64] This process of secularization occurred in England in two stages: 1) the English Reformation of the sixteenth century that transferred ecclesiastical responsibilities from the Church of Rome to the Church of England; and 2) the secularization of the Church of England when it was placed under the supreme authority of the Crown.[65]

The first point of this secularization is best illustrated through an examination of ecclesiastical courts before, during, and after the Reformation. There is no real debate that the Reformation weakened the role of ecclesiastical courts in England.[66] Before the Reformation, church courts played an important part in correction of those who failed to participate in the required observances of the church as well as those who challenged its doctrines.[67] But church courts relied heavily on spiritual sanctions, which lost much of their effect when large sectors of the population became indifferent towards the established church.[68] Houlbrooke posited that after the Reformation, penalties for heresy were suffered by only few extremists who rejected basic doctrines held by both Catholics and Protestants.[69] As Graham stated, the concept of the ban, or excommunication, was the ultimate sanction of the church,[70] and popular rejection of its efficacy severely undercut the legitimacy of church court authority in the minds of the people.

1500. But it was not until the Henrician Reformation that the church was finally and decisively subjected to the crown.")

[60] MICHAEL F. GRAHAM, THE USES OF REFORM: 'GODLY DISCIPLINE' AND POPULAR BEHAVIOR IN SCOTLAND AND BEYOND, 1560-1610, 8 (1996). *See also* G.R. ELTON, THE TUDOR REVOLUTION IN GOVERNMENT 426 (1966) ("The establishment of the royal supremacy over the Church, the expulsion of the pope, and the assertion of the unlimited sovereignty of statute destroyed the foundations of medieval polity and society and put something new in their place.").

[61] BERMAN I, *supra* note 10 at 76.

[62] *Id*. at 70.

[63] *See* RALPH HOULBROOKE, CHURCH COURTS AND THE PEOPLE DURING THE ENGLISH REFORMATION, 1520-1570, 221 (1979).

[64] HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION, x (2003) [hereinafter BERMAN II].

[65] *Id*. at 369.

[66] HOULBROOKE, *supra* note 63 at 1.

[67] *Id*. at 214. This is true even though there were many matters of disagreement that could have separated the courts of the church and the Crown in the fifteenth century. *See* HELMHOLZ, *supra* note 37 at 1 ("The surviving records reveal a remarkable stability in the subject matter jurisdiction of the English courts.").

[68] CHRISTOPHER W. BROOKS, LAW, POLITICS AND SOCIETY IN EARLY MODERN ENGLAND, 47 (2009) ("It seems unlikely that the Reformation Statutes fundamentally altered common law practice or jurisprudence, but there is little doubt about the long-term political and constitutional consequences of the confessional diversity unleashed . . . the gradual spread of the ideas of continental religious reformers.").

[69] HOULBROOKE, *supra* note 63 at 214.

[70] GRAHAM, *supra* note 60 at 8.

It is worth noting, however, that if the authority of the church courts came under severe scrutiny in the minds of the people, some have argued that Roman canon law *did not*.[71] Helmholz criticized Maitland's position that the Reformation cause a "sudden catastrophe" in the dominant role that canon law played in England's legal life.[72] Rather, he argued, the evidence of the practical writings of civilians demonstrates that the Roman canon law continued to exercise the predominant influence in shaping the King's ecclesiastical law after the Reformation."[73] What were pruned were the "ultra-papal glosses," but the shell of the Roman canon law survived the Reformation in defiance of an English "common law mind."[74]

Nevertheless, the jurisdiction of ecclesiastical courts was a principal object of attack during each of the European national revolutions.[75] In many Lutheran and Calvinist countries, church courts were replaced in the sixteenth century by consistories or synods, whose jurisdiction was severely diminished, while the state took over the majority of criminal and civil matters.[76] In England, the Reformation placed what had been papal authority in the hands of the king, who maintained or broadened former ecclesiastical jurisdiction.[77] Unsurprisingly, this transfer of authority did not prove satisfactory for all reformers. Berman noted the loss of jurisdiction from ecclesiastical courts was absorbed by state courts whose procedures were not well suited to deal with the increased number and variety of cases.[78] There was a significant amount of principled opposition to the English Reformation.[79] The dissension, though by no means unified throughout English society, caused the government to devote considerable time and energy to maintain both religious and social order.[80] Even Edward Coke, as chief justice of the first court of common pleas, challenged the king's authority by asserting the supremacy and independence of the English common law.[81]

Ultimately, the Church of England's dominating grip on English law was short-lived. In the seventeenth century, the Church of England was reduced from a state church to a privileged one, supported by the state but under the 1689 Act of Toleration.[82] Simultaneously, substantial jurisdiction of criminal and civil matters was transferred from church courts to common law courts.[83] Judges were given independence and life tenure, rather than serving at the will of the monarch, and the prerogative courts of the Crown were abolished or made subordinate to the

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[71] HELMHOLZ, *supra* note 37 at 123.
[72] *Id*.
[73] *Id*. at 124.
[74] *Id*. at 124-38.
[75] BERMAN I, *supra* note 10 at 267.
[76] *Id*. at 267.
[77] HOULBROOKE, *supra* note 63 at 8.
[78] Berman II, *supra note* 64 at 131. This was the same throughout England, France, and other European states.
[79] van Patten notes the reaction from monasteries as the government began to confiscate church property. van Patten, *supra* note 59 at 26.
[80] *Id*. at 12 ("The religious reformation must be placed in context with social and economic changes brought about by the decline of feudalism and the emergence of mercantile capitalism.")
[81] BERMAN II, *supra* note 64 at 215.
[82] *Id*. at 9.
[83] BERMAN I, *supra* note 10 at 267 (explaining chancery jurisdiction was also transferred).

common law courts.[84] Juries also gained independence from judges, and rules of evidence and witness proof were formalized in trial proceedings.[85]

It is difficult to know how much these legal reforms were directly influenced by the theological changes in contemporary popular thought, but a brief analysis of the Lutheran revolution in Germany provides some insight. Initially, the legal reforms instigated by the Tudor monarchy were not clearly influenced by German philosophy or theology.[86] However, under Edward VI and Elizabeth, the English Reformation came increasingly under Protestant influences from Germany.[87] At the outset of the Lutheran Reformation, many of its leaders bitterly attacked not only the old system of Roman canon law but law in and of itself.[88] Luther himself burned books of canon law.[89] Interestingly, an appeal to Anglo-Norman history was invoked in the language of reform to support revolutionary political change.[90] Berman called this "the myth of return to an earlier time" and argued it is the hallmark of all the European revolutions.[91] This sentiment dissipated, however, as the Reformation gained momentum and it became apparent that a repeal of all existing law would lead to anarchy.[92]

Nevertheless, Lutheranism retained a great deal of skepticism about institutions of law.[93] This skepticism, Berman argued, made possible the emergence of legal positivism that treated the law of the state as morally neutral and a device for manifesting the policy of the sovereign and securing obedience to it.[94] This conviction led Luther and his followers to advocate for the abolition of all ecclesiastical jurisdiction, in favor of spiritual matters being governed by each "private person" and his relation to God.[95] This same individualistic sentiment influenced many Lutherans to explore the nature of law, its unity, integrity, and methods as a jurisprudential and political concern to find a new objective basis for the legitimacy and authority of legal regulation.[96] These questions, though premised on the value of law as a secular institution governed by the prince, still largely assumed the governance of a Christian prince.[97] Thus, the Roman Catholic belief in the infusion of divine and natural law into legal institutions carried into Lutheranism.[98] For Protestantism, the belief in humankind's incapability of lifting itself out of its fallen state (total

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[84] BERMAN II, *supra* note 64 at 9.
[85] *Id*.
[86] *Id*. at 10-12.
[87] *Id*. at 210 (citing repeal of restrictions on printing, reading, and teaching the English Bible, as well as restrictions on priestly marriage).
[88] *Id*. at 63.
[89] BERMAN I, *supra* note 10 at 197. Berman noted this was partially to symbolize his belief that the true church can have no legal character whatever. *Id*.
[90] BERMAN II, *supra* note 64 at 10.
[91] BERMAN I, *supra* note 10 at 15.
[92] *Id*.
[93] *Id*. at 29.
[94] *Id*.
[95] Secular political authority would then be transferred to "the prince and his councilors, the high magistracy, the *Obrigkeit*, must undertake the lawmaking responsibilities that previously were within the jurisdiction of the Roman Catholic Church." BERMAN II, *supra* note 64 at 6. This specific aspect of Lutheran theology has led other scholars to argue that Protestantism produced no substantial change in legal theory or forms. *Id*. at 72.
[96] *Id*. at 111.
[97] *See* ERNST H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY, ch. III (1957).
[98] BERMAN I, *supra* note 10 at 197.

depravity) was what inspired a rejection of the daily experience of oppression and corruption in the legal system.[99] Nevertheless, God remained a source of justice, and the body of ecclesiastical and secular law of medieval Europe was to a large extent carried over into the law of the "modern" state.[100]

Reconciliation in Order: A Legal Balancing Act

The reformation was "a great cultural hiatus, which had dug a ditch, deep and dividing between the English people and their past. Over the course of three generations a millennium of splendour – the worlds of Gregory and Bede and Anselm and Francis and Dominic and Bernard and Dante, all that had constituted and nourished the mind and heart of Christendom for a thousand years – became alien territory, the dark ages of 'popery'."[101]

To return to our examination of the law of deodand and the consideration of nonhuman things involved in the death of human beings, historians have documented a great shift in the popular attitude toward unexpected death before and after the English Reformation.[102] On one hand, we have seen that the basic institutions, concepts, and values of Western legal systems have consistent sources in religious rituals and doctrines dating to the eleventh and twelfth centuries.[103] William Hyde stated that the real object of legislation "atoning for manslaughter in such cases was in full accord with the elementary concepts of justice prevailing in Europe during the Middle Ages under the domination of the church."[104] In the case of suicides, Hyde noted that there were no thoughts of punishing the family by enacting forfeitures, but only to provide suitable atonement for the crime and avert calamity by appeasing the wrath of God.[105] Finkelstein explained that the unnatural death of a human being was, at a minimum, a quasi-crime that entailed expiation in some form.[106] Expiation was naturally directed toward God and, by extension, the king, God's human magistrate on the earth.[107] However, these elements took on new assumptions concerning the relationship of the divine to human faith and reason after the influence of Lutheranism.

In the court system, the introduction of evidence in jury proceedings in the sixteenth century was part of a general movement toward increased rationalization[108] of secular and civil

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[99] BERMAN II, *supra* note 64 at 41.
[100] BERMAN I, *supra* note 10 at 197.
[101] DUFFY, *supra* note 1 at xiv.
[102] *See id*. at 310-53. *See also* LUCIEN FEBVRE, THE PROBLEM OF UNBELIEF IN THE SIXTEENTH CENTURY: THE RELIGION OF RABELAIS, 197 (1982).
[103] BERMAN I, *supra* note 10 at 165.
[104] Hyde, *supra* note 24 at 728-29.
[105] *Id*.
[106] Finkelstein, *supra* note 6 at 197.
[107] *Id*.
[108] BERMAN II, *supra* note 64 at 300-01. Berman argued that the "reasonableness" which English legal science originally received from theology went back into other disciplines and into general speech:

> It is a word that is almost untranslatable into other languages; neither the French *raisonable* now the German *vernunftig* captures its meaning, since they imply not what in English is called "common sense," which is partly intuitive, but rather the kind of rationality that comes solely from ratiocination. The English word "reasonable" eventually came to be used in a multitude of contexts. English lawyers came to speak not only of reasonable doubt but also of reasonable care, reasonable reliance, reasonable risk, reasonable mistake, reasonable delay, reasonable force—and, of course,

criminal procedure.[109] Jurors were expected to have gathered evidence and to know what the verdict should be in advance of the judicial proceeding.[110] Tied closely to the concept of jury responsibility and discretion was the belief in the community's responsibility for sustaining individual believers in righteousness and repressing or correcting sin.[111] For centuries before the Reformation, a crime was not generally conceived of as an offense against political order, but rather as against a victim and the surviving kinfolk and his feudal class.[112] The normal social response to such an offense was vengeance on the part of the victim or his kin, or sometimes alternatively, penance, restitution of honor, and reconciliation on the part of the victim.[113] But the Reformation in England saw the commencement of an important shift in the role of the state and a utilitarian view of morals, law, and sovereignty.[114] A belief in the moral equality of all participants in legal proceedings provided a foundation for the scientific investigation of the state of mind of an accused.[115]

This investigation into states of mind led to a principle of graduated culpability[116] that may be, in part, why the law of deodand persisted in English law as long as it did. The tradition predated the highest levels of papal control and subsisted throughout the Reformation era despite an unprecedented force of legal transformation in custom and common law.[117] Even William Blackstone could not avoid admitting the influence of the practice on the laws of England when he wrote

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> "the reasonable man." As George Fletcher has shown, the virtual absence of this terminology from French, German, and other continental legal systems reflects an important difference between Anglo-American and continental European legal science.

Id.

[109] *Id*. at 285. Berman notes that this was closely connected with the Protestant Reformation and the rise of strong monarchies: "In England, the increased rationalization of jury trial in the sixteenth century was also needed to support the common law courts in their rivalry with the new prerogative courts, in which trial was not by jury but by professional judges who interrogated the parties and the witnesses. *Id*.

[110] *Id*. at 284-85. The principal changes of the late seventeenth and early eighteenth centuries were (1) the establishment of an independent jury as trial of both fact and law; (2) establishment of substantial procedural rights of the accused in a criminal trial; (3) the introduction of the adversarial system of presentation of evidence; and (4) the development of new criteria for proof of guilt in criminal cases and liability in civil ones. *Id*. at 285-86.

[111] *Id.* at 323. *See also* CYNTHIA B. HERRUP, THE COMMON PEACE: PARTICIPATION AND THE CRIMINAL LAW IN SEVENTEENTH-CENTURY ENGLAND, 5 (1987) ("Communal participation in the control of criminality reinforced social pressure for moral conformity. It reminded persons of the frailty of social stability and provided a public display of the dangerous results of loose personal discipline. Chastisement allowed the community to exact revenge and to reaffirm local power against anarchy.").

[112] Berman I, *supra* note 10 at 181.

[113] *Id*. These were the stages of atonement for crime or sin. *Id*. at 182.

[114] Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid to Waste to Due Process*, 45 U. OF MIAMI L. REV. 911, 932 (1991). *See also* JENNY KERMODE & GARTHINE WALKER (EDS.), WOMEN, CRIME AND THE COURTS IN EARLY MODERN ENGLAND, 2-3 (1994) ("In recent years, historians have sought to identify changing patterns of prosecution and punishment, which they have then attempted to explain in terms of economic, religious and political phenomena. Connections have been made between processes of fundamental religious and economic readjustment and an increase in intrusive regulation and legislation.").

[115] BERMAN I, *supra* note 10 at 184.

[116] GEORGE FLETCHER, RETHINKING CRIMINAL LAW, 353 (2000).

[117] Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENV'T. AFFS. L. REV. 471, 514 (1996).

> It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church: in the same manner as the apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul . . . [E]very adult, who died in actual sin, stood in need of such atonement, according to the humane superstition of the founders of the English law.[118]

What superstition was Blackstone recalling? The impact of Purgatory on legal thought is hardly to be underestimated. The legislation of life after death resulted in a substantial reduction of the significance of judgment itself.[119] As Berman wrote, without the fear of purgatory and the hope of the Last Judgment, the Western legal tradition could not have come into being.[120] The change in perspective on the afterlife signaled a shift from a view of criminal behavior concerning individual morals toward those considered an offense to the general well-being. The state, having the responsibility for the moral and physical well-being of the people, became ascendent, and the Church was "stripped of any real power and authority."[121] Over time, religious crimes previously under the jurisdiction of ecclesiastical courts became concerns of the state—a fact some have argued impacted forfeiture laws, including deodand.[122]

But it can hardly be assumed that the fear of unnatural, premature death vanished in the smoke of "reasonableness" brought in at the heels of the Reformation. Tofangsaz argued that "[t]he law of deodands survived the Reformation by its justification as a deterrent against misfortunes."[123] Eamon Duffy noted that the late Middle Ages were obsessed with death in such a way that many described them as a cult of the living in service to the dead.[124] This obsession, though ubiquitous, should not be mistaken as morbid or doom-laden[125] but, rather, should be understood as a vigorous relish for life. Duffy argued this was evident in the wills of fifteenth and sixteenth century Englishmen and women who left loving listings of their cherished possessions and attempts to order lasting relationships among family and friends from beyond the grave not out of morbidity but "of a practical and pragmatic sense of the continuing value of life and the social relations of the living, with a determination to use the things of this world to prepare a lodging in the next."[126] How much more so when a death was unexpected, unnatural, and without perpetrator?

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[118] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 300 (J.B. Lippincott Company, 1893) (1753).

[119] BERMAN I, *supra* note 10 at 171. Duffy noted that after the Reformation, funerary inscriptions would record, not the desire for prayers, but the Christian virtue of the deceased, "forming an obvious contrast with pre-Reformation inscriptions, which were essentially supplicatory and emphasized the need of the dead." DUFFY, *supra* note 1 at 332.

[120] BERMAN I, *supra* note 10 at 558.

[121] Piety, *supra* note 114 at 932.

[122] *Id*.

[123] Hamed Tofangsaz, *Confiscation of Terrorist Funds: Can the EU Be a Useful Model for ASEAN?*, 34 UCLA PAC. BASIN L. J. 149, 156 (2017). This conclusion is in sharp contrast to those who argue that legal proceedings against inanimate objects and animals (particularly by ecclesiastical courts) were attempts to increase revenues and bolster credibility in the church through threat of enforcing an "estrangement from God through in, excommunication, and anathema." *See* Peter Leeson, *Vermin Trials*, 56 J. OF L. & ECON. 811, 812 (2013).

[124] DUFFY, *supra* note 1 at 301.

[125] *Id*. at 302.

[126] *Id*. at 303.

Berman wrote that the study of Western law, "especially its origins, reveals its rootedness in the deepest beliefs and emotions of a people."[127] This was true of the nature of belief on death and the afterlife in medieval England.

> [O]ver all hung the possibility of sudden death – *timor mortis conturbat me*; court records have sufficient examples of litigation which arose from someone falling mortally sick before he had time to formalize agreements he had made, to indicate the wisdom of putting even the friendliest arrangement in good legal language.[128]

The hour of death was never intended to be one of isolation, but itself an experience in the community.[129] Likewise, funerals were "intensely concerned with the notion of community, a community in which living and dead were not separated, in which the bonds of affection, duty, and blood continued to bind. The means of this transaction between the living and the dead was charity, maintained and expressed in prayer."[130]

Ghosts played no insignificant part of the processes of death in this society. Keith Thomas wrote that ghosts were very important for ensuring reverence and fulfilling obligations to ancestors,[131] and the community's obligation to the deceased did not end at death. Kindred of the deceased were responsible for absolving unpaid moral debts of the dead,[132] and those neglected could be angry and dangerous.[133] The sense of the continuing presence of the dead among the living was vividly expressed in funeral rites in 1549, but Duffy notes that by 1552, the dead were no longer with us.[134] As a result, "the boundaries of human community have been redrawn."[135] Thomas wrote that after the Reformation, ghosts only came back to denounce specific injustices when regular detective methods failed.[136] Post-Reformation theologians believed the sovereignty of God excluded much possibility of chance or accident, largely circumventing the inherent grief in unplanned, non-homicidal death.[137] As the Reformation changed rituals of bereavement, the social function of ghosts as well as the customs and rituals present in the legal system to deal with the aftermath of unexpected death diminished.[138]

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[127] BERMAN I, *supra* note 10 at 558.
[128] IVES, *supra* note 54 at 8-9.
[129] DUFFY, *supra* note 1 at 121.
[130] *Id*. at 474-75.
[131] KEITH THOMAS, RELIGION AND THE DECLINE OF MAGIC: STUDIES IN POPULAR BELIEFS IN SIXTEENTH- AND SEVENTEENTH-CENTURY ENGLAND, 1202 (1971).
[132] DUFFY, *supra* note 1 at 352-53.
[133] *Id*. at 350.
[134] *Id*. at 475. Duffy states that

> [T]he dead had gone beyond the reach of human context, even of human prayer. . . . The service was no longer a rite of intercession on behalf of the dead, but an exhortation to faith on the part of the living. Indeed it is not too much to say that the oddest feature of the 1552 burial rite is the disappearance of the corpse from it.

Id.
[135] *Id*.
[136] THOMAS, *supra* note 131 at 1194.
[137] *Id*. at 333-35.
[138] *Id*. at 1208.

Conclusion

The men and women of Tudor England were, by and large, pragmatists. Grumbling, they sold off as much of their Catholic past as they could not hide or keep, and called in the carpenters to set boards on trestles and fix the forms round the communion tables.[139]

Berman wrote that an essential element of each of the great revolutions that shaped the Western legal tradition was an apocalyptic vision of the future, which served as a "revolutionary millenarianism" to inspire commitment to an end-time eschatology and a belief that history was moving toward a final denouement.[140] But he also noted that each of the great revolutions eventually made peace with the prerevolutionary systems of law and restored many of their elements by including them in new systems that reflected the major goals and beliefs for which the revolutions had been fought.[141] His analysis suggests that moments of change are both reactionary toward the failures of the past and visionary of the hope for the future. Revolutions are, by nature, inevitable, unsustainable, and productive. This was true of the effect of the Protestant reformations on the English system of common law, particularly with respect to the law of deodand and unnatural death. The history of the practice likely long predated any observable influence of Roman canon law, at least in the minds of the people and the reforming state, such that the related legal concepts could not be easily thrown aside amid theological reform. As Bernstein wrote, understanding the roots of forfeiture in the context of deodand depends on "the depictionalist belief that things are not exactly commensurable with rationalist devices like money and punishment."[142] The rule of the Yorkist and Tudor sovereigns produced an English society that was "intensely 'law-minded' obsessed with legal considerations, legal rights, and legal remedies."[143] Yet even in the wake of evolving courts, burgeoning and retracting jurisdictions, and an ever-increasingly official legal system open to the woes of political corruption, the "burgeoning weeds of litigation did not altogether hide from view the ancient aim of reconciliation."[144]

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[139] DUFFY, *supra* note 1 at 502.
[140] BERMAN I, *supra* note 10 at 25-26.
[141] *Id.* at 29.
[142] Anita Bernstein, *The Representational Dialectic*, 87 CAL. L. REV., 338 (1999).
[143] IVES, *supra* note 54 at 7.
[144] HOULBROOKE, *supra* note 63 at 265. Ives also notes that the years before the Reformation involved a turning point in English legal history. IVES, *supra* note 54 at 7.

> It was the position of the common lawyers, their attitudes and their activity, positive and negative, which ensured the survival of the common-law process; which delimited the judicial role of the royal prerogative; which made possible the modernization of the law in substance and procedure and established the dichotomy between equity and law. They guaranteed that, in the end, tradition would assimilate the new and not give way to it, that reform came from within the time-honoured procedures, not in spite of them.

HOULBROOKE, *supra* note 63 at 220-21.