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Daniel Klerman and Paul G. Mahoney

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University of Southern California Law School
Los Angeles, CA 90089-0071

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Daniel Klerman^a
Paul G. Mahoney^b

^aUniversity of Southern California Gould School of Law
Los Angeles, CA 90089-0071
dklerman@law.usc.edu

^b(corresponding author)
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903
Telephone +1-434-924-3996
Fax +1-434-924-7536
pmahoney@virginia.edu

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ABSTRACT

Recent empirical work shows that countries whose legal systems are based on English common law differ systematically from those whose legal systems are based on French civil law. Glaeser and Shleifer (2002) trace this divergence to England's adoption of the jury system and France's adoption of Romano-canonical procedure in the twelfth and thirteenth centuries. They argue that these choices implied greater centralization of justice in France than in England. We examine the historical evidence in detail and find that there was no attempt to decentralize litigation in medieval England, and in fact, prior to the French Revolution, justice was more centralized in England and than in France. The different trial procedures, moreover, did not put the two countries' legal systems on sharply different paths. Rather, the systems diverged as the result of political choices made in the mid-seventeenth through early nineteenth centuries.

I. INTRODUCTION

Recent empirical work shows that countries whose legal systems are based on English common law differ systematically from those whose legal systems are based on French civil law. English legal origin is associated with greater financial market development (La Porta et al., 1997). Differences in legal systems accompany other institutional differences. Governments in common law countries tend to protect property rights more and regulate less.

Glaeser and Shleifer (2002) trace the divergence between English and French legal institutions to the design of the first national court systems in the twelfth and thirteenth centuries. England developed a system of adjudication by lay juries while France developed a system of adjudication by professional judges. Glaeser and Shleifer contend that these were conscious design choices reflecting different political environments, which in turn reflected different preferences of English and French barons. The former were concerned about the powerful English king's ability to interfere in adjudication and bargained for trial by local, lay juries, a right enshrined in Magna Carta. The relatively weak French crown, by contrast, was less a threat than other barons. French barons accordingly desired a centralized adjudication system controlled by royal judges who would not be easily captured by local interests.

The great attraction of this explanation is that the twelfth and thirteenth centuries witnessed the creation of durable governmental institutions in England and France. It is therefore plausible that legal systems changed substantially at that time but thereafter became sticky. Glaeser and Shleifer contend that the greater centralization implied by royal rather than local control of adjudication persists and helps to explain the less robust

protection of property rights and higher levels of regulation in civil law countries today. They also argue that this design choice can account for modern differences between the two systems, such as codification and reliance on written records versus oral argument.

In this paper, we examine the development of English and French law during the middle ages and test Glaeser and Shleifer's hypothesis against the historical evidence. We conclude that the medieval English jury was not designed to decentralize adjudication. Indeed, the legal reforms that created the common law achieved precisely what the barons in Glaeser and Shleifer's model wish to prevent—the centralization of judicial power in the hands of judges appointed by and under the control of the king and the displacement of local, lay decision makers by professional royal appointees. The royal judiciary's use of the jury to determine facts was not a consequence of explicit or implicit bargaining between the crown and the barons. It was initially employed in a limited range of cases because it was an efficient mechanism of gathering evidence about property disputes and crimes. English judges themselves later extended jury trial to other cases as a superior alternative to older forms of proof such as battle, ordeal, and oath swearing. French judges developed a different way of extracting information from local laymen, but as in the English case the choice neither reflected the desires of powerful barons nor was of any benefit to them.

The more permanent and consequential divergence between English and French legal institutions took place, we argue, during the seventeenth through nineteenth centuries. During the middle ages, both the French and English judiciaries had in practice the power to make law through precedent. The French judiciary also had an official role in legislation and regulation. By the early modern era, French judges

probably enjoyed greater independence than their English counterparts because a French judgeship was considered a form of heritable property. Normally, French kings neither chose their judges nor had the power to remove them. In contrast, English judges served at the pleasure of the crown, although the power to remove was seldom used.

The judiciary in England gained and that in France lost power and prestige in the wake of the countries' respective revolutions. The English judiciary retained the power to make law through precedent, but the French judiciary lost that power and was instructed to base its decision solely on codes. English judges received life tenure in 1701, after the Glorious Revolution, while post-Revolutionary French judges were demoted to low level bureaucrats whose careers were subject to political oversight.

The paper proceeds as follows. Section II analyzes the early development of the English and French law and argues that it does not fit the Glaeser/Shleifer model. Section III describes later developments in English and French law, emphasizing that the most important divergences occurred as a result of political upheavals in England in the 17th and 18th centuries and the French Revolution and Napoleonic reforms around the turn of the 19th century. Section IV identifies implications for institutional economics. Section V concludes.

II. MEDIEVAL FOUNDATIONS OF THE ENGLISH AND FRENCH JUDICIAL SYSTEMS

Glaeser and Shleifer's (2002) analysis makes four factual claims about the establishment of royal justice in 12th and 13th century England and France. First, English kings chose a decentralized system of adjudication. Second, the trial jury, which gave substantial authority to local actors, was the primary agent of decentralization.

Third, the choice of jury trial was a Coasian bargain between the king and barons who “were willing to pay the king to allow them to resolve disputes locally” (p. 1196).

Finally, French barons feared each other more than royal power and consequently allowed or encouraged the French king to centralize justice. We take up these factual questions in order.

A. The Common Law and Centralization

In the early twelfth century, a dispute between two tenants of the same lord, or between the lord and a tenant, would often be resolved by the lord’s court. Barons maintained their own courts, consisting of the lord or his steward and some of his principal tenants. Other disputes were heard in the county courts or their equivalents in smaller geographical units, also by a group of local notables. Occasionally, the king took an interest in the outcome of a particular dispute or a litigant complained to him about a failure of justice, in which event the king might send his own representative to preside over the proceedings.

Legal reforms instituted during the reign of Henry II (1154-1189) are generally described as the birth of the common law (Baker, 2002). Henry and his successors introduced a permanent system of royal justice administered by professional, royal courts. The new system became known as the “common law” because it was a law for the entire kingdom, in contrast to the varied customs applied by local courts. The system was administered by a small cadre of professional judges (usually around thirteen) who normally sat in Westminster or traveled with the king. With some regularity, these judges also traveled throughout the kingdom, assisted by members of the bar and local notables, to hold trials and resolve disputes locally. Starting in the fourteenth century,

judges were forbidden to hear cases in counties where they owned property so as to ensure that decisions did not reflect local or personal interest. By creating an extremely small judiciary whose members spent most of their time near London and were forbidden to judge where they had local interests, English kings created a highly centralized system largely immune from local influence.

These reforms decreased the power of local courts and barons. Importantly, they interposed the king's justices between barons and their tenants. This was an important—perhaps decisive—step in replacing feudal relationships with property rights in the modern sense (Palmer, 1985). At a minimum, the new royal courts accelerated the process by which tenants' rights ceased to be a matter of the lord's discretion and became determined by fixed rules.

Thus, Glaeser and Shleifer (2002, p. 1194) correctly note that “It would seem natural, then, for the more powerful English kings to create a legal system that extended royal control more deeply into the life of the country. . . .” but incorrectly conclude that this did not occur. The common law was precisely a means of bringing greater royal control over the administration of justice to the shires and manors. Glaeser and Shleifer's decision to focus only on the royal courts and not on the local courts would be appropriate if the allocation of authority between the two court systems was static. In fact, the Angevin legal reforms shifted a substantial amount of litigation from local to central control.

These reforms were clearly not a concession to the barons. Indeed, the dominant view among legal historians is that the reforms were part of a deliberate and successful anti-feudal campaign (Turner, 1990). In a feudal system, the king's tenants in chief were

mini-sovereigns and the kingdom more analogous to a confederation than a unitary state. Monarchs sought to gain control over the administration of justice, which was perhaps the most visible attribute of sovereignty in medieval Europe. Henry II exerted control over his barons in a number of respects, such as destroying baronial castles. He also asserted direct authority over disputes involving his barons' undertenants. This *jurisdictional* move had an important *substantive* consequence. Feudal dispute-resolution systems took for granted that the tenant's property rights were derived from his status as vassal. The new centralized system of justice severed that link and led, over time, to the view that property rights were a creature of law, not power.

B. Jurors and Decentralization

Fundamental to Glaeser and Shleifer's argument is the idea that juries are a form of decentralized decision-making beyond the king's control. This assumption, although true in some respects, is problematic.

Although jurors are today sometimes called "lay judges," this is anachronistic when applied to the middle ages. At that time, the jury was a form of testimony rather than a decision maker. Jurors were expected to be "self-informing." That is, unlike modern juries, they did not generally evaluate and render decisions based on evidence presented in court. In fact, parties did not usually present evidence in court to the jurors, and witnesses did not testify in court. Rather, the jurors were expected to know the facts of the dispute before they came to court, through their own observation, investigation, or hearsay. In short, the jurors were viewed as witnesses (not necessarily eyewitnesses) rather than judges (Klerman 2003). Viewed in this light, the primary difference between the French and English systems is that in the French system, witnesses testified

individually to the judges, whereas in England the witnesses (jurors) testified collectively. In both the English and French systems, royal judges were dependant on local people for their information and in that limited sense both were decentralized.

Of course, there was undoubtedly some “judging” concealed in the collective testimony of the jurors, although the same can probably be said of the testimony of individual witnesses in the French system. It is also probably true that the collective testimony of the English jurors was more subject to manipulation by local interests than individual, secret questioning of witnesses in the French system, which was designed, in part, to ferret out local conspiracies to suppress or distort the truth. In this respect, it is probably true that even the medieval English jury system was somewhat more decentralized than the French inquisitorial system. On the other hand, as was mentioned above and will be discussed further in the next section, this greater decentralization of fact gathering in medieval England was probably more than offset by the greater decentralization of judging in medieval France.

In the later middle ages, in-court witnesses and evidence became more important and the jurors’ personal knowledge less so, and it then becomes more accurate to characterize jurors as decentralized decision makers. It is for this reason that the extent of jury trial and the power of jurors became political issues in the early modern period. Nevertheless, the transformation of jurors from collective witnesses to lay adjudicators of fact was unforeseen in the twelfth and thirteenth centuries when the jury system was first established in England. Here, as elsewhere, the divergence between the English and French systems does not date to their medieval origins and cannot be attributed to conscious design.

A second factor undermining the idea that jurors were decentralized decision makers beyond the control of the king is that jurors were selected by the sheriff, who was a royal appointee and often not a local man (Bartlett, 2000). In this respect, jurors were less independent of royal control than individual witnesses in France, who were nominated by the parties. Were the jury intended to remove dispute resolution from the king's officials and put it within local control, the barons would presumably have insisted that some local actor not affiliated with the king determine the makeup of the jury.

In both England and France, local bullying could pervert justice. It is difficult to say which courts were better designed to prevent local coercion. Both witnesses in the French system and jurors in the English were vulnerable to bullying. If anything, the English system was more carefully designed to blunt the impact of local coercion. English jurors were chosen from among property-holding knights precisely because such men were considered more independent. There were no similar property qualifications for individual witnesses in the French system, which left them more exposed. In addition, French judges, unlike their English counterparts, were resident in the areas where they judged and thus more subject to local influence, whether persuasive, self-interested, or coercive.

C. The Jury, Magna Carta, and Coasian Bargaining

Glaeser and Shleifer argue that the jury system in England was the product of Coasian bargaining between the king and barons. The barons feared a strong king and desired decentralized adjudication. The king wanted more revenue for war and other purposes. The king and barons, most notably in *Magna Carta*, struck a bargain in which

the king granted decentralized decision-making through the jury system in return for cash. This view has almost no historical support in the medieval period.

The jury began its history as an efficient means of ascertaining local facts such as property ownership and boundaries. In late Roman practice and throughout post-Roman Europe, panels of nearby residents established “local” facts such as the boundaries of land holdings, the history of possession of a particular plot, the reputation of an accused, or the status and parentage of a litigant (Macnair, 1999). Under the Carolingian kings, jury-like panels reported to judges sent out from the center. Although the use of juries subsequently waned, especially on the continent, when William the Conqueror compiled Domesday Book (1086), he instructed his officials to gather information by summoning groups of locals (jurors) to give sworn testimony about property holdings. After the anarchy of King Stephen’s reign (1135-1154), in which local barons waged war against each other and seized each other's property, Henry II needed a swift method for adjudicating the substantial backlog of property disputes and prosecuting crime. Starting in the mid-1160’s, he instructed his judges to empanel jurors for these purposes. There is no evidence that the use of jury trial in these circumstances was the result of bargaining between king and barons or that the king would have preferred judicial evaluation of individual witness testimony. There is also no evidence that the barons preferred trial by jury because they feared the king more than each other. Indeed, it is more likely that the barons acquiesced in Henry’s decision to resolve property disputes in his own courts precisely because they hoped that strong royal justice would prevent the reemergence of baronial warfare.

The most substantial evidence of Coasian bargaining over the administration of justice is chapter 39 of Magna Carta, which states:

No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.¹

While Glaeser and Shleifer are correct that this provision was intended to reduce royal power over adjudication, it does not specify jury trial as the mechanism. It mandates the use of particular *tribunals*, but not particular methods of proof. The first thing to notice is that the provision requires either “lawful judgment of the peers” or “the law of the land.” The former term refers to judgment in the feudal court of the king’s tenants in chief. This court was separate from the ordinary royal judicial system, which served most of the population, and was composed of the king’s most important barons, who served as the judges. Similar courts existed throughout Europe and traditionally resolved disputes between the king and his barons or between barons. As kings became more powerful, however, they began to act against nobles they suspected of treason or similar crimes without a judgment of any kind. They simply used their superior military force to imprison, dispossess, or execute those they considered their domestic enemies. Throughout Europe, the baronial response was to demand that kings obtain judgment of the peers (that is, trial in the high feudal court) before punishment. Such provisions can

¹ Holt 1992, p. 461. In their article, Glaeser and Shleifer state that c. 39 provided that “no person may be amerced (i.e. fined) without the judgment of his peers.” (p. 1199). This paraphrase omits the crucial phrase “or by the law of the land.” It also seems to conflate chapter 39 with chapter 20, which states, “a freeman shall not be amerced for a trivial offence, except in accordance with the degree of that offence... and none of the aforesaid ameracements shall be imposed except by the testimony of reputable men of the neighborhood.” This is a more genuine reference to something like a jury, although it is much more limited in import than chapter 39, because ameracements were imposed only after judgment had been issued, and only in those cases where there had been a violation of the King’s rights, rather than simple violation of private rights. Chapter 20, therefore, is not a general provision for trial by jury and had relatively little impact on the further development of English law.

be found in Italy in the Treaty of Constance (1183), in statements of French customary law, and in the laws of Henry I (early twelfth-century England). In none of these documents can it be plausibly argued that “judgment of the peers” meant trial by jury, as trial by jury was not in regular use in Italy, France, or pre-Henry II England. The procedures used by the high feudal court are not well documented, but it is quite likely that it employed traditional methods of proof, such as battle, ordeal, judicial inspection of documents, and compurgation. Perhaps it occasionally used something like trial by jury, but that would by no means have been one of its distinctive characteristics. A further textual indication that Magna Carta did not refer to trial by jury is the use of the word “judgment” (*iudicium*) in the phrase “judgment of his peers.” Only judges gave judgment. Jurors delivered verdicts (*veredicta*).

The phrase “law of the land” was inserted at King John’s request and was not a concession to the barons (Holt, 1992). Whereas the barons preferred to be subject only to the jurisdiction of the traditional high feudal court (“judgment of his peers”), King John wanted the flexibility to try barons in the newer, ordinary royal courts (by “the law of the land”). As noted above, jury trial was coming to be an accepted part of the procedure in the new royal courts. Nevertheless, it is important to remember that at the time Magna Carta was being negotiated, jury trial was not the only accepted method of proof. Contract cases (debt) were resolved by judicial inspection of documents or by compurgation, a procedure in which the defendant was exonerated if he could produce twelve men to swear on his behalf. Criminal cases initiated by jury accusation (presentment) were resolved by ordeals of cold water or hot iron. Criminal cases initiated by private accusation (appeals) were usually settled by battle (if both plaintiff and

defendant were able-bodied males) or by ordeal (if one of the parties were female or infirm). And property disputes involving ownership (writ of right) were resolved by battle or jury, at the option of the defendant. The provision that cases be resolved “by the law of the land” did not entrench jury trial. It merely stated that it was acceptable for freemen to be punished by the normal procedures of the common law, which might or might not involve jury trial.

Over the ensuing three centuries, jury trial slowly displaced ordeal, battle, and compurgation. Because of the disappearance of other modes of proof, later generations came to misinterpret Magna Carta as a guarantee of jury trial. Nevertheless, Magna Carta did not cause later decisions to replace ordeal, battle, or compurgation with jury trial. The abandonment of ordeal was prompted by the Fourth Lateran Council, which in 1215 forbade clerics to participate in ordeals. The most important factor in the eventual dominance of trial by jury was the choice to use it in trespass writs. Such writs were originally used for the resolution of what would today be called intentional torts, but through clever judicial interpretation and jurisdictional competition, such writs eventually became the preferred method of resolving nearly all disputes at common law, whether they involved contracts, torts, or property. The use of jury trial on trespass writs seems to have been a purely judicial decision without royal or legislative input or any other evidence of royal/baronial bargaining. Because actions involving trespass writs generally gave plaintiffs swifter and cheaper recoveries than those using older forms of action, the use of compurgation and battle became extremely uncommon. Nevertheless, battle was not formally abolished by Parliament until the 19th century.

Acknowledging that “trial by jury ... existed only in embryo in 1215,” Glaeser and Shleifer (p. 1199) try to bolster their case by referring to fourteenth century statutes which “interpreted the phrase ‘lawful judgment of peers’ to include trial by peers and therefore trial by jury.” In doing so they are led astray by an error on the part of the eminent historian, J. C. Holt.² None of the relevant statutes refer to trial by jury at all, much less as an interpretation of “lawful judgment of peers.” The statutes were clearly intended to forbid irregular processes by which the king or his council seized land or imprisoned people without recourse to ordinary legal procedures. Although trial by jury was one of those ordinary legal procedures, it was never singled out or even mentioned. The only mention of specific procedures relates to the initiation of proceedings -- indictment and writ -- not trials. While indictment did involve a jury, which later would be known as the grand jury, this institution was distinct from the trial jury and was relevant only in criminal cases. The goal of these fourteenth century statutes was to curb arbitrary executive action, not to regulate procedures used by regular courts. A quotation from one of the statutes makes the matter plain:

[N]one shall be taken by Petition or Suggestion made to our Lord the King or to his Council, unless it be by Indictment ... or by Process made by Writ original at Common Law. (25 Edw. III Stat. 5 c. 4)

As the statute makes clear, the problem to be remedied was penalties exacted pursuant to petitions made to the king or his council, rather than initiated through indictment or writ, the ordinary procedures of the common law.

² That Holt should make such an error is very puzzling, especially given his reliance on Thompson.(1948), who points out that the first person to equate “judgment of the peers” with the trial jury was Lambarde in the 16th century (pp. 185-6).

In sum, Magna Carta's judicial provisions did not require trial by jury. The phrase "judgment of his peers" refers to trial in the ancient feudal court in which the "peers" were judges, not jurors, and the phrase "law of the land," refers to the ordinary procedures of the common law courts, where jury trial was just one of several accepted procedures. Later statutes interpreting Magna Carta require specific methods for initiating judicial proceedings (indictment or writ) but not particular trial procedures. The notion that jury trial was enshrined in Magna Carta and therefore part of the ancient liberties of Englishmen is a much later development. In particular, that argument was used in the seventeenth century to combat the Stuart kings' practice of moving politically sensitive cases to the Star Chamber.

D. Centralization and the French Judicial System

The French crown, like the English, sought to extend its judicial jurisdiction over territories ruled by its barons. The process took longer in France because the relevant territory was much larger and the barons' holdings were more geographically concentrated, in contrast to the English barons who tended to own scattered lands. The development of a central royal court that could exert effective authority lagged the analogous developments in England by approximately a century.

Early French royal judges, like their English counterparts, used a variety of devices to uncover facts, including inquests (the testimony of a collective body similar to the early English jury), written documents, ordeals, and battle. As in England, use of the latter two methods declined in the face of opposition from the church and litigants. In their place, many judges started using the Romano-canonical procedure of individual examination of witnesses. In 1258, Louis IX formally abolished judicial duels in the

royal courts and mandated use of Romano-canonical procedure.

As in the English case, we can reject the hypothesis that the French barons desired and bargained for Romano-canonical procedure. We need only note that the French barons viewed the prospect of examination by a royal official as an affront and secured exemptions from royal inquests (Dawson, 1960). The French higher nobility continued to settle their disputes by judicial battle as late as the 15th century. French barons also retained more jurisdiction for their feudal courts than did their English counterparts. The French barons did, however, obtain the same rights as their English peers to be judged by other barons. The king's tenants in chief sat as judges in the highest royal court, the *Parlement* of Paris, when another peer was on trial.

The procedural differences also did not amount to a greater centralization of justice in France than in England. As noted above, the principal difference between English and French procedures, as initially designed, was that an English judge relied on the *collective* statement of the juror-witnesses while the French judges examined each witness *individually* and reached their own conclusions about the relevant facts. Although in that limited sense a French royal judge had more power than his English counterpart, in another sense the French royal court was weaker. The *parlements* exercised their authority mostly in appeals from judgments in the seignorial courts while the English judges seized original jurisdiction over cases that were previously heard in seignorial and county courts. In addition, the English royal courts set out to impose a common substantive law throughout the country, while in France each barony continued to apply its customary law.

In the 1280s, Philippe de Beaumanoir, who served as a judicial officer under the Count of Clermont and the French king, wrote a treatise on the customary law of the county of Clermont (Beaumanoir, 1992). His treatise evidences the extent to which litigation—even among the nobility—was a local affair notwithstanding the establishment of the *Parlement* of Paris. Beaumanoir describes a comprehensive body of private and criminal law adjudicated in the courts of the Count and his inferior nobles, with only a handful of references to appeals being taken to the *Parlement*. By contrast, the surviving English legal treatises of the same era focus almost exclusively on the common law administered in the royal court, rather than local law.

E. Why Did England and France Choose Different Modes of Trial?

Glaeser and Shleifer identify problems with existing explanations of why England and France chose different modes of trial. If, as argued here, their solution is deficient, is there a plausible alternative? This article is not the place for a full-scale re-examination of the issue, but we believe that any explanation must take into account the fact that in England the choice between jury and judge trial was primarily a choice made by the judges themselves. The king and his advisers did not generally trouble themselves with procedural details. What the king did decide was the size of the judiciary. As noted above, the English king chose a very small judiciary. The choice of trial method largely followed from this decision on size. The tiny English judiciary simply lacked the manpower to examine witnesses individually or to produce the elaborate written records which characterized the civilian trial. For English judges, use of the jury was an essential timesaving device, which effectively left fact-finding to non-professionals whose responsibility it was not just to evaluate the evidence, but to gather it (Klerman, 2003).

Of course, this explanation only pushes the question back one step further. Why was the English judiciary so much smaller? Since the English judiciary was largely self-financed through litigants' fees, budgetary concerns were not paramount. Rather, the limiting factor may have been the availability of literate personnel to staff the courts. Literacy in the early middle ages was notoriously rare, but was increasing rapidly in the twelfth and thirteenth centuries (Clanchy, 1993). The English royal judiciary might have been small simply because of the dearth of educated candidates. In contrast, by the time the French royal judiciary was established about a half-century later, literacy had become more widespread.

III. LATER DEVELOPMENTS IN FRENCH AND ENGLISH LAW

A. *Similarities and Convergences between English and French Justice*

In spite of the differences between English and French trials, there were broad similarities between English and French justice from the late middle ages until the time of the French Revolution. Two of these broad similarities deserve special mention. Most of the law applied in both French and English courts was judicially created. In neither country was there a comprehensive code or set of statutes. In England, judges created law through the interpretation of precedent. In France, judges created law through the interpretation of local custom and classical Roman legal texts. Because the classical texts often did not address contemporary problems and local customs were often vague, French judges had *de facto* lawmaking power, and their decisions were accorded the respect of precedents.

Another important similarity between the English and French legal systems was that, in both, judges in the higher courts were generally recruited from the ranks of the

most eminent practicing lawyers. Judging was a prestigious activity which attracted intelligent and ambitious men (Gorla and Moccia, 1981).

The two systems also converged in an important respect. Starting in the late 14th century, there emerged English courts which, like French courts, employed a variant of the Romano-canonical procedure and thus did not use trial juries. The most important of these courts was Chancery.

The early common law was a particularized set of remedies for particular wrongs. Only a plaintiff whose complaint matched one of the existing writs or who could convince the chancellor to create a new writ could bring suit in the common law courts. Thus, a steady stream of petitioners came directly to the king to complain about wrongs that could not be remedied under the common law, in much the same way as French litigants appealed to the *parlements* about failures of justice in the baronial courts. The king's council dealt with these cases, although eventually a single member of the council—the chancellor—created a separate court to deal with the bulk of these petitions.

Medieval chancellors were often bishops and their legal staff were trained in canon law (Baker, 2002). Not surprisingly, they developed a procedure similar to the Romano-canonical procedure of the *parlements*. Chancery did not use a jury, but instead gathered evidence through interrogation and written statements of witnesses. Its jurisdiction was somewhat self-determined. By refusing to expand the number of common law writs, a chancellor could bring more disputes into his own court.

The remedies and associated doctrines that the chancellor developed came to be known as “equity” to distinguish them from the “legal” remedies and rules applied in the common law courts. Chancery, for example, developed the notion of “equitable”

interests in land, such as the trust, that the common law courts did not recognize. In addition, most of the rules regulating corporate governance originated in Chancery. It is interesting to note that economists have identified the concept of equity as one of the flexible, anti-formalist features of common law that distinguish it from the civil law (Beck et al., 2005; Djankov et al., 2003b). Ironically, that concept was alien to the common law courts in England—it developed in the court that most resembled a French court, by lawyers trained in canon law and judges who did not use juries.

Just as some English courts began to look more like their French counterparts, some French courts had features that today are associated with the common law. The French system included merchant courts that adjudicated commercial disputes. The merchant courts' jurisprudence resembled the flexible, equitable approach associated with English commercial law (Kessler, 2004). From the perspective of the late middle ages, then, there is no obvious reason why French commercial law would become codified and formalistic.

B. Divergences

Nevertheless, the English and French judiciaries gradually diverged in ways unrelated to the degree of centralization or localization. One important distinction was the venality of the French *parlements*. Beginning as early as the thirteenth century, French kings began to sell offices. The procedures for purchasing a judgeship and the purchaser's rights and privileges were regularized in the seventeenth century (Doyle, 1996). By the eighteenth century, membership in the *parlements* was a form of property—the judge could transfer his office by sale or inheritance, subject to various restrictions and additional payments to the king. At the lower levels of the judiciary, the

incentive to purchase office resided in the fees that the judge could extract from litigants. At the level of the *parlements*, however, the judgeship, subject to certain restrictions, conferred nobility and its attendant feudal privileges and exemptions from taxation.

Ironically, venality made French judges more independent than their English counterparts. Most French judges were not selected by the king, and he could not remove them except in extraordinary circumstances. In contrast, the English king exercised the undisputed right to select royal judges and had the right to remove them at will. In practice, kings sparingly used the power to remove except during the 17th century struggles between Stuart kings and common law judges. Nevertheless, through the power to select judges and the threat to remove them, the English king retained substantial leverage over the judiciary. Arguably, judicial insulation from political oversight reached an excessive level in pre-revolutionary France. A system of checks and balances—or, more precisely, of strategic interdependence among executive, legislature, and courts (Gely and Spiller, 1990)—may promote policy stability and therefore credibility.

The phenomenon of venality contributed to the different roles the French and English judiciaries played during the age of revolution and nation building of the seventeenth through nineteenth centuries. Both nations' political crises stemmed in part from their kings' inability to maintain a stable system of public finance. England's Parliament struggled to take control of the public finances and regulation of trade from the crown. The judiciary allied with Parliament in these disputes. The French *parlements*, by contrast, generally opposed fiscal and political reforms that would have reduced the benefits the judges had obtained by purchasing office. Although different *parlementaires* had different ideological and political views, the judiciary as a whole

became associated with the fiscal irresponsibility and system of privileges of the *ancien régime*.

In the resulting upheavals, both England and France reformed their legal systems. Not surprisingly, because England's judges had sided with the victorious Parliament, the judiciary emerged from the Civil War and Glorious Revolution with enhanced prestige and formal independence from the crown. The primacy of the common law courts was strengthened through the abolition of Star Chamber, a powerful court which used a variant of civilian procedure and which was closely controlled by the king's council. The prestige and independence of the common law courts was enshrined in a series of eighteenth-century statutes that insulated the judges from royal removal and increased their salaries.

The French judiciary, by contrast, lost prestige and independence in the wake of the French revolution and Napoleon's legal reforms. Indeed, an important goal of revolutionary reforms was to reduce the judges' power and independence. The Assembly abolished the *parlements* in their entirety as well as venality. Napoleon enacted his Code in part to eliminate judges' power to make law. Lawmaking became solely the prerogative of the legislative branch. As a result, judicial decisions were not to be accorded precedential value. Revulsion at judicial power was so strong after the Revolution that judges were initially forbidden even to interpret law. Instead, they were required to refer ambiguous cases to the legislature (*référé législatif*), a solution whose impracticability soon became apparent (Merryman, 1996). Consistent with their diminished role, judges were treated as minor bureaucrats and paid and recruited accordingly. No longer were they recruited from among the most eminent practitioners,

who could bring with them a wealth of practical experience and wisdom. Instead, judges came to be recruited straight out of law school, given minor posts for training and evaluation, and then promoted according to bureaucratic principles.

The unwieldy size of the French royal judiciary and the king's limited influence over it for a period of centuries before Napoleon is flatly inconsistent with the notion that codification was an executive reaction to the king's loss of control over the judiciary as a consequence of an expanding eighteenth-century economy (Glaeser & Shleifer p. 1196). Long before the nineteenth century, French kings lost any personal knowledge of the myriad of disputes resolved by the thousands of royal judges dispersed throughout the kingdom. If codification were a natural outgrowth of the choice of royal judges over juries and the king's lack of personal knowledge, it would have happened in the fifteenth century, if not earlier. Instead, French codification in the nineteenth century was the consequence of the special history of eighteenth-century France, in particular the role the *parlements* played in the crises leading up to the Revolution (Merryman, 1996).

The post-revolution fates of the judiciary account for the characteristic features of common and civil law systems today. Details such as the extent of codification, the use of written documents, or the prevalence of jury trials no longer reliably distinguish common law and civilian systems. However, the common law remains distinct as a judge-centered system in which the judiciary has relatively higher status and power than in civil law systems, in which the judiciary is often similar to the career civil service and subject to executive control. This fact readily explains the greater tendency towards bureaucratic decision making procedures in the civilian judiciary that Djankov et al. (2003b) document. Government officials who occupy senior appointed posts normally

have considerable scope for discretionary decision making, while career civil servants are more constrained by standardized procedures.

C. Relevance of Initial Conditions

Was there something in the initial design of the English and French systems that made it inevitable that the French, but not the English, judiciary would become venal and preoccupied with retaining its privileges? In the remainder of this section, we briefly review Dawson's argument that initial conditions caused the French and English judiciaries to diverge and then provide our own argument against Dawson's view.

Dawson (1968) argues that selecting Romano-canonical procedures put French law on a distinct path from which it could not easily have diverged. He notes that individual examination of witnesses consumed substantial judicial resources and required both expertise and institutional memory. This, in turn, caused a notable difference between the English and French judicial systems—the heavily bureaucratic character of the latter.

The French judiciary was dramatically larger than the English. It also produced substantially more documentation. Novaes and Zingales (2004) point to heavy documentation of the activities of an organization as a hallmark of bureaucracy. The measurable differences are dramatic—by the late eighteenth century the French royal judiciary exceeded 5,000 (Dawson 1968, p. 71). By contrast, the English common law judiciary typically numbered about a dozen. Proceedings in the French royal courts generated paperwork to a similarly disproportionate extent in comparison to English proceedings. The French royal court was divided into various chambers with different

areas of specialization, such as pre-trial proceedings, inquests, preparing summaries of evidence, and hearing petitions.

Dawson emphasizes the connection between Romano-canonical procedure and bureaucracy. Because the examination of witnesses took place episodically, the exigencies of schedule, illness, and travel meant that a single inquest usually involved multiple judges. Moreover, because appeals involved a fresh review of the facts, it was essential to preserve the results of these examinations. Thus, the examining judge wrote a detailed description of witness testimony which could later be reviewed by other judges and checked against the parties' allegations (which were also in writing). This led to a proliferation of documentation as well as specialization and division of functions.

The all-in-one English trial, by contrast, consumed fewer government resources. The parties and their lawyers were all gathered in one place and could make whatever notes they desired of the proceedings. Appeals were limited to questions of law, making it unnecessary to preserve witness testimony. The English system shifted to the parties themselves tasks that were performed by judges in the French system, thus permitting a smaller and more flexible judiciary.

This distinction by itself does not imply that the French but not the English judiciary would become venal. Venality in France was a revenue-raising strategy and was not limited to the judiciary. But the sheer size of the French judiciary did mean that the king could raise substantial funds by selling judgeships. Moreover, the bureaucratization of judicial procedures made it less harmful to appoint a judge who was not qualified for the job but willing to pay. A newly-appointed English common law judge, by contrast, immediately became part of a small group operating with considerable

individual discretion and limited oversight, making aptitude essential. On the other hand, while these considerations suggests that venality is more likely in a larger judiciary, they by no means suggests that venality was a necessary consequence of the French decision to appoint many judges.

The strongest argument against the influence of initial conditions is that—when the English and French systems of justice are considered as a whole—those initial conditions are less starkly different than they appear at first glance.

As noted above, the English judicial system contained several courts that resembled the French *parlements*, including Chancery and the conciliar courts. Although the common law courts ultimately overshadowed these other courts, that development was not inevitable from the perspective of the 13th through 16th centuries. The question of primacy was settled only after the English Civil War and the Glorious Revolution—struggles motivated in part by the crown’s attempts to expand the jurisdiction of prerogative courts at the expense of the common law courts.

IV. LEGAL ORIGIN AND INSTITUTIONS

The evolution of English and French law is an interesting historical puzzle that has important implications for institutional economics. A rapidly growing literature uses legal origin as a proxy for exogenous historical influences on present institutional arrangements. But what, precisely, are the “institutions,” that is the constraints on government behavior (Glaeser et al., 2004; North, 1981), for which legal origin is a proxy? The common features of English common law or French civil law countries must be durable or else they could not affect present-day policies of a former English or

French colony decades or centuries after the colonizer's control ended. So far, however, the literature has not settled on a particular specification of these common features.

In Glaeser and Shleifer's model, the key institutional feature is the jury, which decentralizes control over litigation. It is very unlikely, however, that the jury can explain differences in modern policy variables such as investor protection, labor market flexibility, and so on. Most countries coded as common law in the contemporary empirical literature do not use jury trial at all, and even those that do restrict the jury to very limited classes of cases.³ In England, for example, jury trial in civil cases is available only for defamation, fraud, and malicious prosecution. Even in the United States, where the right to jury trial is stronger than elsewhere, many commercially significant cases are decided without juries, including all cases in the Delaware Chancery, the most important court for American corporate law.

We do, however, agree with the broader idea that decentralized litigation and lawmaking may constrain policies in ways that in turn affect economic outcomes, a point also identified by Hadfield (2006) and Beck et al. (2003). A number of important contributions within institutional economics identify a government's ability to commit to respect property and contract rights as a central goal of institutional design (Spiller, 1996; Weingast, 1995). Decentralization, which implies that local decision makers can operate with some degree of insulation from the central government's control, can reduce government opportunism. In addition, institutions that insulate decision-makers from

³ Of that twenty-three common law countries analyzed in the LaPorta *et al.* (2004), only six -- Australia, Canada, Ireland, New Zealand, the United Kingdom and the United States-- use jury trial in civil cases. Strikingly, these are all "origin" countries or "settler colonies," where even today a majority of the population is European or of European descent. In addition, although the evidence is unclear, Liberia may have used civil juries before the recent civil war, and criminal jury trial may be available in two additional countries, Ghana and Liberia. It is striking that no common-law country in Asia, even the more prosperous ones, such as Israel and Malaysia, use jury trial. Hong Kong uses juries for some case, although it is no longer an independent country and was not included in LaPorta *et al.* (2004)'s regressions.

political pressure and allow adaptation to particular and changing circumstances without resort to the cumbersome machinery of legislation may facilitate the efficient development and application of legal norms (Klerman and Mahoney, 2004; Mahoney, 2001).

When looked at in this light, the key divergence between England and France occurred in the early modern period. We have shown that dispute resolution was not more centralized in France than in England in the thirteenth century. However, the English government following the English Civil War and Glorious Revolution explicitly chose to reduce executive influence over judging and to preserve judicial power to create and interpret law. In contrast, the French government under Napoleon increased executive control and reduced judicial discretion.

Our historical account also highlights the extent to which legal institutions and economic outcomes were likely endogenously determined in “origin countries” such as England and France, as suggested by Berkowitz et al. (2002) and Beck et al. (2003). The same political influences that created the modern judiciary in England—notably the political power of merchants and industrialists—may also have caused England’s rapid financial development after the Glorious Revolution. Thus one cannot use England and France themselves as data points to show that laws cause economic outcomes.

V. CONCLUSION

One of the most difficult questions confronting institutional economics is how institutions arise and when and how they adapt (or fail to adapt) to changed circumstances. Glaeser and Shleifer (2002) offer a striking account of the differing designs of the English and French legal systems. They argue that each represented the

results of a Coasian bargain between the king and barons struck in the twelfth and thirteenth centuries. The resulting deals have been so durable that the key features persist to the present day. In related work, moreover, Djankov et al. (2003a) contend that the difference between the bargains reflected the different marginal benefits of greater centralization. England faced relatively low risk of disorder and therefore could reach an efficient level of social control with less centralization, while France faced a higher risk of disorder and therefore required more centralization (or “dictatorship” in the Djankov et al. framework).

We argue, however, that the early English royal courts had a centralizing rather than decentralizing tendency. Along most dimensions, the English and French legal systems of the late middle ages were less different than they appear at first glance. The more important divergence came about from the seventeenth through nineteenth centuries. England’s ability to create a market-friendly legal system may have been a consequence of the relatively smooth integration of the moneyed middle class into its political institutions. Although we have focused on the key structural changes of the early modern period, the interplay of politics, economic development and law persists to the present time in developed countries, creating a fertile area for additional research (Roe, 2006).

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