THE CONTENT AND SIGNIFICANCE OF *FLETA* IN THE CONTEXT OF ROYAL JUSTICE: A TEXTUAL HISTORY OF LATE THIRTEENTH-CENTURY ENGLISH COMMON LAW

by

John Casey Gooch

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Approved:

Dr. Bruce C. Brasington, Chair	4 October 2019
Dr. Byron Pearson	4 October 2019
Dr. Matthew Reardon	4 October 2019
Department Head	4-October 2019
Dean, College of Fine Arts & Humanities	4-October 2019
Dean, Graduate School	4-October 2019

ABSTRACT

Medieval historians and legal scholars who study early English common law generally cite the late-thirteenth century legal treatise known as *Fleta* as a corollary to *Bracton* and/or a text that, as M.T. Clanchy has suggested, supplanted *Bracton* as a compendium of statutes. Historians, however, have not given *Fleta* extensive consideration since G.O. Sayles and H.G. Richardson's mid to late-twentieth century translation of this text. This thesis offers a reconsideration of *Fleta* through the lens of Brian Stock's textual community to reveal that *Fleta* shared a common discourse and language with other similar legal treatises as well as appropriated other similar texts to some considerable extent. Furthermore, *Fleta* came about in the context of Edward I's significant legislative actions embodied, for instance, in the Westminster I (1275) and Westminster II (1285) statutes therefore making it plausible that the author was responding, in some way, to these reforms. *Fleta* emerged from a thirteenth-century legal textual community, and this treatise helped lay a foundation for legal thought as well as potentially influenced political philosophies of the enlightenment and, notably, Thomas Hobbes's theories of kingship.

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CHAPTER I

FLETA, STOCK'S TEXTUAL COMMUNITY, AND THE "REVOLTING" RELATIONSHIP OF LAW AND HISTORY

In his 1897 lecture (and later, essay), *The Path of the Law,* American jurist and legal scholar Oliver Wendell Holmes, Jr. lambasted the legal profession for essentially making the study of law a study of history without valuing law as a discipline and intellectual pursuit of its own. In fact, Holmes used the word "revolting" to characterize society basing an understanding of law on history, and he described it as "revolting" to embrace the rule of law simply because "it was laid down in the time of Henry IV."[1] He even went so far as to argue that the rule of law ceases to exist if it "simply persists from blind imitations of the past."[2] In his view, such "blind imitations" were even "still more revolting."[3]

Holmes's ideas sowed the seeds for paradigmatic shifts in American legal thinking during the twentieth century. In telling the legal profession to forego making history the basis for law, he encouraged changes in legal thinking and practice. In other words, he sought to make law a discrete scholarly pursuit, and, by effect, an independent

[1] Oliver Wendell Holmes, Jr., *The Path of the Law*. 1897. (Reprint, American Classics Library, 2012), 18.

[2] Holmes, *The Path*, 18.

[3] Holmes, 18. Holmes's thinking later informed the legal philosophies of legal realism as well as law and economics.

discipline separate from history. While too much emphasis on history may have been "revolting" to Holmes, the historical and evolutionary development of law remains of critical importance and also remains worthy of scholarly discussion. The study of law is, in some sense, a study of history. The practice and theory of law depend upon an understanding of the past to direct the future. Although it may mean less to the practicing attorney (in Holmes's time or the present day), the emergence and impact of legal texts becomes critically important for the legal historian and, consequently, for legal history. One such text is *Fleta Seu Commentarius Juris Anglicani* (henceforth "*Fleta*"), a collection of statutes inscribed during the last decade of the late thirteenth century.[4]

The author of *Fleta* is ultimately unknown, yet the impact of the text and its author deserve a "high place among the medieval legal historians from whom we must learn our common law."[5] In short, it is important because as a text, it has influenced the creation of other texts thereby contributing to the development of legal systems in present-day England and the United States. The claim of this study argues that not only is the formation of legal texts important but they also derive from social interaction, which Brian Stock has termed "textual community." Stock explains that textual community comes about at the intersection of the written word and a particular kind of social

[4] John Selden gave the treatise the following title in his dissertation written in 1644: *Fleta Seu Commentarius Juris Anglicani Sic Nuncupatus Sub Edwardo Rege Primo, Seu Circa Annos Abhince CCCXL, AB Anonymo Conscriptus, Atque E Codice Veteri, Autore Ipso Aliquantulum Recentiori, Nunc Primum Typis Editus*.

[5] G.O. Sayles, "Introduction," in *Fleta: Volume IV, Book V and Book VI*, edited by G.O. Sayles (London: The Selden Society, 1984), xxv. Sayles's labeling of the *Fleta* author as "medieval legal historian" becomes curious given that the author was not a legal historian per se. As latter passages will address, most historians of the period believe Matthew Cheker or Matthew of the Exchequer as the identity of the *Fleta* author. Matthew was a lawyer and clerk during the time of Edward I.

interaction. The textual community exists as both "interpretive community" and "social entity" in Stock's framework. *Fleta*, therefore, emerged from a complex set of social and political relations and became part of a wider network of legal texts that shaped a textual community of judges and lawyers.

The Context of Legislative Reforms under Edward I

It was written between 1290 and 1300 and during the reign of King Edward I, which began in 1272 and ended with his death in 1307. The author, most likely in the employ of the crown, also wrote this treatise during a period of Edward's legislative reforms**.** Under Edward I, legislative reforms granted greater power to the barons over their lands and tenants, and *Fleta*'s extensive treatment of both seisin and novel disseisin, in particular, are likely part of a more complex lord-tenant relationship over what had taken place in previous centuries.[6] The author of *Fleta*, assuming, as many historians have, that his identity was that of Matthew the Exchequer, served under King Edward I and was writing very much in the context of those reforms. It becomes a plausible assertion that the author of *Fleta* responded to legislative reforms and legal developments so that jurists would know the proper courses of action under statutory law. This view enables one to see *Fleta* as not only an appropriation but also an extension of Henry de Bracton's *De Legibus*.

Edward I is often referred to as "The English Justinian," but contrary to Justinian, he did not seek, as Michael Prestwich notes, to codify law; his legislative reforms,

[6] See Theodore F.T. Plucknett, *A Concise History of the Common Law* (Indianapolis, IN: Liberty Fund, 1956) regarding legislative reforms and baronial power in England during the late 1200s and early 1300s. See also Joseph Biancalana, "The Writs of Dower and Chapter 49 of Westminster I," *Cambridge Law Journal* 49, no. 1 (1990): 91-116, https://www.jstor.org/stable/4507371.

however, became a permanent part of the English legal landscape and helped firmly establish his position in legal history.[7] Two of his most significant legislative reforms were the Westminster statutes, known as Westminster I of 1275 and Westminster II of 1285, and both of these legislative measures addressed the issue of novel disseisin, or land dispossession. Westminster I, for example, made it possible for heirs of parties in a property dispute to claim ownership of land.[8] The legislation also mandated for the first time that if disseisin resulted from robbery or violence, then the plaintiff would recover all he had lost, and the defendant would likely face a fine or imprisonment.[9]

Westminster II extended the scope of an action that enabled plaintiffs in disseisin cases to recover costs as well as damages.[10] It also expanded the scope of novel disseisin in other ways, such as making the law applicable to woodlands where rights to collecting fruits and nuts were concerned.[11] Prestwich contends that Edward remained determined to introduce stiffer penalties, especially related to novel disseisin, and stiffer penalties for royal officials who abused the law. His intent lie not in undermining or destroying

[7] Michael Prestwich, "Chapter 10: The Statutes and the Law," in *Edward I*, ed. Michael Prestwich (New Haven, CT: Yale University Press, 1997), 267, https://www.jstor.org/stable/j.ctt1bh4bss.16.

[8] Prestwich, "Chapter 10: The Statutes," 271. Prestwich also notes that Edward's legislative reforms were almost innumerable.

[9] Prestwich, 271. Prestwich also explains that a plaintiff would not need a formal assize of novel disseisin if a royal official carried out disseisin without the proper warrant. The plaintiff would use the plaint procedure. The guilty royal official would then most likely face double damages.

[10] Prestwich, 271. The Statute of Gloucester, put forth in 1278, first established that plaintiffs could recover both costs and damages. Westminster II built upon the Gloucester statute and went further in expanding the scope of novel disseisin.

[11] Prestwich, 272.

principles of novel disseisin, but he was promoting the principles of effectiveness and efficiency in executing the law.[12] As evidence for this claim, Prestwich cites that 84 per cent of approximately 500 cases appearing before Justice Ralph Hengham between 1271 and 1289 were resolved with judgment on the first day.[13] He also cites several other cases during the time of Edward I that yielded similar results.

A considerable portion of *Fleta* reflects a recording of statutes the exigencies for which lie in legislative reforms like Westminster I and II. *Fleta,* however, also becomes important when considering legality in the late-thirteenth and early-fourteenth centuries. It represents one of several legal texts that contributed to the further development of English common law during this time. Notably, "The English Justinian," in addition to being known for his legislative reforms, "granted a full reissuance" of the Magna Carta based upon its 1225 charter.[14] The Magna Carta charter of 1297 included some subtle changes, but essentially, it reflected a recitation of the 1225 charter.[15] The final reissuance of the 1297 charter finally came about in 1300 and was "once again distributed to counties and cathedrals of England under the king's great seal."[16] The year 1300 marks

[12] Prestwich, 272.

[13] Prestwich, 272. King Edward I took the throne in 1272 and died in 1307, so this statistic, more or less, pertains to the first 17 years of his reign.

[14] Nicholas Vincent, *Magna Carta: A Very Short Introduction* (Oxford: Oxford University Press, 2012), 87. The text, according to Vincent, was taken from a lawyer's unofficial collection. That collection contained elements of the original charter of 1215, which was produced under the rule of King John I, Edward's grandfather. The 1225 charter came to fruition during the time of Edward's father, Henry III.

[15] Vincent, *Magna Carta,* 87.

[16] Vincent, 88.

the last reissuance, although the charter was confirmed over 40 times in the next 200 years; those confirmations, however, manifested as promises to uphold the terms of the charter and not as the material distribution of copies.[17] The writing and publication of *Fleta* and the final reissuance of Magna Carta occurred in approximately the same decade (i.e., 1290-1300).[18]

Roman Textual Influence

The reissuance of Magna Carta and the writing of *Fleta* coinciding with one another might not mean much, and granted, it may only represent (legal) coincidence. The two textual events, however, do suggest something about the textual history of common law as well as the communities that form because of it. Another illustration of this point lies in the Roman influence on both Bracton's *De Legibus* and, subsequently, *Fleta*, as both treatises drew upon Roman law and, particularly, Justinian.

The early English jurists' attempts to translate and/or transcribe Roman texts became a somewhat clumsy endeavor. That clumsiness was no more apparent than in Bracton's *De Legibus*, a text from which the *Fleta* author borrowed extensively. Bracton, himself, displayed his ignorance of what Latin indications meant yet used those indications despite his unknowingness. Samuel Thorne describes Bracton's mistakes, noting that he often times failed to comprehend his Roman sources and frequently "drew

[17] Vincent, 88.

[18] See also Sir John Baker, *The Reinvention of Magna Carta, 1216-1616* (Cambridge: Cambridge University Press, 2017), 8-12. Baker explains that Edward never personally supported the reissuance of the 1297 charter, and the royal confirmation of it now receives treatment as an act of parliament. In 1305, Edward, as his grandfather before him in 1215, obtained papal dispensation from his oath to observe the 1297 charter.

from them what was little better than nonsense."[19] The statement actually reflects Thorne's reaction to Frederic Maitland, whom Thorne says "reluctantly reached" the conclusion that Bracton was an "uninstructed Romanist, a beginner groping his way among foreign books and alien ideas."[20] Thorne refutes Maitland, arguing that Bracton neither simply reproduced the Roman text in front of him nor did he copy it "without reflection." A treatise on English law for English readers forced Bracton to modify the Roman material to some, probably considerable, extent.[21]

Thorne acknowledges, however, a number of "defects," as he terms them, in *De Legibus* that he says a non-expert on Roman law, like Bracton, might make in composing a doctrine from "scattered and contradictory fragments" of Justinian's *Digest*.[22] Thorne cites Bracton's use of some inaccurate words and phrases (e.g., *animo* for *omino, nolui* for *nolim*), but he faults the incompetence of Bracton's scribe rather than faulting Bracton for those mistakes.[23] Thorne argues that Bracton demonstrated competence in his understanding of both Roman law and medieval English jurisprudence; furthermore, he could decipher the sources to reproduce and/or summarize accurately from Justinian's *Digest* and his *Code* as well as the works of Azo of Bologna (e.g., *Summae*).[24] According

[19] S.E. Thorne, "The Text of Bracton's *De Legibus Angliae*," in *Essays in English Legal History*, ed. S.E. Thorne (London: The Hambledon Press, 1985), 99.

[20] Thorne, "The Text of Bracton's *De Legibus Angliae*," 99.

[21] Thorne, 99.

[22] Thorne, 100.

[23] Thorne, 106.

[24] Thorne, 100. Thorne, at one point, says that *Bracton* "presents a puzzling mixture of competence and incompetence," but by the end of this chapter of his book, he becomes more adamant that *Bracton* was unquestionably competent and that Maitland had mischaracterized *Bracton* in his reading of *De Legibus*.

to Thorne, Bracton did not misrepresent the Latin texts to the degree other scholars may have once thought.

Whether or not Bracton or *Fleta*'s author misrepresented, misappropriated, or mistranslated in reproducing the sources of Roman law becomes somewhat less relevant when considering how these texts aided in forming and advancing English common law in the mid to late-thirteenth century. In other words, these treatises existed and captured the legal thought of the day despite any errors attributable to poor transcription. Jurists followed the statutes that these authors set forth in their respective treatises, and *Fleta* built upon, reproduced, and altered other texts, like Bracton's *De Legibus*, in adapting to changes in the law.

Custom vs. Statute: Unwritten vs. Written Law in the Thirteenth Century

Thirteenth-century writers of legal treatises faced other problems besides wrestling with Latin legal terminology in Roman law. Plucknett, for example, describes the wider distribution of statutes as written texts as a "revolution" in the English legal system, and that revolution had only begun during Edward's reign.[25] The revolution in English law pertained to the inscription of statutes and an increasing prevalence of written law. Plucknett explains that "for a generation or two" lawyers and judges considered statutes "in much the same way as those other documents and modes of legal change."[26] They thought of statutes as "merely modifications of the elastic web of the

[25] T.F.T. Plucknett, "Chapter 10: Law and Statutes," in *Legislation of Edward I: The Ford Lectures Delivered in the University of Oxford in Hilary Term 1947,* ed. T.F.T. Plucknett (London: Oxford at the Clarendon Press, 1949), 13.

[26] Plucknett, "Chapter 10: Law and Statutes," 13.

customary common law. The fact that they were in a written, published form was still only an accident."[27]

The chasm, however, between unwritten, or customary, and written, or statutory, law eventually produced a dilemma for those writing legal treatises in thirteenth-century England. Bracton, for example, was "at great pains to argue that there is such a thing as law in England in spite of the fact that it is not 'written' (as Romanist understood that word)."[28] Plucknett argues that Bracton maintained "a paradox" between unwritten and written law, and his view "would be that ink and parchment alone" did not constitute 'written' law.[29] The written statutes represented complements to and also took effect as unwritten law.[30] Over time, however, the written statute became more than merely a "memorandum about a point of custom."[31] Lawyers began finding two modes of English law – written and unwritten – whereas Bracton had only found one; the statute, therefore, became "a very special sort of law, studied in a special way, and manifestly different from the common law."[32]

M.T. Clanchy's study of literacy in England during the medieval period, titled *From Memory to Written Record: England 1066-1307*, coincides with Plucknett's

[27] Plucknett, 13.

[28] Plucknett, 13.

[29] Plucknett, 14.

[30] Plucknett, 14.

[31] Plucknett, 14.

[32] Plucknett, 14. Plucknett refers to "common law" here as the customary and unwritten common law.

assessment of customary, or unwritten, and written statutory law. Clanchy's thesis is that law literacy emerged from bureaucracy and not from a desire for education or literature between the tenth and early fourteenth centuries.[33] Literacy emerging from bureaucracy reflects a change in the way people thought and acted, and according to Clanchy, the reign of Edward I during the late thirteenth and early fourteenth centuries reveals the apex of this shift. Edward I's lawyers began arguing, for example, that in *quo warranto* cases, a *written* warrant was the only legitimate warrant. Clanchy says that "memory, whether individual or collective, if unsupported by clear written evidence, was ruled out of court."[34] Despite the fact that such cases were suspended in the 1290s, he explains that Edward's government "had to concede that tenure 'from time out of mind' was a legitimate claim," but "the principle had been established for the future that property rights depended generally on writings and not on the oral recollections of old wise men."[35] These moves further illustrate Plucknett's notion of "revolution" in English common law and, specifically, that the seeds were sewn for this revolution while Edward I held the throne.

Clanchy's work, with its focus on changes in literacy, also corresponds with Brian Stock's theory of textual community. *Fleta*, as the focus of this study, represents one legal text in the milieu of other similar texts written during the 1200s. In another sense, *Fleta* became part of an expanding thirteenth-century textual environment that included,

[33] M.T. Clanchy, *From Memory to Written Record: England 1066-1307*, 3rd ed. (West Sussex: Wiley-Blackwell, 2013), 19.

[34] Clanchy, *From Memory to Written Record*, 3.

[35] Clanchy, 3.

for instance, Bracton's *De Legibus*, and *Fleta* helped further establish a textual community of lawyers and judges in England. As a conceptual framework for the present study, Stock's *Listening for the Text* helps illustrate how written texts become galvanizing forces for social groups.

Stock's Textual Community and the Uses of the Past

Stock's theory emphasizes the evolution of literacy and, more precisely, the often times complex relationship between oral and written traditions that shape society. His argument is that the Middle Ages become critical in this evolution, and he explains that "medievals were forced to find their own solutions to the problem of reading, writing, and society."[36] This tension is worked out in what Stock calls "textual community," a concept this chapter will more fully explore in its latter passages.

Stock asserts that the study of oral and written traditions is not an "invention of the modern age."[37] In supporting this assertion, he explicates two theses in the field of orality and literacy. A strong thesis, according to Stock, suggests that if no writing existed before, then historians can "speculate on the influence that the introduction of literacy has on life and thought. Changes in mentality may be the result of bringing reading and writing to a society for the first time."[38] A strong thesis necessarily lacks nuance in that it suggests that oral societies have no systems of written symbols, even in the simplest form, and the advent of reading and writing brings about an enlightenment of

[36] Brian Stock, *Listening for the Text: On the Uses of the Past* (Baltimore: The Johns Hopkins University Press, 1990; Philadelphia: University of Pennsylvania Press, 1996), 15. Citations refer to the University of Pennsylvania Press edition.

[37] Stock, *Listening for the Text*, 5.

[38] Stock, 5.

sorts. The strong thesis purports a dichotomy between orality and (written) literacy; it embraces oral and written literacies as both "states of mind" and "stages of culture."[39]

The weak thesis, on the other hand, tries to account for a complicated interaction between orality and literacy after the society has already adopted some form of reading and writing. Thus, it assumes that societal knowledge of reading and writing as not completely new.[40] More writing and reading, in other words, becomes part of a society that already has begun using written text. Stock contends, however, that this point about inception becomes largely irrelevant for this thesis. For the weak thesis, "the focus of interest lies in the way in which speech and writing answer to different social priorities."[41] If a community already has some understanding of reading and writing, then more reading and writing becomes a "force of change" in which a number of factors (e.g., geographical, linguistic, economic, political, and gender) contribute.[42]

Stock believes that a marriage of the strong and weak theses can take place. While the strong thesis helps explain "ground-breaking ceremonies in culture," it does not help one understand what comes *after* the "ground-breaking."[43] Stock's claim about the weak thesis then becomes slightly more obfuscating. He argues that the weak thesis treats oral

[39] Stock, 6. Stock continually refers to "mentalities" or "differing mentalities" when describing the distinction between orality and "literacy," which is the advent of reading and writing. He goes on to explain that the orality/literacy binary become parallels for other dichotomies like prelogical/logical, irrational/rational, magical/scientific, and traditional/modern.

[40] Stock, 6.

[41] Stock, 6.

[42] Stock, 6.

[43] Stock, 7.

and written literacies as "forms of expression and performance."[44] Here, Stock offers no direct explanation of what he means by "performance," but he does indicate that the weak thesis emphasizes the "everyday challenges and responses of social life" as opposed to "ultimate origins and global mentalities."[45] In short, Stock argues for a new thesis that, while offering a hybrid of the strong and weak theses, encourages historians – as well as other scholars from other disciplines – to place emphasis on the *community* and the interactions that take place therein.[46] Stock strongly suggests a more interdisciplinary approach to looking at texts that uses community with emphasis on social convention as a conceptual frame.[47] He argues that the terms *orality* and *literacy* are over-limiting. To overcome the problem of over-limitation, Stock recommends replacing these two terms with something more "neutral"; however, he quickly points out that doing so does not change the "basic issue, which concerns publicly acknowledged referential tools."[48] Again, Stock emphasizes community and that communities use text regardless of whether or not the text is oral or written, to be read or to be said.

[44] Stock, 7.

[45] Stock, 7.

[46] Stock devotes the next several pages to exploring the different intra-disciplinary debates over text. He mentions philosophy, literary criticism, history, and media studies (e.g., Eric Havelock – although Stock does not label the field "media studies" or "media ecology" per se), but he gives slightly more attention to the debate in anthropology over text. To summarize, ethnographers record, which is "necessary" according to Stock. Interpretive anthropologists, on the other hand, engage in textual and contextual inquiry.

[47] Stock never uses the terms "interdisciplinary" or "interdisciplinarity," but the terms become useful in describing and analyzing his theories.

[48] Stock, *Listening for the Text*, 10.

Stock argues for bringing together scholarly methods from history, literature, and anthropology as well as hermeneutics and sociology.[49] By the end of his introduction, Stock reminds the reader that text represents the unifying concept tying together different theories from different disciplines. Stock chooses to problematize the concept of *text* by noting a problem of definition. Here, he contends that "it is not possible to say precisely what is or is not a text" and that no "sufficiently comprehensive" definition of text exists to reflect all possible cases.[50] He presents text as an intellectual tool, a tool more practical than literacy because of its manageability; that is, text enables a scholar to manage more effectively the smaller "units" that motivate action in society.[51]

Textual Community as Conceptual Frame

Stock's "textual community" provides the conceptual frame for this study of *Fleta.* Textual community enables an interdisciplinary approach that encourages consideration of *Fleta* and its place in the history of English common law as well as a major work of legal literature that embodies a particular legal language and discourse. Stock, for instance, explores this interplay between history and literature. He describes a number of "complementary forces" that have resulted in a détente, of sorts, between historical inquiry and literary criticism.[52] While literature has seen a growing interest in history, according to Stock, "new historicism" has recognized an "interdependence" of

[49] Stock, 11-12.

[50] Stock, 11-12.

[51] Stock, 11-12. Stock goes on to explain action as based on smaller units such as scripts, scenarios, and parts of bigger narratives as opposed to the whole of a society's literature.

[52] Stock, *Listening for the Text*, 16.

interpretive modes brought about "under the guidance" of hermeneutics, semiotics, and linguistics.[53]

An interchange between history and literature can help facilitate new understandings in studies of textual communities. Furthermore, Stock identifies three stages in the creation of textual community. Using the example of the Waldensians, an ascetic movement within Christianity, Stock illustrates how a literate community forms.[54] The three stages, according to Stock, are oral contact, educative process, and historicizing of the community.[55]

Oral Contact

Stock explains that in the accounts of the Waldensian formation in the Laon chronicle and also in *De Septem Donis Spiritus Sanctus,* that oral experiences are "attached to a textual backdrop."[56] The Laon chronicle describes Peter Waldo, the sect's founder, listening to a jongleur sing the text; the *De Septem* relates a story of Waldo hearing a preacher read aloud the text of the gospels.

Educative Process

In the two accounts, Waldo, in "seeking counsel for his soul," pursues the study of "vernacular texts, their commitment to memory, and preaching by Waldo or his

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[53] Stock, 16.

[54] Stock, 24-5. The Waldensians were an ascetic movement within Christianity founded in Lyon by Peter Waldo in 1173. Stock bases his account of the Waldensians' origins on Etienne de Bourbon's *De Septem Donis Spiritus Sanctus*. Stock also refers to the Laon chronicle in historicizing their formation, but he claims the Laon chronicle as less reliable than de Bourbon's *De Septem*.

[55] Stock, 25.

[56] Stock, 25.

delegates, sometimes in public."[57] In short, Stock reveals that an interaction with oral culture, on the one hand, precipitates the engagement with written text, but on the other hand, engagement with written text leads to more oral expressions. This process of interaction between the oral and the written contributes to an educative process.

Historicizing of the Community

Stock says "historicizing of the community" means simply "giving it a past."[58] In the case of the Waldensians, "giving it a past" is achieved through "intertextuality" or an inextricably intertwined relationship between textual sources. According to the accounts Stock cites, Waldo hears the preacher quote a passage in Matthew, which is the same passage Anthony heard as he passed before his village church just a short time after inheriting his familial estate."[59] Stock argues that readers from the medieval period would know this allusion, and upon encountering the story of Waldo for the first time, they would associate him "with an archetypical saint's life."[60] Historicizing the community, in particular, becomes a facet of studying *Fleta* and the textual community of lawyers and judges living in England during the late thirteenth century. Analyses presented in this study will reveal how *Fleta* aided in constituting a past for English jurisprudence.

Recent studies have sought to apply Stock's theories and have elaborated these aspects of textual communities. Jennifer Wynne Hellwarth's 2002 essay, for example, adds the dimension of "gender" to Stock's theories in her analysis of "female textual

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[57] Stock, 25.

[58] Stock, 25-6.

[59] Stock, 26. Stock cites an anecdote from the *Life of St. Anthony*.

[60] Stock, 26.

communities" in medieval and early modern England.[61] Hellwarth argues that male authorship of midwifery manuals resulted in male construction of the female body through text. Teresa Webber, on the other hand, differentiates her study of mainstream religious groups from Stock's focus on heretical communities. In doing so, she shows how Latin texts constructed a group identity among clerics, which became evident in both liturgical and scholarly environments.[62] Webber emphasizes "identity" as integral to the formation of textual community; creation, recreation, and repeated use of texts not only constituted community for clerics but texts constituted and re-constituted their identity as a community. Webber explains that authoritative texts, in particular, led to the "emergence of new alignments" that existed "not only through personal and institutional contacts but also through a shared repertoire of textual allusion."[63] She contends that clerics shared a repertoire of textual allusion and quotation "in newly composed or compiled works, the exchange of letters and the circulation of books."[64] Webber also reveals that close readings of the Bible and other seminal texts not only stoked the fires of religious reform, but differing interpretations of those texts helped opponents assert authority.[65] Texts read aloud and interpreted for parishioners solidified both their

[61] Jennifer Wynne Hellwarth, "'I wyl wright of women prevy sekenes': Imagining Female Literacy and Textual communities in Medieval and Early Modern Midwifery Manuals," *Critical Survey*, 14, no. 1 (2002): 45, http://www.jstor.org/stable/41557147.

[62] Teresa Webber, "Chapter V.5: Textual Communities (Latin)," in *A Social History of England: 900-1200*, ed. Julia Crick and Elisabeth Van Houts (Cambridge University Press, 2011), 330.

[63] Webber, "Chapter V.5: Textual Communities (Latin)," 331.

[64] Webber, 331.

[65] Webber, 340.

identification with those texts and also their identities within a specific textual community aligned with a particular perspective.

Elaine Treharne's study, however, turns to a definition of textual community reflected in King Alfred's plans for a system of education.[66] According to Treharne, King Alfred's textual community required pragmatic literacy in English for the students' everyday lives (e.g., for themselves, for their local administration) while the second layer provided for those who possessed the ability and also the desire to pursue scholastic and religious life. A textual community necessitated provisions for those who would go on to study Latin.[67] Treharne argues that in order for the textual community to succeed, its members were persuaded to believe in divinely inspired texts; clerics, for example, convinced community members that certain texts (e.g., the Bible) essentially came from God. In addition, perpetuation of the textual community depended upon writing as well as its power and permanence. Writing also helped constitute and reconstitute the emerging institutional apparatuses of church *and* state. The textual community, Treharne concludes, extended "from the concerned author and his circle to the individual reader, to the learned listener in the chapter house, to the wide-eyed parishioner acquiring an intimate knowledge of the inevitability of eternal damnation for liars and adulterers."[68]

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[66] Elaine Treharne, "Chapter V.6: Textual Communities (Vernacular)," in *A Social History of England: 900-1200*, ed. Julia Crick and Elisabeth Van Houts (Cambridge University Press, 2011), 341. Treharne cites herself from her essay, "King Alfred's Preface to Gregory's *Pastoral Care*," which appears in an anthology she edited titled *Old and Middle English, 890-1400*. *An Anthology* (2nd ed., Oxford University Press, 2004). She explains that King Alfred communicated his plan to his bishop, Waerforth of Worcester, after almost a century of warfare with the Danes.

[67] Treharne, "Chapter V.6: Textual Communities (Vernacular)," 341-2.

[68] Treharne, 350-1.

These historians have added dimensions to Stock's propositions regarding textual community. Webber illuminates how identity, a concept that Treharne echoes, forms textual community in that text substantiates the person's connection to the group. Treharne, on other hand, emphasizes writing as integral to textual community as opposed to stressing the more integral nature of writing and speaking in symbiosis. For Treharne, inscriptions are key to advancing textual communities as entities. Furthermore, she suggests that textual communities exist in overlapping contexts of writing; writing constitutes the parish, and the parish constitutes the church as a larger apparatus. Writing also aids in constructing the state and all the apparatuses that comprise it.

Stock indicates that "wherever there are such [written and oral] texts, there is the possibility of textual community."[69] He explains that textual community "arises somewhere in the interstices between the imposition of the written word and the articulation of a certain type of social organization" and that that textual community exists as both "interpretive community" and "social entity."[70] As an interpretive community, participants act as both producers and consumers of oral and written texts, a function Stock describes as a group of listeners benefiting from hearing or reading the text. A "natural process of education" takes place within the textual community as an interpretive community wherein participants engage texts by reading aloud or silently and by listening to those texts.[71] Stock claims that this process of education can "weld" the participants from different socioeconomic backgrounds together "if the force of the word

[69] Stock, 150.

[70] Stock, 150.

[71] Stock, 150.

is strong enough."[72] On the other hand, the textual community as a social entity forms an organization with hierarchies and roles for its members as well as with the ability to institutionalize and to perpetuate itself. Moreover, the textual community as social entity establishes rules, and those rules, as Stock argues, "transcend preexisting economic or social bonds, since it is the rules that are both the basis and the result of common interpretive efforts."[73] The social entity aspect flows from the interpretive community aspect, and the two aspects become inextricably intertwined in the formation and perpetuation of textual community.

Textual communities, however, emerge not as one oral or written narrative but as "combinations" of narratives.[74] Stock describes the role of the actor, or storyteller, as much like an actor performing from a dramatic script, but the story is not a text but "life that is seen as a story."[75] The "shaping devices," as Stock terms them, "produce in life the rough equivalents of the rhetorical strategies of storytelling" such as metaphor and irony.[76] Although Stock does not expand upon the uses of rhetorical strategies, he is describing the storyteller as one conveying a message to an audience and the audience responding, not necessarily as passive agents, but as more active participants in constructing both narrative and ritual.[77]

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[72] Stock, 150.

[73] Stock, 150-1.

[74] Stock, 152.

[75] Stock, 152.

[76] Stock, 152.

[77] Stock, 152. Stock engages in a more expanded discussion of rituals that emerge before and after the introduction of text into a community. That discussion, however, is beyond the

This study of *Fleta* stands as a legal and intellectual history, but in the spirit of Stock's textual community approach, it also stands as a study that embraces interdisciplinarity. Thus, this study, as a study of law, becomes "revolting" because it presupposes that an understanding of legal formation presupposes an understanding of, for example, history, textuality, literacy, rhetoric, anthropology, and sociology. Such an underpinning flies in the face of the law enterprise existing in a vacuum; rather, law, as an intellectual pursuit, depends upon a number of intertwined interdisciplinary connections and also methodologies. This study, for instance, makes use of textual analysis in examining *Fleta* and related texts while also dovetailing with the other scholarly concerns (e.g., textuality and literacy studies, anthropology). It resides at an intersection and also at a convergence; that is, it is situated in overlapping areas of academic and scholarly inquiry.

The organization of this study is as follows. "Chapter Two" represents the historiographical essay, but it also offers context for *Fleta* while explaining how historians have treated this work. "Chapter Three" offers an exegesis of specific passages from *Fleta* addressing property law, homicide, theft, and robbery. "Chapter Four" explores the relationship of *Fleta* to earlier legal treatises, specifically those of Henry de Bracton. "Chapter Five" is the conclusion for this study, and it provides reflection on textual community as well as *Fleta* and its historical significance.

This study investigates the relationship between *Fleta* made on other legal texts and Bracton, specifically. While several historians have written about *Fleta* and Bracton, scholars have not considered, in any substantive way, the relationship between the two.

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scope of this chapter and this study. For purposes of this study, the relevant point is that the text, narrative, and ritual become inextricably intertwined in social formations.

Furthermore, other studies of English common law have not used Stock's concept for analyzing how a text helped to shape a community. As a "revolting" exploration of textuality and legal history, this study seeks to illuminate a seminal common law text and the various factors (e.g., ideological, sociocultural, political) that shaped its creation.

CHAPTER II

FLETA IN ITS HISTORICAL CONTEXT: G.O. SAYLES'S INTRODUCTION, A BRIEF HISTORIOGRAPHY, AND THE CREATION OF TEXTUAL COMMUNITY

George Osborne Sayles and his collaborator, H.G. Richardson, produced the most modern edition of *Fleta,* which the Selden Society published in three volumes between 1955 and 1984. Sayles and Richardson, however, published *Volume II, Volume III,* and *Volume IV* without ever publishing *Volume I*.[78] Richardson tended to enter into numerous commitments for producing numerous volumes of scholarly work "rendered damaging only by his equally recurrent failure to meet those commitments," the latter due largely to his perfectionistic tendencies.[79] Those tendencies in Richardson often embarrassed Sayles, who once encouraged him "not to get it right but to get it written."[80] Nevertheless, Richardson's willingness to commit to such projects had something to do with why he and Sayles produced this particular translation of *Fleta*. Paul Brand comments upon the dubiousness of producing a new edition of *Fleta* when an already "adequate if not perfect, seventeenth-century edition" was available, although he does note the usefulness

[78] Both Sayles and Richardson died before completing the project. Sayles died in 1994; Richardson passed away in 1974.

[79] Paul Brand, "George Osborne Sayles, 1901-1994." *Proceedings of the British Academy* 90 (1996): 446.

[80] Brand, "George Osborne Sayles," 447.

of Sayles and Richardson's translation and annotations.[81] It becomes reasonable, therefore, to assume that Sayles and Richardson produced this multi-volume edition because of multiple (over)commitments to the Selden Society as well as other publishers.[82]

Sayles explains that the first printed edition of *Fleta* accompanied John Selden's dissertation, which itself was first published in 1647. Due to a significant number of errors in the text, Selden published a second edition of his dissertation in 1685. "Dissertation," however, does not denote a "dissertation" in the modern sense of the term. Selden's "dissertation" becomes mostly translation with the indication "annexed to *Fleta*" in the title; Selden's work, in other words, reads like a translation with a series of extended annotations, to use a more contemporary vernacular.[83] These annotations are interspersed throughout and in between translated passages from *Fleta* as the original source. Sayles also mentions new editions of the text appearing in 1735 and 1776 as well as David Ogg's translation in 1925, which predates the initial volume from Sayles and Richardson by approximately 25 to 30 years. [84]

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[81] Brand, 462.

[82] Brand, 458-462. Brand describes a number of projects that Sayles and Richardson embarked upon after the Second World War. According to Brand, some of those projects Sayles was only able to complete or partially complete after Richardson's death in 1974. Richardson's failure to return drafts and/or corrections, for example, resulted in the demise of a publication of a volume on *The Medieval Parliament in England*.

[83] John Selden, *The Dissertation of John Selden, Annexed to Fleta. Translated with Notes. By the editor of Britton: Translated and Illustrated* (London: J. Worrall, and B. Tovey, at the Dove in Bell-yard, near Lincoln's-inn, 1771).

[84] See Harold Dexter Hazeltine, ed. *Iohannis Seldini ad Fletam Dissertatio*, trans. David Ogg (Cambridge: Cambridge University Press, 1925).

Published in 1984, *Volume IV*, which contains the translations of Books V and VI of *Fleta*, also includes Sayles's introductory essay. Seven subsections comprise this introduction; those subsections are titled "Previous Editions of the *Fleta*," "the Manuscripts," "the Date of the *Fleta*," "*Fleta* and Bracton," "*Fleta* and the Statutes," "*Fleta* and Other Sources," and "the Author." The mystery of who wrote *Fleta* and when it was written permeate, either directly or indirectly, each of these seven subsections. Sayles, for instance, opens the third subsection, "the Date of the *Fleta*," with nods to Selden's argument from his dissertation that claims *Fleta* was written during the reign of Edward I and, specifically, sometime after 1290.[85] Sayles, however, points out that one should not forget T.F. Tout's argument that *Fleta* may have been written during the time of Edward II. He then categorically dismisses the argument, indicating that one can "put aside any suggestion that *Fleta* was written or revised under Edward II."[86] Simply put, Sayles maintains that, in all likelihood, *Fleta* was written and published at the time Selden stipulates in his dissertation.

Origins of *Fleta* and its Sources

Sayles devotes considerable attention to the relationship between *Fleta* and Henry of Bracton or Henry de Bracton, whose work most scholars regard as the "greatest medieval treatise on the common law."[87] Bracton, as Theodore F.T. Plucknett explains, served as judge during the reign of Henry III.[88] During his life, he was continually

[85] Sayles, "Introduction," xii.

[86] Sayles, xiv.

[87] J.W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore: The Johns Hopkins University Press, 2000), 7.

[88] Plucknett, *A Concise History of the Common Law*, 20.

gathering material for an extensive treatise on common law given that no written collection of procedures was available to any king.[89] Bracton, however, died in 1268 thereby leaving unfinished the task of writing this treatise. Sayles argues that someone who ostensibly once worked with Bracton and had access to his papers did indeed publish his work, which "was seen as potential best-seller."[90] Moreover, according to Sayles, this "incomplete, untidy, much corrected manuscript of Bracton was 'edited' and 'published,' and this copy became the indispensable vade-mecum of members of the rapidly growing legal profession in London and the provinces."[91] Sayles points out that "we may properly assume" that judges, lawyers, and students in the late thirteenth and early fourteenth centuries were familiar with Bracton's treatise, but his work remains "stark, impersonal documents, for we know next to nothing about who owned them and how they used them."[92]

By the seventh page of his introduction, Sayles makes at least two points clear about *Fleta*. First, he maintains that *Fleta* was written during the reign of King Edward I; however, he acknowledges that Bracton's treatise considerably influenced *Fleta*. Second, although the author of *Fleta* is ultimately unknown, it was someone who worked closely with Bracton's treatise while he was writing his treatise on common law. Effectually, as Sayles contends, the author was the "first man to write a learned commentary on

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[89] Plucknett, 20.

[90] Sayles, xv.

[91] Sayles, xv.

[92] Sayles, xv.

Bracton."[93] Sayles maintains that *Fleta* reflects and represents Bracton's earlier work, but at the same time, he remains steadfast in his claim that *Fleta* was more than a commentary on Bracton.

In addition, Sayles makes two other important contextual points about *Fleta* and its place in history. First, he remarks that the author's "greatest addition" to Bracton's text was "complementing the common law of Bracton with statute law."[94] Before publication of *Fleta*, statutes "were not regarded as verbally sacrosanct," and Sayles explains that prior to *Fleta*, lawyers had taken "no painstaking desire" with the precise wording of statutes. They simply assumed that statute law contributed to the whole of common law.[95] In other words, *Fleta* helped establish a distinction between statute law as separate from common law while still representing one part of common law.

The second major contextual point in Sayles's introduction concerns the author of *Fleta* and his being well-read beyond legal literature.[96] He cites numerous examples to support this claim. Sayles points out, for example, in a small section about jurors' oaths, the author cites St. Augustine of Hippo's *De Mendacio*. *De Mendacio,* as Sayles explains, "sought the reasons why men told lies," and he stresses that the author benefited from some sort of classical education, a claim that is supported by the his effective and

[93] Sayles, xv.

[94] Sayles, xviii.

[95] Sayles, xviii.

[96] Throughout the "Introduction," Sayles presupposes the writer of *Fleta* as "he" and uses masculine pronouns when referring to the author. It represents a most likely safe assumption, given that women probably would not hold a position that would enable them to write such a work.

intelligible use of Latin.[97] Sayles implies that he was either trained in a "Romanist" tradition or accepted "Romanist learning" as presented in Bracton or he, himself, was educated in a tradition that exposed him to significant works written in Latin.

Fleta and Bracton

It becomes difficult to decouple *Fleta* from Bracton's text as the two have become, in a sense, inextricably intertwined, and one can view *Fleta* as an extension of Bracton as well as Ranulph de Glanvill.[98] Bracton never finished his book, and it remains a mystery whether or not he published what does exist from it during his lifetime. Most historians, at one time, believed he wrote the main part between 1250 and 1258.[99] Recent scholarship, however, indicates that he wrote the text in the 1220s and 1230s using the plea rolls and then it was "mangled by editors who tried to bring it up to date in the middle of century."[100] Nevertheless, earlier scholarship on English common law highlighted Bracton's impact. As nineteenth-century English historian Frederic Maitland put it, Bracton was "a good and great book very worthy of careful study" and one that denoted "a critical moment in the history of English law, and therefore in the essential

[97] Sayles, "Introduction," xix.

[98] See Arthur R. Hogue, *Origins of the Common Law* (Bloomington, IN: Indiana University Press, 1966; Indianapolis, IN: The Liberty Fund, 1986), 191-2. Citations refer to The Liberty Fund edition. Hogue explains that Bracton extended Glanvill's work in several ways, but most notably, Bracton described "even more explicitly" the role of custom in English law.

[99] Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I, Volume I*, 2nd ed. (Cambridge: Cambridge University Press, 1898; Clark, NJ: The Lawbook Exchange, Ltd., 2013), 207. Citations refer to The Lawbook Exchange edition.

[100] J.H. Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2011), 176.

history of the English people."[101] No jurist rivalled Bracton until Blackstone wrote his commentaries some five centuries later; only twice in history, according to Maitland, had "an Englishman had the motive, the courage, the power to write a great readable, reasonable book about English law as a whole."[102]

Maitland also rejected the notion that English law simply adopted Roman law, maintaining that Bracton wanted English law to stand on its own and separate from Roman jurisprudence with him having "no intention of supplanting English by Roman law."[103] Roman law may have influenced Bracton, but Maitland argued that "Rationalism rather than Romanism (*sic*)" shaped Bracton's philosophy while also declaring that "at an early date English law was rationalized by an able man is not the least among the causes which *protected* [emphasis added] us against Romanism in the following centuries."[104] Maitland also noted that certain "principles of jurisprudence" found in Bracton are not Roman, specifically, but rather "common to all mankind" and "dictates of reason implicit in all law."[105] While Maitland acknowledged Bracton's awareness of Roman law, he

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[101] Frederic William Maitland, "Introduction," *Bracton's Note Book: A Collection of Cases Decided in the King's Courts During the Reign of Henry the Third, Volume 1: Apparatus*, ed. Frederic William Maitland (London: C.J. Clay & Sons, Cambridge University Warehouse, 1887; Cambridge: Cambridge University Press, 2010), 1. References are from the Cambridge University Press edition. Pollack and Maitland in *The History of English Law Before the Time of Edward I, Volume I* also characterize the Bracton's book as "the crown and flower of English medieval jurisprudence" on page 206.

[102] Maitland, "Introduction," 8. Maitland almost omits any mention of Edward Coke (1552-1634) in complimenting Blackstone. He briefly disparages Coke in referring to his "chaos" and, specifically, his works as "bad chaos."

[103] Maitland, 9.

[104] Maitland, 9.

[105] Maitland, 9.

contended that Bracton helped establish English law as its own entity that did not merely recreate the Roman system.[106]

Maitland remained satisfied that Bracton was cognizant of legal history and, specifically, Roman jurisprudence, and although he saw some indirect relation between Roman law and Bracton, he remained adamant that the English did not just appropriate the Romans. In *A Sketch of English Legal History,* Maitland and Franklin Montague continued this line of argument, stating that from Bracton onwards Roman law had exercised "but the slightest influence on the English common law," and any influence it had exercised was "by way of repulsion" rather than "by way of attraction."[107] Maitland and Montague viewed Bracton as a turning point in the history of English common law as Bracton had effectually separated English from Roman jurisprudence. Until the time of Bracton, they maintained, English law "had absorbed so much Romanism that it could withstand all future attacks, and pass scathless even through the critical sixteenth century."[108]

More recently, though, Peter Stein, contrary to Maitland, has described Roman law as having a much more direct influence on Bracton. Stein argues that Bracton needed a structure for articulating the laws of the king's court, and he could only find such a

[106] See also S.F.C. Milsom, *A Natural History of the Common Law* (New York: Columbia University Press, 2003). In his introduction, Milsom claims no one since those writing in the thirteenth century had mastered Bracton in a way comparable to Maitland until S.E. Thorne's writings in the mid to late twentieth century.

[107] Frederick William Maitland and Franklin C. Montague, *A Sketch of English Legal History* (New York: G.P. Putnam's Sons: The Knickerbocker Press, 1915; Clark, NJ: The Lawbook Exchange, 2010), 45. Citations refer to The Lawbook Exchange edition.

[108] Maitland and Montague, *A Sketch of English Legal History*, 45.

structure in Roman law.[109] Stein indicates, for example, that many passages "echo the language of Digest and Code" in which Bracton used phrases from Roman texts by weaving those phrases into the exposition. Bracton's treatise, as Stein contends, "equipped the nascent common law with the minimum theoretical structure that it needed to grow in a coherent way."[110]

Stein's statements suggest a more explicit relationship between Bracton and Roman law and one that Maitland would have likely found objectionable. S.F.C. Milsom concurs with Stein, although in a more blunt manner when he candidly says that Bracton "was *infected* [emphasis added] by Roman ideas and Roman legal language."[111] Milsom continues with the metaphor by stating that "the infection was only of the skin, but the skin is what you see."[112] A prima facie examination of Bracton, according to Milsom, leads one to believe that English law shares the same "nature" as Roman law, and legal practice in the centuries following Bracton reveal an English system with a great deal in common with the Romans. Church courts, for example, applied a system "derived from the Romans," and those "courts had judges armed with law-books and with mechanisms for ascertaining the facts to which the law would be applied."[113] Milsom indicates that Bracton, upon closer examination, does not reflect a duplication of the Roman system;

[109] Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 2004), 64.

[110] Stein, *Roman Law in European History*, 64.

[111] Milsom, *A Natural History of the Common Law*, xiv.

[112] Milsom, xiv.

[113] Milsom, xv.

however, the practice of English law more closely parallels Roman jurisprudence, particularly as related to the organization of the court system.

Context and Authorship

The theme of authorship coincides with *Fleta's* origins and permeates Sayles's introduction to Sayles and Richardson translation of this text, but he devotes the last section of the opening essay to the origin and authorship questions, specifically. Under the heading, "The Author," Sayles begins with the statement that "we must seek our knowledge of him from internal evidence. Some indications are not helpful." The first three to four pages of this subsection, however, address the circumstances surrounding the production of *Fleta* rather than the author's identity with Sayles concerning himself, once again, with the "when" question over the "who" question.

In these passages, Sayles conveys his conviction that *Fleta* was written between 1275 and 1300 and that evidence suggests the author wrote parts of *Fleta* before 1290. Sayles argues that several passages, for example, referred to "Jews and Jewesses" as residents of England, but the author could not have written these passages after July 1290 "when the wholesale expulsion of the Jews was decided upon or October when that expulsion was mercilessly carried out."[114] On the other hand, evidence also points to the author writing and revising parts of *Fleta* after 1290. Sayles contends that a subtle indication meant that the author could not have written specific passages prior to 1296. The author refers to, for example, the chancellor of Scotland as a subordinate to King Edward. King Edward, however, did not claim to be the king of Scotland until 1296.[115]

[114] Sayles, "Introduction," xxi.

[115] Sayles, xxi.

Sayles, therefore, infers that the writing of *Fleta* remained in progress as late as 1296 but not as late as 1300.

Sayles also seizes an opportunity to provide some additional details about the title of the treatise. He suggests the author lived in Fleet, a common name for places, and the author had created a double entendre that played upon the equivalent Latin and English words for "fleet," although he never offers evidence to support the assertion.[116] The Anglo-Saxon term for "fleet" was "fléot" meaning "water-course and swift."[117] Latin for "fléot" or "fleet" is "fleta." In short, the author, engaged in the "inveterate medieval habit of punning" and double entendre, created a play on words to suggest that "hurriedness" had something to do with the preparation of *Fleta*.[118] The *Fleta* "Prologue", for example, is addressed "to many who are hurried" and "to many who are unlearned a compendium in a small volume of the judgements of upright judges may be very necessary, for the enquirer will escape turning over a large number of books and chapters when, without trouble, he is given what he seeks, brought together in a brief space."[119]

Sayles then speculates further related to the author's identity. He suggests that the author of *Fleta* had some specialized knowledge of administering the law in that the author, for example, was likely a member of the Steward of the Household, an official

[116] Sayles, xxi. "Fleet" was also the name of a prison in London in use from the late twelfth century to the mid-nineteenth century.

[117] Sayles, xxii.

[118] Sayles, xxii.

[119] Sayles, xxii.

responsible for supervising a lord's estate.[120] As a steward, the author would "gain intimate knowledge of the clerks and procedures of the royal household, of the chancery and the exchequer, and the duties they fulfilled."[121] Sayles emphasizes the author's detailed descriptions, explaining that "his lucid description of the courts of law" provides the first definition of parliament "as the supreme form among the many forms assumed by the king's council in its governance of the country."[122]

Here, Sayles touches upon the possibility that Matthew of the Exchequer wrote *Fleta,* an assertion that has historically rested on two assumptions. First, he notes that a long-held belief, not necessarily based in historical fact, suggests that the author remained in prison for a length of time and that he wrote the *Fleta* during this period of incarceration at the Prison of the Fleet.[123] Second, many have assumed that the author was one of the judges or lawyers that Edward I jailed for corruption while the King was away on the continent between 1286 and 1289.[124] Matthew of the Exchequer was imprisoned for two years between 1290 and 1292. Sayles also notes that Selden accepted these two assumptions, and these "assumptions are still accepted today,"[125] and more recently, in *The Making of the Common Law,* Paul Brand follows these assumptions in

[120] Sayles, xxiii. Sayles offers an extensive discussion as to why the author was a member of this administrative arm and how *Fleta* necessarily expanded the powers of the Steward of the Household.

[121] Sayles, "Introduction," xxiii-xxiv.

[122] Sayles, xxiv.

[123] Sayles, xxiv.

[124] Sayles, xxiv.

[125] Sayles, xxiv.

maintaining that Matthew of the Exchequer most likely wrote *Fleta* while, at the same time also referring to *Fleta* as both commentary on and revision of Bracton.[126]

Sayles, however, dismisses these assumptions, arguing "it impossible to believe that *Fleta* was written during two years of imprisonment, however casual, in 1290-92 or that the learned author should choose to have his life's work associated with a gaol" (a jail).[127] In short, according to Sayles, Matthew has no place among the candidates for authorship. Sayles, after devoting so much direct and indirect attention to this question, then dismisses identity as important, noting that "all this would not add much to the value of *Fleta* itself, for it can stand alone in its own right."[128] Sayles's statements, though, reflect his attempts to avoid tainting the legacy of *Fleta* by associating it with a less-than-savory individual. In fact, his closing remarks capture his further efforts to preserve a legacy for *Fleta* separate from merely a commentary on Bracton.

In contrast with Sayles's position, N. Denholm-Young, in his 1943 essay "Who Wrote 'Fleta'?", makes the case that Matthew de Scaccario (aka Matthew Cheker), did indeed author *Fleta*. Denholm-Young bases his argument on evidence of a parallel between a passage from Bracton and a passage from *Fleta*. The passage concerned novel disseisin in which Bracton referred to himself in the third person as Henricus de Bracton or Henry of Bracton. Similarly, *Fleta*'s author, who borrowed, as Denholm-Young points out, considerably from Bracton, included an almost identical passage regarding disseisin,

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[126] Paul Brand, *The Making of the Common Law* (London: the Hambledon Press, 1992), 73.

[127] Sayles, "Introduction," xxv.

[128] Sayles, xxv.

even making reference to himself in the third person. In making this third-person reference, the author identified himself as "Mathaeus filius Petri" or "Matthew son of Peter."[129] Denholm-Young suggests that "Matthew son of Peter" was actually "Matthew de Scaccario," pointing out "Matthew" as an uncommon first name in England during this time. In addition, he presents a number of other pieces of contextual information necessarily offering a preponderance of evidence proving Matthew de Scaccario as the author of *Fleta*. He mentions, for example, that in 1290, a royal attorney named Matthew was imprisoned at Fleet for almost two years.[130] The following year, Denholm-Young publishes another essay in which he makes a concise, yet even more authoritative case that Matthew de Scaccario (or Matthew the Exchequer or Matthew Cheker) wrote *Fleta*.[131]

Impetus for *Fleta*

Historians, in general, have given much more attention to Bracton and his treatise as a major source of English common law. In most instances, they give *Fleta* more limited treatment, at times relegating *Fleta* to a mention in a footnote that supports some

[129] N. Denholm-Young, "Who Wrote 'Fleta'?," *The English Historical Review* 58, no. 229 (1943): 6, https://www.jstor.org/stable/553805.

[130] Denholm-Young, "Who Wrote 'Fleta'?," 6.

[131] N. Denholm-Young, "Matthew Cheker," *The English Historical Review* 59, no. 234 (1944): 252-257, https://www.jstor.org/stable/554004. Denholm-Young points to several key pieces of evidence strongly suggesting Matthew de Scaccario as the author of *Fleta*. In one passage, he explains that Matthew once served as the wartime clerk supervising payments to soldiers, which brought him into direct contact with the deputies of the Earl Marshal. Denholm-Young notes that *Fleta*'s author "speaks at length and with feeling of the work of the Marshal's deputies" and especially in wartime. Many passages, Denholm-Young indicates, addressing the steward's work reflect a "glorification" of the marshal as an executive officer of the court. Denholm-Young argues that other passages in *Fleta* are not balanced with an equal treatment of the offices of steward or constable.

discussion of Bracton. (The limited treatment very well derives from the fact that only one original manuscript of *Fleta* actually survived.) Furthermore, most historians refer to *Fleta* as a commentary on Bracton, a characterization that Sayles dismisses on its face. Historians of early English common law, to varying degrees, take up the issue of the rationale for *Fleta*, but to address this particular point, it becomes necessary to return to Bracton under the assumption that *Fleta* represents a revision, of sorts, of Bracton. Bracton's treatise reflects royalist views, which the author of *Fleta* also shares. *Fleta* espoused "the theory that the inalienable rights and privileges of the kingdom could not be divided or diminished, and that the King was thus unable to diminish his own authority."[132] Similarly, Bracton had sought to limit the authority of ecclesiastical jurisdiction and, moreover, recognized that the "king's justice had a large field and behind it was power not to be withstood."[133] Under this view, the king's power, or "potestas," rests upon the divine will, or "voluntas," which "is both the ultimate source of all justice and the final avenger of all transgressions."[134] The king controls himself from committing any crimes or abuses through a "self-imposed restraint" of his own will.[135] While no one could force

[132] Kinsch Hoekstra, "Leviathan" and Its Intellectual Context," *Journal of the History of Ideas* 76, no. 2 (2015): 248, https://www.jstor.org/stable/43948736.

[133] F.W. Maitland, "Introduction" to *Bracton's Note Book*, 3.

[134] Cary J. Nederman, "Chapter 19: Arguing Sovereignty in the Seventeenth Century: Bracton's Readers," in *Lineages of European Political Thought: Explorations along the Medieval/Modern Divide from John of Salisbury to Hegel*, ed. Cary J. Nederman (Washington, D.C.: Catholic University of America Press, 2009), 307, https://www.jstor.org/stable/j.ctt285181.23.

[135] Nederman, "Chapter 19: Arguing Sovereignty," 308.

the king to behave or decide matters justly, he should focus his "voluntas" almost solely on justice so that he cannot choose an unjust course of action.[136]

Inalienable authority of the crown, however, may be a bit of a misnomer in Bracton as he did provide for checks on the king's authority. Bracton placed law on a higher plane than the king, and by placing the king under the law, he asserted that the "law makes the king."[137] Furthermore, the king's barons and counts could restrain him should he abuse the royal "potestas" by committing an injury to his subjects.[138] Bracton allowed for checks to the king's power should he become tyrannical, and he applied "to the problem of the tyrannical ruler the typically medieval claim that a prince who ordinarily exercises a given set of political rights may, in exceptional circumstances, legitimately have his authority overridden by another power – without, however, losing or abrogating his original rights."[139] A major Bractonian contribution, therefore, is that he, through written text, restricted unbridled and absolute monarchical power.

Kantorowicz's *The King's Two Bodies* situates this relationship between the king and the law as a "political theology" that positions the king in both his physical, natural body as well as his mystical body that incorporates his subjects.[140] That mystical body, or his "body politic," enables the king to transcend his "body natural," which Kantorowicz

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[136] Nederman, 308.

[137] Hogue, *Origins of the Common Law*, 112.

[138] Nederman, "Chapter 19: Arguing Sovereignty," 308.

[139] Nederman, 308.

[140] Ernst H. Kantorowicz, *The King's Two Bodies* (Princeton: Princeton University Press, 1957; Princeton: Princeton Classics, 2016), 13. Citations refer to the Princeton Classics Edition.

characterizes as a migration of the soul or the "immortal part of kingship."[141] Kantorowicz explains that the "body politic in a king of flesh not only does away with the human imperfections of the body natural, but conveys "immortality" to the individual king as King, that is, with regard to his superbody."[142] This notion of the king's body politic began in the Middle Ages and persisted for many centuries thereafter; the London courts, according to Kantorowicz continually cited his body politic as "immortal."[143] The two bodies, however, became indivisible in that one could not attack, for example, the king's natural body without also attacking his body politic.

The king's body politic meant that he acted with the authority of God's representative on Earth, but that status did not mean challenges to the king's power did not exist. The feudal barons became the agency by which that monarchical power was limited thereby setting the stage for power struggles with the king. Perhaps no better example serves to illustrate the implications of this struggle than the Barons' War. The barons, by the mid-thirteenth century, had long felt that they had no say in governmental affairs and the king – and Henry III, specifically – had exercised tyrannical authority. Hogue explains that the barons' "reforming zeal" led to a number of reforms they passed at the Parliament of Oxford in 1258. These reforms included the establishment of baronial control over the major officers of royal government, including the justiciar, the treasurer, and the chancellor as well as the guardians of royal castles.[144] Moreover, they

[141] Kantorowicz, *The King's Two Bodies*, 13.

[142] Kantorowicz, 13.

[143] Kantorowicz, 15.

[144] Hogue, *Origins of the Common Law*, 62-3.

made themselves partners in the exercise of royal authority, which became, as Hogue puts it, a "deep invasion of royal prerogative and entirely out of line with contemporary political thought elsewhere in Europe."[145] A conflict between baronial leaders and the crown ensued, and in 1264, King Louis IX of France was asked to mediate between the Montfort faction of barons and the royalists. King Louis IX sided with the English crown and "in favor of a Europe-wide theory of medieval kingship by which the king was king by the grace of God, the sole administrator of the realm, without peer, and free to take counsel from any person whom he wished to consult."[146] In response, the Montforts and their leader Simon resorted to military action, and the war continued until Simon's death and the barons' defeat at the Battle of Evesham in 1265. The battle, more or less, marked the end of the Barons' War.[147]

Despite the barons' defeat, they succeeded in establishing more firmly in the English constitution that the king is *under* the law. Plucknett argues the Barons' War as relevant and worth studying "with care," particularly in relation to Bracton.[148] He notes that Bracton stopped writing and revising his treatise on the eve of the crisis, and as most historians point out, Bracton's treatise remains unfinished to this day.[149] In a later chapter of *A Concise History of the Common Law*, Plucknett mentions that little, if any, evidence

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[145] Hogue, 63-4.

[146] Hogue, 64.

[147] See E.F. Jacob, *Studies in the Period of Baronial Reform and Rebellion, 1258-1267* (Herts, UK: Octagon Press, 1974) for a more complete exposition on the Barons' War.

[148] Plucknett, *A Concise History of the Common Law*, 26. Plucknett, among others, believes Bracton stopped writing his treatise in 1256. He also suggests that the Barons' War, which was essentially a civil war, may have prevented Bracton from conducting further study needed to finish the work.

exists of Bracton taking sides during the Barons' War, and it becomes "impossible to regard him as partisan, for he served both the barons and the King."[150] An explanation for this failure to take sides may lie, according to Plucknett, in a sound judicial policy of remaining neutral in times of political turmoil and strife.[151]

Fleta borrowed extensively from the unfinished Bracton; furthermore, it addressed, particularly in the "Prologue," the need to respect royal authority. It is plausible that *Fleta's* author was alive during the Barons' War and was quite familiar with this event. The case that historians, like N. Denholm-Young, have made that Matthew Scaccario authored *Fleta* would support this point. Matthew lived during this time, served in the royal court, and he, himself, would have been familiar with the Barons' War and its aftermath.[152] Unlike Bracton, the text of the *Fleta* "Prologue" suggests its author had no divided loyalties; his loyalties lay with the crown. It is possible to see *Fleta*, at least in part, as an attempt to assert royal authority in the face of intense opposition.

One must consider, however, other contextual aspects and reasons for *Fleta*'s production. *Fleta* accounted for legislative changes under Edward I as well as made novel contributions, such as its offering of extensive descriptions of the law courts and the royal household.[153] It also provided a systematic treatment of routine estate management, a

[150] Plucknett, 259.

[151] Plucknett, 259.

[152] Denholm-Young notes, for instance, that Matthew served as second in command to John de Mohaut, a knight and important infantry leader (see "Matthew Cheker," page 252).

[153] T.F.T. Plucknett, *Early English Legal Literature* (Cambridge: Cambridge University Press, 1958), 78. Plucknett argues that because only one manuscript of *Fleta* has survived

treatment that had not been seen prior to the *Fleta*'s publication. Such reasons for its existence have led some historians (e.g., T.F.T. Plucknett) to believe that because of Bracton's incompleteness, it may have become necessary to consider abandoning Bracton in favor of augmenting it with other texts, like *Fleta*.[154] *Fleta*, as a complete text, would serve the needs of posterity in that future lawyers could look to it for guidance on prescient legal matters.[155]

As previously indicated, comparatively few historians have explored the relationship between Bracton and *Fleta*, or, more precisely, they have not considered what *changed* between the two texts. Like others, J.W. Tubbs also characterizes *Fleta* as a revision of Bracton, while also noting, in concurring with Plucknett, that the author's primary purpose apparently lie in modifying Bracton in response to the legislation of Edward I.[156] Tubbs agrees with Plucknett in that he sees *Fleta*'s original treatment of the law courts as its most important contribution. Furthermore, while he acknowledges *Fleta* was based mostly upon Bracton, Tubbs argues that its "Prologue" follows Glanvill, not Bracton, in its discussion of "the fact that some English laws were unwritten."[157] In citing a passage from *Fleta*'s "Prologue" about "unwritten laws," he declares it "so close a paraphrase of Glanvill that nothing by way of analysis or commentary needs to be added

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suggests that "its merits (possibly its language) failed to win it a public."

[154] Plucknett, *Early English Legal Literature*, 94.

[156] J.W. Tubbs, *The Common Law Mind* (Baltimore, MD: The Johns Hopkins University Press, 2000), 20.

[157] Tubbs, *The Common Law Mind*, 21.

here to what was said of Glanvill's treatment of custom."[158] Tubbs, however, does not compare and/or contrast to any considerable extent *Fleta* with Bracton or Glanvill other than to speak generally to a few overall similarities.

Fleta and Textual Community

Sayles argues that the identity of *Fleta's* author remains unknown, and simply put, it does not necessarily matter, at least in a sense, who wrote it given the significance of its content. The idea of textual community gives a bit of credence to the irrelevance of the author's identity in that the text itself represents a significant aspect of the ongoing creation of the legal community in medieval England. *Fleta* existed in a system with other texts and interactions, and it contributed to historicizing a thirteenth-century community of legal professionals. From this perspective, the authorship question becomes less important, although it did come about in the context of the London courts. *Fleta*, however, necessarily revised and/or borrowed considerably from Bracton (who, himself, appropriated Glanvill), which becomes important in seeing it as existing in a cultural and intellectual milieu with other corresponding texts.

Fleta is worthy of further investigation, regardless of whether or not it exists as a unique contribution or as a commentary and/or revision on Bracton. Stock's textual community can help illuminate *Fleta*'s impact and contribution to the development and evolution of English common law. Chapter 1 identified the three main characteristics of textual community from Stock's work as oral contact, educative process, and historicizing the community. Historicizing the community becomes most valuable for this analysis, as *Fleta* contributes to giving a past to a thirteenth-century textual community of

[158] Tubbs, 21.

English lawyers and judges. Explication of statutes from *Fleta* reveals that the author was well aware of the texts that came before it (e.g., Bracton's treatise), and that it shared a discourse and language with previous texts for purposes of shaping the future.

Analysis of *Fleta* also shows a legal community becoming increasingly reliant upon written literacy for purposes of not only communicating law but also administering it. Stock's notion of the marriage between the strong and weak literacy theses becomes useful for purposes of showing how communal interactions resulted in a written compendium of statutes that the author intended to reach wider of audience of those engaged in the practice and adjudication of law in England. Stock's theories of literacy and textuality undergird the analysis in the following chapters.

CHAPTER III

A COMMENTARY ON *FLETA SEU COMMENTARIUS*

Its author organized *Fleta* into six books (titled "Book I," "Book II," etc.) with multiple chapters comprising each book. Book I contains 45 chapters and Book II 88 chapters. Book III, however, only contains 18 chapters while 31 chapters make up Book IV. The author arranged Book V into 40 chapters and Book VI into 54 chapters. No evidence points to precisely why the author chose to include, for example, only 18 chapters in Book III while offering up 88 chapters in Book II. His decision was mostly arbitrary or so it would seem as no unified themes function as organizing principles for any one book. Each chapter begins with "Of" (or "De," in Latin); for example, the opening chapter of Book I is titled "Of persons" ("De personis") and the final chapter of Book VI is called "Of prescription [by lapse] of time" ("De tempore prescripto"). Although no theme necessarily ties all the books of any one volume together, the last three books in the series (Book IV, V, and VI) focus more on civil and transactional matters, with more emphasis given to warranties and exceptions, while the first three books give more attention to criminal and procedural matters. Book I has the most to say about criminality and crime ("Of criminal actions," Chapter 16), murder and homicide ("Of homicide," Chapter 23 and "Of murder," Chapter 29), and theft ("Of theft," Chapter 36). That distinction, however, remains imperfect as all the books take up procedural matters (e.g., procedures jurors must follow in "Of the verdict of the jurors," Chapter 9 of Book IV).

Royal Authority in the "Prologue"

Sayles and Richardson published the "Prologue," Book I, and Book II as part of Volume II in their series. G.O. Sayles died before publishing a Volume I. The Selden Society series begins with Volume II ("Prologue", Book I, Book II published in 1955) and ends with Volume IV (Books V and VI – published in 1984). Volume III contains Books III and IV (1972). Volume I would have functioned as an extended editorial commentary with additional notes and indices. The "Prologue," which comprises three pages of Volume II, serves largely to assert and to solidify the authority of the king. That authority becomes foundational in *Fleta* as all law contained within the volumes rests on the king as an absolute authority. *Fleta's* author, however, goes to great lengths to emphasize the sovereignty of the crown. In a lengthy opening statement, for example, the author declares:

> Kingly power should be equipped, not only with arms against the rebellious and the nations that rise up against the king and his realm but also with laws for the meet governance of his peaceful subjects and peoples, to the end that, the pride of the unbridled and untamed being shattered by the right hand of power and justice being administered with the rod of equity to the humble and meek, he may at once be ever victorious over his enemies and without ceasing show himself impartial in his dealings with his subjects.[159]

[159] "Prologue," in *Fleta: Volume II, Book I,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1955), 1. The passage reflects Sayles and Richardson's translation of the Latin text. All translations cited in this chapter and proceeding chapters come from Sayles and Richardson. Regiam potestatem non solum armis contra rebelles et gentes sibit regnoque insurgents oportet esse decoratam set legibus ad subditos populosque pacificos regendos decenter ornatam esse vt vtraque tempora, pacis scilicet et belli, ita feliciter transigat vt effrenatorum indomitorumque dextera fortitudinis elidendo superbiam et humilium mansuetorumque equitatis virga moderando iusticiam tam in hostibus debellandis semper victoriosus existat quam in subditis tractandis equalis iugiter appareat.

The opening statement speaks to the king's authority both domestically and in foreign affairs. The author's reference to "the rebellious and the nations that rise up against the king" suggests a need to maintain order in the kingdom, both at home and abroad.

The author then heaps praise upon King Edward I by exuding "how finely, how actively, how skillfully, in time of hostilities our most worthy King Edward has waged armed war against the malice of his enemies there is none to doubt."[160] He goes on to lift King Edward to an even more exalted position, claiming that "for now his praise has gone forth to all the world and his mighty works to every border thereof, and marvellously [*sic*] have his words resounded far and wide to the ends of the earth."[161] The "Prologue" continues with even more such embellishment, with the author asking a series of rhetorical questions. He asks, "…what man is there could praise him to the full measure of his due, whose famous deeds from youth up should be commended in everlasting memorials and whose noble acts, as his age increased, should be set down with pen in books, nay, graven on the rocks with chisel, as a testimony for those to come?"[162] The author, however, does not stop there; he continues making platitudes toward King Edward, referring to the "rich abundance of his graces" and his "comeliness, beyond the sons of men, is the desire of nations, whose outflowing bounty draws like a

[160] "Prologue," in *Fleta*, 1. Quam eleganter aut quam strenue, quam callide hostiumque obuiando malciis excellentissimus rex noster Edwardus hostilitatis tempore armatam excercuerit miliciam nemini venit in dubium, cum iam in omnem terram exierit laus eius et in omnes fines terre magnalia eius et intonuerunt longe lateque mirifice verba sua in terminus orbis terre.

[161] "Prologue," 1.

[162] "Prologue," 1. Quis ergo posset amplo famine prepotens eius ample preconia laudis exprimere cuius ab tempore nature cunabilis gesta conspicua memorialibus sunt commendenda perpetuis et cuius estate crescent cum tempore facta magnifica calamo sunt exaranda codicibus, set celte pocius sculpenda scilicibus ad memoriam futurorum.

loadstone."[163] The author continues this flattery of King Edward by telling the audience that "tongues falter, mouths fail, lips tremble, and the eloquence of a Tully is stilled."[164] He then shifts to the imperative mood with a call to action. He orders his audience to "arise therefore, ye young men bold and valorous; unfurl your flags, sound your trumpets, and make merry for such a king, who in his youth manfully assumed the shield and, unweakened and vigorous maturity, has fought for his right."[165]

The "Prologue," therefore, is dedicated to celebrating Edward I while serving to establish that all judicial authority ultimately comes from the crown.[166] In short, the emphasis makes sense in that the author wishes to establish the King as the authority and source of law. As Kantorowicz describes it, "Edward I, quite unexpectedly, appears like another paradisian Adam, a cosmic ruler" or a "messianic prince."[167] Praise for Edward I aside, the author's statements also point to something else about the time that *Fleta* was

[163] "Prologue," 1. Quis vnquam posset explicare sermonibus graciarum vberes dotes eius qui statura decorus placet aspectibus, speciosus forma pre filiis hominum desideratur a gentibus, qui trahit effleuncia largitatis vt adamas…

[164] "Prologue," 1. Porro lingue deficient, ora subcumbunt, labia tremefiunt, et facundia subticet Tulliana.

[165] "Prologue," 1-2. Surgite igitur, O animosi et iuuenes bellicosi, explicate vexilla, clangite tubis, et festum agite tanto regi, qui viriliter sumens ab adolescencia sua scutum et ad viriles annos vsque perueniens indefecte pugnauit et strenue pro iure suo.

[166] Plucknett, *A Concise History of the Common Law*, 81.

[167] Edward Kantorowicz, "The "Prologue" to *Fleta* and the School of Petrus de Vinea," *Speculum: A Journal of Mediaeval Studies* 32, no. 2 (1957), 232, https://www.jstor.org/stable/2849115. Kantorowicz, in latter passages of this article, basically concurs with N. Denholm-Young that Matthew Cheker wrote *Fleta*, but early in the article, he mentions the irony of someone Edward I put in prison offering up so much praise for the king. Kantorowicz says one might consider those feelings as a "*document humain* characterizing the generous and noble mind" of the *Fleta* author and the "English Justinian," or Glanvill. He then offers the analysis regarding the extensive borrowings from both Glanvill and Justinian.

written. The words suggest that challenges – possibly numerous challenges – to King Edward's authority had taken place. The emphasis on kingly authority in these passages suggests a need for stability; however, one must consider the exigency. That is, the author stresses the need for subjects to respect the authority of the crown because of inherent instability within the kingdom. A stable authority in law is necessary precisely because of an absence of political and social stability.

It would be remiss, however, for one not to acknowledge the influences on the author in his writing of the "Prologue." While its assertion of royal authority remains unquestionable, the author plagiarized, to use contemporary terminology, the opening from *De legibus Angliae* from Ranulf de Glanvill who, himself, had paraphrased from Justinian's *Institutes*.[168] Furthermore, Kantorowicz's study of the *Fleta* "Prologue" reveals that the *Eulogy* for Frederick II "served *Fleta* for the embellishment" found in the opening.[169] Kantorowicz describes the *Eulogy* as a "panegyric oration" or "panegyric," but in all likelihood, no one recited or spoke the *Eulogy* aloud. Rather, the *Eulogy* represented a "written encomium," or a text written to praise someone.[170] Kantorowicz finds it curious that the *Fleta* author had access to this oration, as the *Eulogy* author

[168] Kantorowicz, "The "Prologue" to *Fleta*," 231. See also Ralph V. Turner, "Who was the author of Glanvill? Reflections on the Education of Henry II's Common Lawyers," *Law and History Review* 8, no. 1 (Spring 1990): 97-123, https://www.jstor.org/stable/743677. Turner puts forth questions as to the actual identity of the Glanvill treatise as well as who might have contributed to its formation and publication.

[169] Kantorowicz, 233.

[170] Kantorowicz, 236. See also Aristotle, *The Rhetoric and Poetics of Aristotle*, trans. by W. Rhys Roberts, ed. Edward P.J. Corbett (New York: Random House, 1984), 4-5 for Aristotle's explanation of the three different kinds of rhetoric, which include forensic or judicial, deliberative, and epideictic. Epideictic rhetoric serves to praise or blame. A funeral oration represents a common example.

would have only released it as part of an epistolary or rhetorical collection (i.e., "letter books") and not as a separate piece.[171] Kantorowicz concludes that this panegyric was actually part of the Vinea collections, to which he assumes the *Fleta* author had access. Kantorowicz explains that the Vinea collections "were composed in the late thirteenth century – perhaps in Paris, perhaps at the Curia, perhaps at both places." [172] These were rhetorical or epistolary collections or "letter books" named after Vinea or some other well-known dictator. Kantorowicz implies that copies of these collections were readily available in England, and he suggests that the *Fleta* author probably owned one or more of these "letter books."

One can also draw other parallels between the *Fleta* "Prologue" and publications associated with Frederick II. In 1231, Frederick II published the *Liber Augustalis*, also known as *The Constitutions of Melfi*, in an attempt to establish his authority in the Kingdom of Sicily and to bring about the end to a power struggle between the Sicilian aristocracy and Markward of Anweiler, a "ministerialis" claiming "to carry out the last will of the Emperor Henry VI," Frederick's father.[173] A "Prooemium" and three books comprise the *Constitutions of Melfi*. Book I addresses public law; Book II focuses upon procedural law in civil and criminal cases, and Book III explains feudal and private law

[171] Kantorowicz, 236.

[172] Kantorowicz, 236.

[173] James M. Powell, "Introduction," in *The Liber Augustalis or Constitutions of Melfi Promulgated by the Emperor Frederick II for the Kingdom of Sicily in 1231,* trans. James M. Powell (Syracuse, NY: Syracuse University Press, 1971), xiv. A "ministerialis" was an agent of the emperor who had been placed in a position of power.

as well as stipulates the punishment of crimes.[174] Its "Prooemium" functions similarly to *Fleta*'s "Prologue" in that it establishes God as the basis for royal power and that power will instill social and political stability in the kingdom. *The Constitutions* says that God created the "princes of nations" who could correct the "license of crimes" and that "these judges of life and death for mankind might decide, as executors in some way of Divine Providence, how each man should have fortune, estate, and status."[175] Like the "Prologue," the "Prooemium," as an opening to *The Constitutions*, positions the emperor (or king) as the giver of law and as the one whom must be seen as the ultimate legal authority. Frederick, like Edward, draws from God the authority to make law.

In another sense, the "Prologue" reflects an emphasis upon greater efforts to organize a society based on rule of law. Two examples illustrate this point. First, the expansion of the royal court during King Edward's reign manifested as a reduction in the number of eyres, or visitations from justices to specific regions, in favor of litigating in the Common Bench, or the central court at Westminster.[176] During Edward's reign, the number of royal justices was always two and the average complement was three.[177] His reign not only "produced proportionally" a larger number of justices, but it also produced a larger number of "long-serving justices, justices who were clearly making a

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[174] Powell, "Introduction," xix.

[175] "Prooemium," in *The Liber Augustalis or Constitutions of Melfi Promulgated by the Emperor Frederick II for the Kingdom of Sicily in 1231*, trans. James M. Powell (Syracuse, NY: Syracuse University Press, 1991), 4.

[176] Paul Brand, *The Origins of the English Legal Profession* (Oxford: Blackwell Publishers, 1992), 21. This trend actually began under Henry III, Edward I's father.

[177] Brand, *The Making of the Common Law*, 137. Brand contrasts the practice during Edward's reign with the previous reign of Henry III in which a single justice only served on the King's Bench.

professional career out of acting as a royal justice."[178] Edward I reversed several years of decline in the number of justices under Richard I and Henry III. Paul Brand explains that prior to the court divvying up its business into separate sections, no advantage existed in increasing the number of justices. The Common Bench, in the late 1100s, began hearing four terms each year as opposed to two; furthermore, with more centralization at the Common Bench, it is possible that more efficiency existed in having a smaller group of justices.[179] Second, *Fleta*'s calls for respect of kingly authority also point to the author's desire for subjects to respect the authority of the king. By the end of the thirteenth century, the crown had begun exercising increased influence in other parts of the kingdom, such as Wales. Edward I, for example, kept a labor force of 3,000 men for purposes of building castles there.[180] The construction of castles suggests something about Edward's exercise of authority, although the extent to which English courts involved themselves in Welsh legal matters becomes a somewhat different story. In 1284, a statute extended the English system of counties, sheriffs, and justices to Wales, and an intended consequence of this statute lie in codifying some principles of English law for Welsh officials.[181] This statute, however, did not make Wales part of the English realm, and it did not extend jurisdiction of English courts to Wales.[182]

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[178] Brand, 142.

[179] Brand, *The Origins of the English Legal Profession*, 22-3.

[180] R.H.C. Davis, *A History of Medieval Europe: From Constantine to Saint Louis*, 2nd ed. (New York: Longman, 1988), 378.

[181] J.H. Baker, *An Introduction to English Legal History*, 30.

[182] Baker, 31.

The "Prologue" exemplifies the author's reliance upon the rhetorical appeal of *pathos* to convince the audience to support royal authority.[183] References to faltering tongues and trembling lips, for example, suggest attempts to elicit emotional response from the audience and encourage them to rally in support of King Edward. The author has also engaged in using an *ethos* appeal in that the writer's words establish that royal authority with the writer assuming a certain reverence in his audience for the crown. That reverence not only helps him establish credibility for *Fleta* as a legal treatise, but it also contributes to constructing rule of law for society.

Categories of Subjects, Villeins, and Property in Book I

The author of *Fleta* devotes a significant portion of the first book to defining, categorizing, and classifying the statuses of citizens. The opening paragraph indicates that "all men are either free or bond."[184] The writer defines freedom as the "natural power of every man to do what he please, unless it is forbidden by law or by force."[185] He

[183] See Aristotle, *On Rhetoric*, 24-6. Aristotle describes the three persuasive appeals used in oratory – *pathos* (emotional appeal), *logos* (appeal through reason), *ethos* (appeal through the character and credibility of the speaker).

[184] "Chapter 1: Of persons," in *Fleta: Volume II, Book I,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1955), 13. Summa itaque diuisio personarum hec est, quod omnes homines aut liberi sun taut serui, nec de ascripticio habetur instancia, nam villenagium vel seruitus ei qui liber est nichil aufert libertatis nec liberum tenementum villano aliquid confert libertatis, quamuis, de facto cum de iure non, possit quandoque per excepcionem alicuius priuilegii contra dominum suum petentem ipsum in natiuum. Now the highest categories into which persons can be divided are these: all men are either free or bond. There is no question of adscription, for villeinage or bondage takes away nothing of his freedom from him who is free, nor does a free tenement confer on a villein any particle of freedom, although he may sometimes be able [to establish it], in fact though not of right, but by pleading an exception of some privilege against his lord who claims him as his serf.

[185] "Chapter 2: Of freedom," in *Fleta: Volume II, Book I,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1955), 13. Est autem libertas naturalis facultas eius quod cuique facere libet, nisi quod de iure aut vi prohibetur. Alio modo dicitur libertas euacuacio seruitutis, quia recte contrario modo se habent. Freedom, indeed, is the natural power of every man to do what he pleases, unless it is forbidden by law or by force. In another fashion it is said

goes on to say that freedom can also be defined as the "purging away of bondage" as freemen and bondmen are "clean contrary one to the other."[186] His making this distinction suggests that a significant number of people were born into bondage or became villeins sometime in their lives.[187] Circumstances created this need to define and distinguish freemen from bondmen. The definition serves purposes of clarification but it also establishes categories of both citizenry and property.

Chapter 3, titled "Of bondage," provides a detailed explanation of the status of bondmen. The writer goes even further to define the status of bondmen, indicating that bondmen "are called *servi* because they are preserved, not because they are in servitude."[188] The distinction between "preserved" and "servitude" gives one pause, as the two terms do not seem to be antithetical to one another. The writer, however, offers further explanation, stating it the "practice of princes to sell, not to kill" and, therefore, they "preserve them" by doing so.[189] The original Latin sentence reads, "Et dicti sunt serui a seruando et non a seruiendo." Sayles and Richardson choose "preserved" as their English translation for the word "seruando." "Seruando," however, can correspond with

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that freedom is the purging away of bondage, because they are clean contrary the one to the other.

[186] "Chapter 2: Of freedom," 13.

[187] See J.H. Baker, *An Introduction to English Legal History*, 468-472. A "villein" provided services to a feudal lord in exchange for holding and occupying land.

[188] "Chapter 3: Of bondage," in *Fleta: Volume II, Book I*, ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1955), 13. Est quidem seruitus libertati contrarium, item constitution quedam de iure gencium qua quis dominio alieno contra naturam subicitur. Et dicti sunt serui a seruando et non a seruiendo. Bondage then is the contrary of freedom, but it is also an ordinance of the law of nations, by which one man is unnaturally subjected to the lordship of another. And bondsmen are called *servi* because they are preserved, not because they are in servitude.

[189] "Chapter 3: Of bondage," 13.

several verbs, including to retain, to protect, to rescue, to save, and to guard. It is not completely clear why Sayles and Richardson selected "preserve" as the best translation for "seruando." "Preserved," as a translation, fails to create a category of persons that "seruando" necessarily connotes thereby creating problems for analysis. More precisely, "seruando" is a present participle form of the verb, but Sayles and Richardson's choice in translating the text, "preserved," is a past tense verb. Consequently, the past tense verb reifies the object under consideration as opposed to the present participle that conveys an ongoing process (e.g., "performed" or "played" as opposed to "performing" or "playing"). In short, their decision to use "preserved" does not accurately capture the wording of the statute.

The chapter then stipulates that one can also refer to bondmen as *mancipia*, as "they are taken by the hand of their enemies."[190] Both of these terms, *mancipia* and *servi*, imply property designations and suggest something about another person's ownership. The writer elaborates the distinction between freedmen and bondmen by indicating that if a child is born to a bondman and freewoman, then the child is considered bond. The writer, however, does not address whether or not a child born to a freeman and bondwoman is, in turn, 'free,' given that the paternal, not maternal, relation determines the free or bond status of the child.[191]

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[190] "Chapter 3: Of bondage," 13. Dici eciam possunt mancipia eo quod ab hostibus suis manu capiuntur. Serui autem aut nascuntur aut fiunt. They may also be called *mancipia*, because they are taken by the hand of their enemies. Bondsmen, moreover, are either born or become such.

[191] "Chapter 3: Of bondage," 13-14. A child born out of wedlock represents an exception. In such cases, the child took the status of the mother. Nascuntur quidem ex natiuo et natiua, solutis vel copulates, et eius erit seruus in cuiuos potestate nasci contigerit, dum tamen de soluta natiua domini loci, quia sequitur condicionem matris a quocumque fueri genitus, libero vel natiuo. Si autem copulate fuerint et genitus fuerit partus a libero, licet a natiua, partus erit liber, et

Men, the writer explains, become "bond by capture."[192] The wording of the text suggests warfare as a given for the time, and the author states, "Wars, for example, break out and captures are their consequence."[193] The text reflects careful consideration of how a person can become "bond" as opposed to "free" only then to offer a conclusion that no distinction in status exists for bondmen. The writer explains that in addition to a person becoming bond as a result of capture, the royal court can decree that he becomes bond. The author, however, also notes that a bondman can choose to become a monk or clerk, noting that he can obtain freeman status by choosing religious or monastic life.[194] The writer then stipulates that should a man choose to leave that life, then "he should be restored to his lord as a bondsman."[195] Such precise laws governing bondmen suggest

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si de seruo et libera in matrimonio seruus erit. They are born, that is to say, from a serf and a neif unmarried or married , and the bondsmen will belong to him in whose power he happens to be born, save that the offspring of an unmarried neif belongs to the lord of the manor, for his condition is determined by that of his mother, by whomsoever he may be begotten, freeman or serf. If, however, the parents should be married and the offspring begotten by a freeman, although on a neif, he will be free, and if from a bondsman and freewoman in wedlock, he will be bond.

[192] "Chapter 3: Of bondage," 14. Fiunt autem homines serui de iure gencium captiuitate. Bella enim orta sunt et captiuitates sequute. Fiunt eciam de iure ciuili per confessionem in curia fisci factam, vel cum quis seruus clericus vel monoachus efficitur et sic in statu libero si ad secularem vitam redierit restituendus est domino vt seruus suus, quia omnium seruorum vna est condicio substancialis. Quicumque enim seruus est ita est seruus sicut alius nec plus nec minus. In seruorum enim condicione nulla differencia est. In liberis autem multe sunt differencie, quia quidam sunt ingenui et quidam libertini. Moreover, by the law of nations, men become bond by capture. Wars, for example, break out and captures are their consequence. Under the civil law also men become bond by an acknowledgment made in a royal court, or if a man being bond, becomes a clerk or a monk (thereby acquiring the status of a freeman) but returns to a secular life, he should be restored to his lord as a bondman, for the essential condition of all bondsmen is one and the same. Whosoever, therefore, is a bondsman is just as much a bondsman as any other, neither more nor less, and in the condition of bondsmen no difference exists. Between freemen, however, there are many differences, because some are freeborn and some are freedmen.

[193] "Chapter 3: Of bondage," 14.

[194] "Chapter 3: Of bondage," 14.

[195] "Chapter 3: Of bondage," 14.

that some exigency existed that created a need for a legal statute. In other words, creating specific definitions of "bondmen" and "freemen" implies that in many cases, it had become difficult to distinguish between the two.

That explanation, however, discounts, to some degree, the "preserve" or "protect" condition of slaves. Approximately 300 years prior to the publication of *Fleta*, bishops criticized slave trade practices and called for an end to the sale of Christian slaves outside the kingdom.[196] The development of law here connotes a need for legal protection of slaves that was brought about by a concern for their welfare in the kingdom. Furthermore, as David Pelteret has noted, the "poor and the powerless were very much part of a wider society and shared in its mores," and they had done so for several hundred years prior to the production of *Fleta*.[197] In short, English society recognized a social status of slaves, but paradoxically, it also viewed them as property. *Fleta*'s author characterizes this social status as a legal status by defining what the slave status was, as well as what it was not, in the kingdom. *Fleta* never addresses the slave status issue again in any of its other books, although property rights become a persistent theme throughout the pages of its volumes.[198]

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[196] Bruce O'Brien, "Authority and community," in *A Social History of England, 900-1200*, ed. Julia Crick and Elisabeth Van Houts (Cambridge: Cambridge University Press, 2011), 95-6.

[197] David A.E. Pelteret, "Power and powerless," in *A Social History of England, 900-1200*, ed. Julia Crick and Elisabeth Van Houts (Cambridge: Cambridge University Press, 2011), 144. Pelteret classifies slaves as part of the social strata of Medieval England in his characterization of the "poor and powerless."

[198] See also R.C. Van Caenegem, "Part Two, Chapter IV. The Common Law Writs of Naifty, Prohibition and Account," in *Royal Writs in England from the Conquest to Glanvill* (London: The Selden Society, 1959), 336-346. The Writ of Naifty allowed a lord to reclaim a runaway peasant or villein. For more recent discussion of naifty and villeins, see Paul R. Hyams, "Chapter 10: The Action of Naifty and Proof of Villein Status," in *King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries*

Of Violent Crimes: Of Murder, Of Homicide, Of Theft, Of Robbery

Book I represents the only book of *Fleta* that addresses directly crime and criminality or deals with crime or criminality in an explicit way. Twenty-two chapters, twenty-one of which appear in succession, of Book I offer treatment of the issue. One of the first chapters to do so, "Of the crime of lésé-majesté," presents in some detail how courts must contend with the crime of treason, and it spells out, in some considerable detail, the procedure and punishment of persons found guilty of any action against the crown. *Fleta* outlines punishment for any man found guilty of treason by decreeing that he "shall suffer the extreme penalty, with an intensification of bodily pain" (torture).[199]

(Oxford: Clarendon Press, 1980), 162-183.

[199] "Chapter 21: Of the crime of lésé-majesté," in *Fleta: Volume II, Book I*, edited by H.G. Richardson and G.O. Sayles (London: The Selden Society, 1955), 56. Si quis autem mortem regis ausu temerario machinatus fuerit vel ad seduccionem eius vel excercitus sui procurauerit vel egerit vel auxilium prebuerit vel consensum, quamuis voluntatem non perduxerit ad effectum, et sit aliquis de populo qui sibi inponat, dum tamen non criminosus, qui ab omni debet merito accusacione repelli, admitti debet absque plegiorum inuencione de prosequendo, ne se abstineant alii in consimili, quicumque fuerit accusatory, nisi eciam fuerit conspirator et crimini aliquot consenciens, vel si nullus appareat accusator set sola oriatur infamia apud bonos et graues, diffamatus vel accusatus attachia bitur per corpus et captus remanebit donec se inde legitime acquietauerit, qui, si culpabilis ineuniatur, vltimum supplicium sustinebit, cum pene aggrauacione corporalis omniumpque bonorum amissione et heredum suorum exheredacione perpetua, et vix est permissibile quad heredes viuere permittantur. Should a man rashly attempt to devise the king's death or procure or incite or give aid or assent to the king's betrayal or the betrayal of the king's army, although he should not have carried his intention into effect, and should there be any one of the people (so long as he is not himself a criminal, who should rightly be debarred from making any accusation) who charges him, the accuser should be admitted without finding pledges for prosecuting, whoever he may be (unless he was also a conspirator and consenting to any [such] crime), lest others should refrain in like circumstances, or if no accuser should appear, but ill report only should arise among sober and reputable men, the defamed or accused shall be attached by his body and remain under arrest until he has lawfully acquitted himself in the matter. And if he is found guilty he shall suffer the extreme penalty, with an intensification of bodily pain, the loss of all his goods and the perpetual disherison of his heirs, and hardly indeed shall his heirs be permitted to live.

The writer continues by stipulating that he will suffer "the loss of all his goods and the perpetual disherison of his heirs, and hardly indeed shall his heirs be permitted to live."[200]

The chapters become even more compelling upon closer examination of the distinctions the writer of *Fleta* chose in making his contribution to English law. The writer, for example, distinguishes between "murder" and "homicide" with one chapter titled "Of murder" (Chapter 30) and one chapter titled "Of homicide" (Chapter 23). Both chapters begin with a definition of each concept. The writer defines homicide as "the slaying of man by man with evil intent, and there may be bodily slaying by deed or by word."[201] The "Of homicide" chapter explains the act as one with intent but done in the moment; in other words, the accused intended to kill but he (or she, in some cases) did not plan the attack, so the killing as "homicide" was not premeditated. The "Of murder" chapter, on the other hand, clearly defines murder as "the secret slaying of men, committed wickedly by men's hands." The act, moreover, "is done to the knowledge and in the sight of none except the slayer and his accomplices and maintainers alone, so that the hue and cry will not straightway be raised."[202] Here, the writer differentiates the act of

[200] "Chapter 21: Of the crime of lésé-majesté," 56.

[201] "Chapter 23: Of homicide," in *Fleta: Volume II, Book I,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1955), 60. Homicidium est hominis occisio ab homine nequiter facta et potest quis corporaliter occidi facto et lingua: facto, iusticia, necessitate, casu et voluntate; lingua, precepto, consilio, defensione. Homicide is the slaying of man by man with evil intent, and there may be bodily slaying either by deed or by word: by deed, as in justice, by necessity, by chance or willfully; by word, as by precept, by counsel or by forbidding.

[202] "Chapter 30: Of murder," in *Fleta: Volume II, Book I,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1955), 78. Est autem murdrum occulta hominum occisio a minibus hominum nequiter perpetrata que nullo sciente vel vidente facta est, preter solum interfectorem et suos coadiutores et fautores, ita quod non statim assequatur clamor popularis. Murder is the secret slaying of men, committed wickedly by men's hands, which is done to the knowledge and in the sight of none except the slayer and his accomplices and maintainers alone, so that the hue and cry will not straightway be raised.

murder from the act of homicide with the words "secret slaying committed wickedly" and by defining murder as a premeditated act. The accused planned to kill his victim and did so with a plan and necessarily with his accomplices.

The author also qualifies that a person can commit a homicide, or "bodily slaying," by "deed or by word," meaning that he can commit the act himself or order someone else to do the killing. The author then states provisions for self-defense in matters of homicide by stating that if the accused goes before a justice and jury, and they find that "he did the deed by mischance or while defending himself, then let him be sent back to the gaol [prison].[203] The writer goes on to note that "when the king is certified of the truth of the matter, he will deal graciously with him saving the right of any other person."[204] "Deal graciously" means the king can grant a pardon; the author points to the authority of the king in this matter (and in all matters), and his words imply that he trusts the king implicitly to take the most just action in matters of self-defense or homicide committed "by mischance."

The chapter, "Of murder," emphasizes the premediated act of murder in differentiating it from homicide, but the writer makes an exception regarding "murder" as

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[203] "Chapter 23: Of homicide," in *Fleta: Volume II, Book I,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1955), 61. Inhibetur tamen ne breue exeat a curia ad inquirendum si quis alium interfecerit per infortunium vel se defendendo vel alio modo quam per feloniam, set si talis in prisona existens, coram iusticiariis se ponat in patriam de bono et malo, et conuincatur per patriam quod id fecit per infortunium vel se defendendo, tunc remittitur gaole et cum regi super facti veritate cercioretur, graciose dispensabit cum tali, saluo iure cuiuslibet. Yet it is forbidden that a writ shall issue from the court to enquire whether a man slew another by mischance or while defending himself or in some way other than feloniously. But if such a one, lying in prison, submits to trial by jury for good or ill before the justices and it is found by the jury that he did the deed by mischance or while defending himself, then let him be sent back to gaol and, when the king is certified of the truth of the matter, he will deal graciously with him, saving the right of any other person.

[204] "Chapter 23: Of homicide," 61.

a label for the killing. After he describes murder as the "secret slaying of men, committed wickedly by men's hands," the writer indicates that "it is called murder because the slain man is reputed a *foreigner* [emphasis added] unless englishry [anglescheria] be presented in regard to him."[205] This passage (and the "Of murder" chapter, generally) describes the late medieval practice of the murder fine, which remained in place for two and half centuries or possibly longer and had become integral in administering both English criminal law and in collecting royal revenue. Frederick Hamil explains murder fine as a theory that the local community was obligated to certain communal duties and could be fined for not fulfilling certain obligations.[206] A county or township, for example, could be held liable for robberies taking place within its borders unless it could produce those criminally responsible. The king saw the administration of such justice as a source of revenue, and the crown could assess fines "more for the sake of the exchequer than the

[205] "Chapter 30: Of murder," in *Fleta: Volume II, Book I,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1955), 78. Et dicitur murdrum quia interfectus pro alienigena reputabitur, nisi de eo fuerit anglescheria presentata, vbi sciri possit quod anglicus erat per presentacionem parentum. Et quocienscumque in patria murdrum inueniri contigerit, amerciabitur comitatus per iusticiarios itinerantes, nisi excusaciones interuenerint. Et si corpus alicuius, sic mortui per feloniam vel infortunium, sepultum fuerit antequam de coronatoribus visum fuerit et per decenas et villatas adiacentes in illo comitatu de circumstanciis sue moris inquisitum, villata in misericordia regis remanebit. And it is called murder because the slain man is reputed a foreigner unless englishry be presented in regard to him, when it may be ascertained that he was an Englishman by the production of his kinsmen. And whensoever it shall happen that murder is discovered in the countryside, the county will be amerced by the justices in eyre, unless grounds for discharge are brought forward. And if the body of anyone, dead in this fashion by felony or mischance, be buried before it has been viewed by the coroners and enquiry made concerning the circumstances of the death by the neighbouring tithings and townships in the county, the township will be in the king's mercy.

[206] Frederick Coyne Hamil, "Presentment of Englishry and the Murder Fine," *Speculum: A Journal of Mediaeval Studies* 12, no. 3 (1937), 285, https://www.jstor.org/stable/2848624. For more recent study on the origin of the murder fine, see Bruce R. O'Brien, "From Mordor to Murdrum: The Preconquest Origin and Norman Revival of the Murder Fine," *Speculum* 71, no. 2 (April 1996): 321-357, https://www.jstor.org/stable/2865416.

preservation of the king's peace."[207] Similarly, the king held counties or townships responsible for those persons murdered in their respective areas, and if proof of "englishry" existed, then the township, for instance, could avoid the murder, or murdrum, fine. The community, however, could only avoid the murder fine if its "twelve best men" swore an oath that the slain person was English.[208]

The "Of murder" chapter also reveals the writer's attempt to create jurisdictional boundaries. The author makes no mention of needing "twelve best men" for proof of englishry, but he does explain that a coroner must make the body available so that any relatives of the deceased can produce proof of englishry. Should the "body be buried before it has been viewed by the coroners and enquiry made concerning the circumstances of death," then the royal authority will hold the township accountable, with the writer noting it "will be in the king's mercy."[209] The writer, however, then refers to murders taking place in the countryside, noting that the "countryside may be discharged from the penalty of murder in many ways."[210] If the "slayer be known," for example, and he goes before a court, then the crime, according to the writer, is no longer murder because the slayer has been convicted of a felony. In this instance, the writer suggests that murder characterizes an unsolved killing, but once the slayer is convicted, then the crime becomes a felony and no longer viewed as murder. The writer states, "For if there

[207] Hamil, "Presentment of Englishry," 285.

[208] Hamil, 289.

[209] Hamil, 289.

[210] Hamil, 289.

is a conviction for felony, it follows that there is no murder."[211] He then stipulates certain conditions under which the crime is not considered murder, including the victim living in spite of his (or her) wounds and then being able to identify his assailant. According to the writer, that crime becomes something else – something similar to assault or maybe *attempted* murder – but those remain contemporary legal terms absent from the "Of murder" chapter. The writer only indicates that the crime is no longer murder if the victim survives. He also stipulates that "nor will it be murder if the slayer flee (*sic*) to a church and acknowledges the felony," implying that the perpetrator could seek sanctuary in the church.[212] The writer concedes some control to the church to give asylum or sanctuary to murders without those perpetrators facing justice from the king. The perpetrator could seek sanctuary in the church but only with a promise that the perpetrator would go into exile. Both "Of homicide" and "Of murder" depict a late thirteenth-century English royal authority struggling with exercising social control over a violent society.

Comparably, the chapters "Of theft" (Chapter 36), in particular, and "Of robbery" (Chapter 37) also reflect a struggle to address persistent crime problems. The writer opens the "Of Theft" chapter with an explicit definition that "theft is the fraudulent

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[211] "Chapter 30: Of murder," 78. Conuicta autem felonia nullum sequitur murdrum. For if there is a conviction for felony, it follows that there is no murder.

[212] "Chapter 30: Of murder," 78. The original text states "slayer flee" not "slayer flees." Item nullum erit murdrum cum interfector ad ecclesiam confugerit feloniamque congnouerit regnumque abiurauerit. Item de his qui mortui sunt per infortunium, nullum erit murdrum. Item nullum erit murdrum de submerses in mari vel in aqua salsa, vbi locus in nullius bonis esse dicitur nisi regis tantum: secus si in loco vniuersitatis. Nor will it be murder if the slayer flee to a church and acknowledge the felony and abjure the realm, nor in regard to those who die by mischance, nor those drowned in the sea or salt water, in a place which is said to be the property of none except the king alone, though it is otherwise in a place belonging to a community.

appropriation of the property of another, with the intention of stealing, against the owner's will."[213] He then distinguishes between two different kinds, stating "there is manifest theft and secret theft."[214] Manifest theft takes place when the perpetrator is "arrested seised of stolen property, hand-having and back-bearing, and has been pursued by him to whom the property belonged, who is called the sacrobar."[215] In a lengthy exegesis, the writer describes manifest theft as both a civil and criminal matter. If the accused cannot "deny the theft, in the presence of the coroner," then "he shall be condemned to death, unless he can warrant the goods."[216] Here, the accused can be found guilty if he cannot justify his right to those goods. The criminality of his actions becomes clear, and, as the writer has stated, he receives the death sentence. The accused, however, has recourse according to this chapter. He can "warrant the goods," meaning he can vouch for the warranty of those goods, or that he can prove his right to possess them. The

[213] "Chapter 36: Of theft," in *Fleta: Volume II, Book I,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1955), 90. Est autem furtem contrectatio rei aliene fraudulenta cum animo furandi, inuito domino cuius res illa fuerit, et est autem furtum manifestum et secretum. Theft is the fraudulent appropriation of the property of another, with the intention of stealing, against the owner's will, and there is manifest theft and secret theft.

[214] "Chapter 36: Of theft," 90.

[215] "Chapter 36: Of theft," 90. Furtum enim manifestum est vbi aliquis latro deprehensus est seistus de aliquo latrocinio, handhabbinde et bakberinde, et insecutus fuerit per aliquem cuius res illa fuerit, qui dicitur sacborghe; et tunc licet insecutori rem suam petere criminaliter vt furatam, et quo casu, presente coronatore qui recordum habet, cum furtum dedicere non poterit, morti debet condempnari, nisi inde possit warantizare. Manifest theft is so called where a thief is arrested seised of any stolen property, hand-having and back-bearing, and has been pursued by him to whom the property belonged, who is called the sacrabar; and it is then lawful for the pursuer to sue for his property, as stolen goods, in a criminal action. In this case, if the accused cannot deny the theft in the presence of a coroner, who has the record, he shall be condemned to death, unless he can warrant the goods.

[216] "Chapter 36: Of theft," 90. "Coroner" refers to a type of law enforcement official with quasi-judicial authority.

writer discusses manifest theft at length and acknowledges the various gradations of such criminality while once again offering his exceptions and qualifications. Much of this discussion focuses on warrant and warranty, which pertained to proof of the transfer and exchange of goods. He explains that clerks, for instance, must sometimes justify that they had indeed given a warranty to the accused for the alleged stolen goods. The writer points out, though, that cases of fraud did exist and that a clerk engaging in fraudulent behavior "shall be required to defend himself as principal, and the clerk shall be committed to gaol [prison] for his knavery and put to ransom."[217]

The "On theft" chapter not only qualifies actions the court should take against unscrupulous clerks issuing false warranties, but one of its paragraphs addresses how the law should treat the wives of accused thieves. The writer states clearly that a thief's wife "will not be held responsible for her husband's delict," and the penalty should only affect the one who committed the act.[218] The following sentence then, in a somewhat paradoxical turn, indicates a wife "should neither accuse her husband nor assent to his felony," but "she is required to hinder him so far as she is able."[219] The writer does *not*

[217] "Chapter 36: Of theft," 92. …et oportebit quod principaliter se defendat clericusque gaole pro malicia committetur et redimatur. …and he shall be required to defend himself as principal, and the clerk shall be committed to gaol for his knavery and put to ransom.

[218] "Chapter 36: Of theft," 92. Vxor autem furis non teneatur pro delicto viri: pena enim suos tenere debet auctores. Vxor autem virum accusare no debet nec felonie sue consentire: inpedire tamen tenetur in quantum potest. Si furtum tamen sub clauibus vxoris inueniatur simul cum viro tenebitur, et sola teneri debet cum furtum in manu sua inueniri contigeri. The wife of a thief will not be held responsible for her husband's delict, for a penalty should strike those who do the deed. A wife, moreover, should neither accuse her husband nor assent to his felony; but she is required to hinder him so far as she is able. If stolen property is found, however, under the wife's lock and key she will be held liable jointly with her husband, and she will alone be held liable if the stolen property should perchance be found in her hand.

[219] "Chapter 36: Of theft," 92.

stipulate a penalty for the "accusing" or "assenting," and furthermore, he proposes no punishment for failing to "hinder him so far as she is able." The wife cannot accuse her husband or assent to his wrongdoing, yet through her actions, she must hinder him. Hinder would imply her a priori knowledge of his crime, and the statute makes a wife, in some way, culpable or responsible for her husband's actions. The writer does go on to articulate conditions for liability for husbands and wives who are partners in crime. He simply says that the wife "will be held jointly liable with her husband" and that "partners in crime" should also be "partners in penalty," assuming the stolen property is located "under the wife's lock and key."[220] He also states, however, that should the stolen property "perchance be found in her hand," then "she alone will be held liable," regardless of whether or not her husband actually committed the crime.[221] In other words, if the stolen property is located anywhere on her body or on her person, then she will face charges and penalties. This paragraph points to the lower status of women, and even necessarily makes the wife liable for her husband's crime. It makes wives responsible not only for their own behavior but also responsible for their husband's behavior. These statutes treat women with fewer rights in that they can essentially be accused of their husbands' wrongdoings and suffer penalties for those wrongdoings. Such statues illustrate that a woman experienced difficulty asserting her personhood apart from her husband thereby exemplifying her lack of power under this particular law.

[220] "Chapter 36: Of theft," 92.

[221] "Chapter 36: Of theft," 92. See also Jack L. Herskowitz, "Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine," *University of Miami Law Review* 21, no. 423 (1966), 423-456.

The author chooses to present two new categorical distinctions that distinguish two different kinds of theft; that is, theft can be "of a great thing and of a small."[222] He explains that a thief taking something small means that the accused took the item using stealth and that it was worth "twelve pennyworth or under," but for such offenses, "no one will be condemned to death."[223] The writer decrees that the perpetrator of secret theft only serve for a limited time in the pillory, or stocks, but he should not suffer any punishment more severe.[224] The writer, however, indicates that if the value of the stolen item be more than twelve pennyworth, then the thief would be put to death for the "theft of the chattels," or property.[225] The chapter "Of robbery" (Chapter 37) follows "Of theft" in succession, but as with manifest and secret theft, he never explicitly defines the distinction between robbery and theft. Based on his description, though, one can assume that robbery implies that a perpetrator took property by force, not surreptitiously or by stealth. The writer exemplifies robbery as someone "coming with his force [and]

[222] "Chapter 36: Of theft," 92.

[223] "Chapter 36: Of theft," 92. Est enim furtum de re magna et re parua. Pro minimo tamen latrocinio xij. denariorum et infra nullus morti condempnetur. Theft is of two kinds, of a great thing and of a small. For a very small theft of twelve pennyworth or under no one will be condemned to death.

[224] "Chapter 36: Of theft," 92. The writer uses the example of the thief surreptitiously cutting the straps of a purse and then stealing the purse.

[225] "Chapter 36: Of theft," 92. Si autem ab inicio bursam absciderint cum valore xij. denariorum et vitra, non solum tenedi sunt pro burse scissura, verum eciam pro latrocinio catalli morti debent condempnari. If, however, at the outset they cut a purse containing twelve pennyworth and more, not only are they to be arrested as cutpurses but they shall be condemned to death for the theft of the chattels.

wickedly and feloniously and against the king's peace took from him in robbery a hundred shillings, a three-pence and a horse of such-and-such price."[226]

In "Of robbery," as is the case in "Of theft," the writer focuses more on the procedure by which one can bring appeal against an accused perpetrator of a crime as opposed to more precise explanations of categorical distinctions. Both of these chapters, moreover, illustrate a growing concern over private property and, more to the point, the protection of individual private property. The writer struggles with the concept of ownership and how one can establish ownership in the event of a theft or robbery. Repeatedly, in both chapters, *Fleta* specifies death as punishment for anyone found guilty of these crimes. The death penalty represents a deterrent, but it also functions as evidence of a society in which potentially large numbers of people were stealing to survive as well as exemplifies efforts of a central governmental authority seeking to exercise greater control over criminality.[227]

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[226] "Chapter 37: Of robbery," in *Fleta: Volume II, Book I,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1955), 95. De robberia autem fit appellum hoc modo: A. appellat B. quod etc. venit idem B. cum vi sua, nequiter et in felonia et contra pacem regis in robberia abstulit ei centum solidos et tres denarius et vnum equum talis precii. (Et sic nominare poterit in appello suo plures res diuersi generis, dum tamen certum precium apponat et certam rei designet qualitatem, quantitatem, precium et pondus, numerum, mensuram, valorem et pilum.) Et quod hoc fecit nequiter etc., vt supra. An appeal of robbery is made in this wise: A. appeals B. for that [when he was in such a place] etc., the said B. came with his force [and] wickedly and feloniously and against the king's peace took from him in robbery a hundred shillings and three pence and a horse of such-and-such a price (and so he may name in his appeal several things of different kinds, so long as he puts a certain price [upon them] and designates a particular kind, quantity, price and weight, number, measure, value and coat). And that he did this wickedly etc. (as above).

[227] Several references in Book I of *Fleta* establish jurisdictional rules indicating where certain matters should be referred in the kingdom. In "Of Theft" on page 93, Book I, the writer explains that that every sheriff in the kingdom "defers to a command from the justices of Newgate in London." The passage cites Newgate as a kind of centralized legal authority when it is unclear where an accused perpetrator should be tried.

Rationality, Textuality, and Textual Community

These excerpts from Book I provide evidence of an English legal community in the late thirteenth and early fourteenth centuries essentially attempting to define itself. Specifically, the chapters present statutes, but they also define societal status for men and women, for freeman and bondman, for warrantors and tenants, and for perpetrator and victim. These statuses become manifest in written text and govern how English society would perceive of those roles. In the context of this discussion, it becomes useful to turn to D.L. D'Avray's theory of rationalities as those rationalities manifested in the Middle Ages. Rationality, as D'Avray defines it, means "thinking which involves some general principles and strives for internal consistency, where the key causes of the idea or action are different from the reasons the person or people would give for it, even to themselves."[228] Rationality relates to people attempting to make sense of their world by organizing according to a set of "principles," but the concept also captures their attempts to act consistently according to those general principles. D'Avray contrasts rationality with irrationality, which he says occurs when people step outside the normal avenues of thought. People, however, remain unaware they are engaging in irrationality. He clarifies that a person's utterance, for example, can differ from his or her actual thoughts or actions or, as D'Avray puts it, the utterance "may direct attention away" from those thoughts and actions.[229]

[228] D.L. D'Avray, *Medieval Religious Rationalities: A Weberian Analysis* (Cambridge: Cambridge University Press, 2010), 2. D'Avray does not paint rationality and irrationality as black and white, and he describes different kinds of rationality (e.g., partial rationality, diminished rationality).

[229] D'Avray, *Medieval Religious Rationalities*, 2.

D'Avray's rationality also corresponds with Stock's concept of "textuality" as part of his theory of textual community. At the crux of Stock's discussion is a problem of definition, particularly as that problem relates to the term "literacy." From the beginning of this chapter, Stock indicates that "literacy" and "textuality" are *not* synonymous, and most of the first part of this chapter addresses the difference between the two concepts. In short, Stock argues that scholars (medieval historians, in his case) should frame their understandings of social formation, not on "literacy," but on textuality. Stock argues that historians as well as scholars from other disciplines have engaged in a certain carelessness or cavalier-ness with regard to their use of 'literacy' as both category and object of study. He suggests that the literacy category has become a bit of a catchall for generalizing about complex trends in social, political, and ideological formations. Historians, therefore, may be oversimplifying by relying too much on this category or concept. Stock sees textuality as a "stabilizer" for the term "literacy," which he says carries too much "ideological tonnage."[230] Although he fails, in some respects, to describe fully what he means by "ideological tonnage," he does clarify that members of a textual community essentially create their cultures by writing about those cultures. In doing so, they engage their own points of view about their own cultures and their perspectives do not lack bias. Stock points out that there may be no good way to lessen the weight of ideological tonnage, but he strongly suggests that use of the literacy category only exacerbates the problem. One might say that continued use of the category only increases ideological weight that decreases the legitimacy of scholarly inquiry.

[230] Stock, *Listening for the Text*, 143.

Although he does not spell out those advantages in an explicit way, Stock characterizes the uses of text as "historically specific," the definition for which returns to a distinction between literate and nonliterate.[231] An "illiterate" – based on a contemporary definition of the term – group can still use a written text for purposes of mediation.[232] Textuality, as a concept or category, enables historians to study the complex interplay between the oral and the written and the different ways in which societies conceptualize the internal relations between the two. Furthermore, textuality implies that texts become a tool by which a textual community can achieve rationality.

Fleta and its antecedent texts exemplify both Stock's textuality in textual community and D'Avray's rationality. *Fleta*, as a compendium of civil and criminal statutes, illustrates how a text can lay down general principles pertaining to how subjects, from a legal perspective, should conduct themselves in society. Both *Fleta* and similar texts, like Bracton's *De Legibus Et Consuetudinibus* (*On the Laws and Customs of England*), illustrate rationality in that these texts provided an organizational scheme for legal statutes that helped a textual community of legal professionals make sense of their legal world. *Fleta* also embodies values and convictions that contributed to shaping a formal legal system in England. Legal texts contribute to rationalizing and organizing a society. *Fleta* compelled its audience to respect its contents because it establishes the authority of King Edward I. Its audience, therefore, would feel bound to respect that authority and obey the law thereby creating a societal order.

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[231] Stock, 144.

[232] Stock, 144. Stock mentions that uneducated peasants in the Middle Ages used parchment without legal text that effectually served the same purpose as a contract for labor and services.

CHAPTER IV

ROYAL AUTHORITY, "REAL" ACTION, AND NOVEL DISSEISIN: A COMPARATIVE ANALYSIS OF *BRACTON* AND *FLETA*

The historiography of English common law reflects general agreement regarding the interconnectedness between Bracton's treatise and *Fleta*. Historians have addressed how the author of *Fleta* borrowed extensively from Bracton and, specifically, from Bracton's *De Legibus Et Consuetudinibus* (*On the Laws and Customs of England*), most of which was probably written, as J.H. Baker has noted, in the 1220s and 1230s instead of the 1250s as some historians have surmised.[233] It becomes difficult to disentangle the two; however, the necessarily more significant question becomes not only how *De Legibus* informed *Fleta* but also what changed between the two treatises. Sayles and Richardson's work ends without ever pursuing this question, yet it remains relevant for making sense of thirteenth-century English common law.

The most recent, and possibly most widely cited, edition of *De Legibus* is that of George Woodbine (editor) and Samuel E. Thorne (translator), which was published in three volumes between 1968 and 1977.[234] This chapter will examine more closely the

[233] See J.H. Baker, *An Introduction to English Legal History*, 4th ed., 175-77.

[234] Henry de Bracton, *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), ed. George Woodbine and trans. Samuel E. Thorne (Cambridge, MA: President and Fellows of Harvard College, 1968-1977), accessed February 11, 2019, http://amesfoundation.law.harvard.edu/Bracton/index.html.

relationship between *Fleta* and *Bracton*. It will juxtapose the *Bracton* "Introduction" and the *Fleta* "Prologue," the meanings of "real action" as described both in *Bracton* and *Fleta*, and finally, the treatment of disseisin in these treatises. While other points of comparison are worthy of consideration, these three represent pronounced themes and represent points for initiating discussions that necessarily go beyond the scope of this particular project. Juxtaposing *Bracton* and *Fleta*, however, reveals trends in the common law during the late thirteenth century.

Royal Authority in *Bracton* and *Fleta*

Historians agree that Henry de Bracton borrowed extensively from Azo of Bologna, Glanvill, Augustine, and Justinian. Furthermore, H.G. Richardson claims that Bracton was influenced by William of Drogheda's *Summa Aurea*, which described the procedures of the ecclesiastical courts.[235] A side-by-side comparison of *Fleta* and *Bracton* reveals that the authors organized their treatises in very similar, and in some instances identical, ways. The "Introduction" to *Bracton* and the "Prologue" to *Fleta* also share in common appeals to royal authority; a notable difference, however, lies in their expressions of that authority. The initial sentence from the *Bracton* "Introduction" reads: "To rule well a king requires two things, arms and laws, that by them both times of war and of peace may rightly be ordered."[236] This beginning statement contrasts with the much more stylistically flamboyant opening words of the *Fleta* "Prologue":

[235] H.G. Richardson, "Azo, Drogheda, and Bracton," *The English Historical Review* 59, no. 233 (1944), 22-24, https://www.jstor.org/stable/554236. Drogheda taught law at Oxford and died in 1245. Richardson suggests that for his *Summa Aurea*, which remained unfinished upon his death, Drogheda appropriated quite a bit from Azo, and furthermore, he suggests that Drogheda also pilfered from Bracton just as Bracton quite possibly used material from him.

[236] Henry de Bracton, "Introduction," Volume 2, page 19, *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), ed. George Woodbine and trans. Samuel E.

> Kingly power should be equipped, not only with arms against the rebellious and the nations that rise up against the king and his realm, but also with laws for the meet governance of his peaceful subjects and peoples, to the end that, both in peace and in war, he may so happily perform his office that, the pride of the unbridled and untamed being shattered by the right hand of power and justice begin administered with the rod of equity to the humble and meek, he may at once be ever victorious over his enemies and without ceasing show himself impartial in his dealings with his subjects.[237]

While *Fleta* opens with its effusive praise for Edward I, whom the author calls by name, and an insistence that his subjects respect both his authority and the king as the giver of justice, *Bracton* begins with a more prescriptive, in a sense, set of guidelines for, not "the" king, but "a" king – any king. *Bracton* also establishes "arms" and "laws" as equal and, as such, equally necessary for the survival of the kingdom while arguing that "if arms fail against hostile and unsubdued enemies, then will the realm be without defense; if laws fail, justice will be extirpated nor will there be any man to render just judgment."[238] The previous sentence, however, indicates that "for each [arms and laws] stands in need other, that the achievement of arms be conserved [by the laws], the laws themselves preserved by the support of arms."[239] *Bracton* presents arms and laws in governance as two sides of the same coin in that one cannot exist without the other.

Like *Fleta*, *Bracton* establishes the authority of the king throughout the treatise, but he goes further in explaining hierarchy and royal authority. *Fleta*'s author remains

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Thorne (Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977), accessed February 4, 2019, http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/19.htm.

[237] "Prologue" in *Fleta,* 1.

[238] Bracton, "Introduction," Volume 2, page 19.

[239] Bracton, "Introduction," Volume 2, page 19.

content to elevate King Edward I to an unassailable position in the "Prologue" and then move on to defining statutes. *Bracton*'s "Introduction," however, describes the importance of arms and laws in a somewhat cursory manner and then moves on to addressing the difference between *leges*, or written law, and *jus scriptum*, or unwritten law based on custom. *Bracton* also provides a rationale for his work that lies in "unwise and unlearned men" who ascend to the "judgment seat" and that it becomes important to create a *summa* thereby putting into written form the decisions and "ancient judgments of just men."[240] Neither in the "Introduction" nor in any other place in the text does *Bracton* refer to the ultimate authority of Henry III or any other king, but he does return to the theme of royal authority in the body of the work. He states plainly that the "king has no equal within his realm" as well as that "subjects cannot be the equals of the ruler," but *Bracton* does not mention a specific king in the context of a discussion about royal authority.[241]

The "Introduction" and opening passages of *Bracton* begin articulating a philosophy of kingship. *Bracton* clearly stipulates that "the king must not be under man but under God and under the law, because law makes the king. Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power, for there is no *rex* where will rules rather than *lex*."[242] The treatise places in binary opposition "will" and *lex*

[240] Bracton, "Introduction," Volume 2, page 19.

[241] Henry de Bracton, "Of Persons," Volume 2, page 33, *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne (Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977), accessed February 13, 2019, http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/33.htm.

[242] Bracton, "Of Persons," Volume 2, page 33.

or "law" suggesting that anarchy exists when no law exists, and the king, therefore, must exist to preserve rule and order under the law. In the spirit of the king's duty to preserve rule under the law – or rule of law, to use contemporary vernacular – *Bracton* metaphorically equates the king to "the vicar of God" and the "vicegerent" of Jesus Christ on earth while drawing a parallel between God and the king.[243] *Bracton* makes a comparison by stating that God chose to use the "reason of justice" rather than the "power of force" in destroying "the devil's work" and God, in doing so, thereby "willed himself to be under the law that he might redeem those who live under it."[244] *Bracton*, too, illustrates the divine province of law with the "Virgin Mary, Mother of our Lord, who by an extraordinary privilege was above the law, nevertheless, in order to show an example of humility, did not refuse to be subjected to established laws."[245] Mary and Christ both subordinated themselves to law out of regard for justice and humility, not because they were responding to stringent sanctions or decrees.[246] *Bracton*, in the next sentence, then concludes his argument by proclaiming, "Let the king, therefore, do the same, lest his power remain unbridled, there out to be no one in his kingdom who surpasses him in the doing of justice."[247] The treatise does not characterize an absolute authority of the king; rather, *Bracton* makes a provision that while no one can bring a writ

[243] Bracton, "Of Persons," Volume 2, page 33.

[244] Bracton, "Of Persons," Volume 2, page 33.

[245] Bracton, "Of Persons," Volume 2, page 33.

[246] Brian Tierney, "Bracton on Government," *Speculum* 38, no. 2 (1963): 303, https://www.jstor.org/stable/2852455.

[247] Henry de Bracton, "Of Persons," Volume 2, page 33.

against the king, a subject can petition the king to amend or correct an act. The passage states that should the king not correct an unjust act, then "it is punishment enough for him that he await God's vengeance."[248]

Bracton borrows from the Romans in that the king, or the emperor, is, in principle, not above the law.[249] The king, however, is not bound by law; he *chooses* to bind himself to the law. The passage establishes that no human can deny the king's authority coming from God, but when the king performs some unjust act, then he acts in accordance with the devil and suffers the consequences.[250] In *Bracton*, the king remains duty-bound to obey the laws with his observance of the law guaranteed only by his will and not by legal constraint or coercion.[251]

In *Fleta*, the writer devotes necessarily less attention to the role of the king as an arbiter of justice, yet the text presents royal authority as a given as well as unassailable and that the king, himself, could do nothing to diminish his own authority.[252] Later interpretations of *Fleta*, most notably those of Thomas Hobbes, credited the treatise with constituting the king's sovereign inalienability while contending that not only did the king grant liberties, he could also restrict or forbade certain liberties "if they tend to the

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[248] Bracton, "Of Persons," Volume 2, page 33.

[249] Fritz Schulz, "Bracton on Kingship," *The English Historical Review* 60, no. 237 (1945): 156, https://www.jstor.org/stable/555534.

[250] Miller, "The Position of the King in Bracton and Beaumanoir," *Speculum* 31, no. 2 (1956): 270, https://www.jstor.org/stable/2849413. Miller explains that it was common in the thirteenth century to "harmonize apparently irreconcilable ideas." That is, in this case, the writer presents the supremacy of the king and then "rushes in with qualifications that modify the original statements."

[251] Tierney, "Bracton on Government," 303.

[252] Hoekstra, "'Leviathan in its Intellectual Context," 248.

hinderance [*sic*] of Justice, or the subversion of the Regal Power."[253] *Fleta*'s insistence upon kingly authority in the "Prologue" could very well be in response to the Barons' War of 1258. The barons had achieved some reforms, but Edward I, who fought and defeated Simon de Montfort, was likely reacting to a power struggle that persisted in the years following the baronial uprising. Plucknett, however, argues that Edward's legislative reforms only served to strengthen the barons and the feudal system, including, for example, the passing of two statutes giving feudal lords greater power over bailiffs.[254] Edward remained steadfast, though, in his intolerance for baronial abuses, and he remained active in assuring tenants of their rights.[255] One might conclude, therefore, that the appeals to kingly authority in the *Fleta* "Prologue" represent a loyal servant of Edward I attempting to galvanize support from both tenants and lords for legislative reforms, not merely renewed attempts to dissuade barons from instigating another civil war. One could also conclude, however, that the *Fleta* author was merely trying to gain royal favor and, assuming the author's identity as Matthew Cheker, to garner favor from the king who had imprisoned him.

"Justice" in the Treatises

The calls for respect of royal authority in the "Prologue" reflect one, albeit subtle, alteration in *Fleta* from Bracton, but the two treatises also treat the concept of justice

[253] Thomas Hobbes, *A Dialogue Between Philosopher and a Student, of the Common Laws of England*, ed. Alan Cromartie (Oxford: Clarendon Press, 2005), 37, qtd. in Hoekstra, 249.

[254] Plucknett, *A Concise History of the Common Law*, 30-1. "Bailiff," in this context, refers to someone who manages the land and property of the feudal lord. Plucknett goes on to cite other legislative reforms such as those giving them greater control of appropriating the commons and new laws forcing tenants to forfeit land for failure to make payments.

[255] Plucknett, 31.

differently, thereby revealing a more obvious change between the two texts. *Fleta* refers simply to "justice" when referring to the concept while *Bracton*, on the other hand, describes two different facets to the "justice" concept. *Bracton* states that "since from justice, as from a fountain-head, all rights arise and what justice commands *jus* provides."[256] For *Bracton*, justice is divine. "Justice is the constant and unfailing will to give each his right," as the text reads, "this definition may be understood in two ways, according as justice is taken to be in the Creator or in the created."[257] Justice lies either in God, who, as *Bracton* says, "in all things rightly orders and justly disposes," or justice lies in the hearts of just men. [258] *Bracton* proceeds to catalogue all the different ways, by definitions of "justice," that a man can be "just," such as one having a "good habit of mind," or one exhibiting a "habit of a mind well constituted," or justice as "willed good."[259]

Bracton then explains that *jus* is "derived from justice and is used in a number of different senses"; in other words, *justice* represents the ideal or concept while *jus* represents the application of justice.[260] *Bracton* offers up a series of qualifications and

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[256] Henry de Bracton, "Of Persons," Volume 2, page 22, *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne (Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977), accessed February 4, 2019, http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/22.htm.

[257] Bracton, "Introduction," Volume 2, page 22.

[258] Bracton, "Introduction," Volume 2, page 22.

[259] Bracton, "Introduction," Volume 2, page 22.

[260] Henry de Bracton, "Introduction," Volume 2, page 24, *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne (Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977), accessed February 6, 2019, http://amesfoundation.law.harvard.edu/Bracton/

definitions of what *jus* can be while describing, in absolute terms, *jus* as "the art of what is fair and just."[261] The author says that *jus* "is sometimes used for" natural law or for civil law only or "sometimes used for" the place for administering law; however, *Bracton* also explains that *jus* "is sometimes used for an action, sometimes for an obligation, sometimes for an inheritance […] or sometimes for the possession of goods."[262] But after providing this listing of possibilities for the application of justice, *Bracton* claims that for his purpose, *jus* is all that "enjoins […] us to live virtuously, to harm no one and to give each his right."[263] Applications of justice, therefore, must result in subjects living virtuously and harmoniously yet also receiving equitable treatment under the law. Here, the Roman influence becomes undeniable. The *jus*, or *ius gentium*, refers to a natural law and the application of justice under natural law or a law of nations, which contrasted with traditional civil law.[264] Moreover, *ius gentium* could apply to both citizens and non-citizens under Roman Law, and ostensibly, *Bracton* saw the *jus* concept as identical to the Roman *ius gentium*.

Unframed/English/v2/24.htm.

[261] Bracton, "Introduction," Volume 2, page 24.

[262] Bracton, "Introduction," Volume 2, page 24.

[263] *Bracton*, particularly in this passage, takes the *jus* and *justice* distinction directly from Justinian and from Roman jurisprudence. Notably, in a previous passage, *Bracton* makes direct reference to Augustus in his definition of the "just man."

[264] Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 13.

Fleta makes only limited mention of *jus* or of *ius gentium*, other than, for example, to define, albeit briefly, *jus* as "right" that comes from justice.[265] Its author mentions "justice," or "iusticiam," only a handful of times (five, to be exact) in the "Prologue" and always in relation to the king and/or the king's steadfast hand in administering justice. Unlike *Bracton*, however, the author never once distinguishes between "jus" and "justice" either in the "Prologue" or anywhere in his cataloguing of statutes, although he does echo some Bractonian ideas. *Fleta*'s author, for example, differentiates between justice from God and justice from the king in stipulating that "the king should not only be wise but pitiful, and his justice be tempered with wisdom and mercy."[266] The author makes clear that "mercy to the incorrigible is indeed injustice," although he devotes more attention, in this particular passage, to defining "mercy" and the "merciful," while drawing less attention to "justice" per se, as well as to emphasizing to whom the king should show mercy (e.g., the poor).[267]

Fleta also reiterates that the king's justice comes from God, and he promises that "he will cause all judgements to be given with equity and mercy, so that by his justice all men shall rejoice in unbroken peace."[268] *Fleta* decrees that the king is "constituted and elected" so that he might "do justice to all men and that the Lord may dwell in him and

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[265] "Chapter 1: Of real actions," in *Fleta: Volume III, Books III and IV,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1972), 46.

[266] "Book I," in *Fleta: Volume III, Books III and IV,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1972), 37.

[267] "Book I" in *Fleta*, 38. See also Bruce Clark Brasington, "Advice to the Judge: The Distinctio "Delicto coram iudice manifestato" with a Note on the Question of "Unjust Mercy" in Medieval Canon Law," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 134 (2017): 131-145.

[268] "Book I," 38.

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through him may declare His judgments."[269] *Fleta*'s author uses the same word as *Bracton* when he refers to the king as the "vicar" of God, and "since he is the vicar of God he is bound to separate right from wrong and equity from iniquity, so that his subjects may live honourably, none injuring another, and by a fair distribution there shall be rendered to everyone that which is his own."[270] The king acts in accordance with the God's will and the king's justice becomes His (or God's) justice.

The question remains, however, why the *Fleta* author chose not to differentiate "justice" and "jus" to the same extent as *Bracton*. Statements pertaining to "justice" relate directly back to the king as the giver of justice. Many statements also relate directly to the justice of King Edward I whereas *Bracton* had remained more interested in posterity and the meanings of "justice" and "jus" for future generations of rulers and for the rule of law. It is possible that the *Fleta* author deemed the distinction as less important. Regardless, the passages from *Fleta* not only reflect common thirteenth-century beliefs about the king but the author also insists upon King Edward I, specifically, as the voice of legal authority and as the arbiter of justice. *Fleta*'s words suggest a reverence for Edward I that lacks parallel treatment in *Bracton* toward Edward's father, Henry III.

The Meanings of "Real Action" in *Bracton* and *Fleta*

Bracton and *Fleta* both present collections of statutes. *Bracton*, however, as suggested previously, devotes necessarily more attention to defining what concepts mean and explaining, in some considerable detail, how those concepts apply to the law. *Fleta*, on the other hand, necessarily makes more assumptions about what concepts and terms

[269] "Book I," 38.

[270] "Book I," 38.

mean (e.g., justice), almost as if the reader should already know and understand those terms and concepts, and devotes necessarily more attention to application. The *jus* and *justice* distinction in *Bracton* illustrates this point, but their treatment of "real" action also speaks to this differentiation.

Bracton, in explaining "real" action, divides the term into its component parts by addressing "action" in Volume 2. In the Volume's section titled "Of Actions," *Bracton* simply asks, "What is an action?"[271] In response, *Bracton* says that "action" becomes the "right of pursuing in a judicial proceeding what is due to one," but "right," he maintains, remains different from "action."[272] He claims that "right" can be invoked to distinguish the term in cases where "right" does not exist, or matters of "right" apply to situations in which a judge *ex officio* rather than by judicial action, or writ.[273] *Bracton* clarifies that an *ex officio* act "is not a matter of *jus* but rather a matter of fact," meaning that this kind of action suggests that a judge can make, for instance, a decree but he can only "moderate or reduce" monetary compensation to the plaintiff for damages, not increase it.[274] He goes even further to elaborate that in referring to "in a judicial proceeding" that those words

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[271] Henry de Bracton, "Of Actions," Volume 2, page 282, *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne (Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977), accessed February 18, 2019, http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/282.htm.

[272] Bracton, "Of Actions," Volume 2, page 282.

[273] Bracton, "Of Actions," Volume 2, page 282. *Bracton* explains that *ex officio* refers to the wide-ranging powers of a judge.

[274] Bracton, "Of Actions," Volume 2, page 282.

are used to separate actions "we pursue not in a court but outside it."[275] He illustrates this idea by using the pursuit of a thief when the one who was wronged pursues a perpetrator "to do right for himself without legal proceedings."[276]

Bracton essentially classifies three broad categories of actions that include *in personam*, or "personal," as well as *in rem*, or "real"; *Bracton* also accounts for actions that can be "mixed."[277] He gives careful consideration to actions *in personam*, explaining that these actions, which relate to the person, can themselves, be divided into the subcategories of "criminal" and "civil." *Bracton* then details the requisite punishments in both criminal and civil cases connected to actions *in personam*.[278] Actions *in rem*, or "real" actions, on the other hand, very much relate to actions or pleas connected to property, although *Bracton* qualifies that some *in rem* actions "are for the recovery of a corporeal thing."[279] *Bracton* cites examples of "corporeal things" as slaves, the estate, a

[275] Bracton, "Of Actions," Volume 2, page 282.

[276] Henry de Bracton, "Of Actions," Volume 2, page 283, *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne (Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977), accessed February 18, 2019, http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/283.htm.

[277] Henry de Bracton, "Of Actions," Volume 2, page 290, *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne (Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977), accessed February 20, 2019, http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/290.htm.

[278] Bracton, "Of Actions," Volume 2, page 290.

[279] Henry de Bracton, "Of Actions," Volume 2, page 294, *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne (Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977), accessed February 20, 2019, http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/294.htm.

horse, or a garment, but the purpose of actions *in rem* lies in obtaining, retaining, or recovering possessions.[280]

Bracton borrows from the Romans in his exegesis of "real" and "personal" actions. David J. Seipp notes that this distinction exemplifies the embodiment of "'absolutist' political ideas and the centralization of power" in Roman law.[281] A "real" action, as Seipp explains, was a claim of ownership of a physical object or slave, "asserting that the individual claimant's relationship to the thing was superior to that of all other claimants."[282] His definition of "personal" actions becomes too limited as Seipp only describes "personal" actions as claims "to enforce a preexisting obligation owed by a specific person."[283] The detailed description in *Bracton*, however, conveys a more complex characterization of this concept that goes beyond enforcing "preexisting obligation" in that *Bracton*, for instance, describes actions addressing crimes that have been committed against the person such as assault and battery, to use modern vernacular. Furthermore, whether or not *Bracton*, unlike the authors of classical law, sought to reinforce some existing power structure and place more power in the hands of those already with power remains unclear. He was more likely responding to the social and cultural norms and conditions of his day and making sense of a feudal society and its customs from a legal perspective.

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[280] Bracton, "Of Actions," Volume 2, page 294.

[281] David J. Seipp, "Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law," *Law and History Review* 7, no. 1 (1989): 177, https://www.jstor.org/stable/743780.

[282] Seipp, "Bracton, the Year Books," 177.

[283] Seipp, 177.

Fleta offers limited explanation or definition of "real" action, although it does acknowledge the distinction between "real" and "personal" actions. In fact, *Fleta*'s author organizes his treatise according to three "principal parts," which he forecasts in the "Prologue." Those parts are "the charter of liberties in England and the statutes," "personal" actions, and "real" actions.[284] The author expends less effort in defining what "personal" and "real" mean, however, in, once again, possibly assuming the readership of the day was already familiar with the terms. He does expend, on the other hand, much more effort in explaining the application and implications of *in personam* and *in rem* law, although he never makes any direct reference to the two Latin terms. He only refers to actions that relate to the personal and actions that relate to the real. The more elaborate explanation and analysis "Of Real Actions" appears in Chapter 1 of Book IV in *Fleta*. *Fleta*'s author turns almost immediately, in the opening paragraph of this chapter, to right of possession and inheritance of property, demarcating a noteworthy distinction between this treatise and that of *Bracton*. *Bracton*'s treatment of possession tends to focus upon civil and natural possession. He explains civil possession as "that retained by intention alone" while natural "by physical occupation, and [thus] it is sometimes rightful, sometimes wrongful."[285] *Fleta* does not bother, at least overtly, with making such distinctions with the author becoming more concerned about laws of inheritance and, more precisely, laws governing disseisin.

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[284] "Prologue," 3.

[285] Henry de Bracton, "Of Acquiring the Dominion of Things," Volume 2, page 122, *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne (Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977), accessed February 20, 2019, http://amesfoundation.law.harvard.edu/Bracton/ Unframed/English/v2/122.htm.

The Assize of Novel Disseisin: A Cursory Examination

Both treatises give considerable attention to the assize, or writ, and particularly as the assize related to seisin and disseisin, or the possession and dispossession of land and property. An extensive treatment of land-holding comes as no surprise, especially given that ownership of land and property served, without question, the upper echelons of English feudal society. The person, in this case, became a tenant, and assuming he fulfilled services to the lord, an heir would likely succeed him.[286] *Bracton*'s attention to this practice and the legal ramifications of inheriting land would then make sense assuming a continually increasing number of tenants in early to mid-thirteenth century England.

It would also make sense that by the late thirteenth-century, the practice had grown and necessitated greater legal attention. *Bracton* gives mostly equal treatment to procedures and rules for seisin and disseisin, but *Fleta* focuses more in-depth discussion on disseisin and the procedure for issuing assizes to dispossess landowners whom someone had claimed had no legal right to the land. *Fleta* stipulates that disseisin "is done in many ways, and it does not matter whether it is done to the owner when he is present or to an agent or to his household when he is absent."[287] This paragraph at the beginning of Book IV, Chapter 1 ("Of Real Actions") goes even further with *Fleta* qualifying that "not only is a man disseised when he is in any way ejected forcibly, wrongfully and without judgement from his seisin of his tenement," but he can be

[286] John Hudson, "Maitland and Anglo-Norman Law," in *The History of English Law: Centenary Essays on 'Pollock and Maitland'* (Oxford: Oxford University Press, 1996), 42-4.

[287] "Chapter 1: Of real actions," in *Fleta*, 46.

removed from the land while he travels.[288] If someone else enters into possession, the *Fleta* author decrees, an individual can repel him "forcibly, either by himself alone or taking his men with him."[289] The chapter continues to identify all the ways in which some individual or group can dispossess someone occupying the land, although notably, *Fleta* makes no judgement about legality or illegality of disseisin. The writer, rather, establishes all the conditions under which disseisin can take place.

The following chapter of Book IV does establish remedies for dispossession (notably titled "Chapter 2: Of the Remedy for Dispossession") so that the dispossessed tenant possesses some recourse should he find himself without possession of his land. *Fleta* gives rules for diseissing the disseisor by stating that those "who intend to eject disseisors should make such provision for expelling them immediately while the wrongdoing is fresh so that they do not allow the wrong of disseisin to grow cold by their sufferance, indifference, negligence, weakness, apathy or failure to provide aid."[290] Should a tenant risk the "wrong of disseisin to grow cold," then he might also lose possession of "both kinds," natural and civil, "while the disseisor begins to acquire both and thus cannot lawfully be ejected without a judgment of the court."[291] *Fleta* carefully puts forth timeframes and constraints for the original tenant to act with the author deliberately accounting for all possibilities and conditions.

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[288] "Chapter 1: Of real actions," 46.

[289] "Chapter 1: Of real actions," 46.

[290] "Chapter 2: Of the remedy for dispossession," in *Fleta: Volume III, Books III and IV,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1972), 46. 50.

[291] "Chapter 2: Of the remedy for dispossession," 50.

Placing these kinds of time constraints indicates legal prescription by creating time limits. Legal prescription relates to the role that time plays in establishing (and de-establishing) certain rights as well as the parameter or constraint (e.g., time constraint) normally inherent within a statute. "Chapter 5: Of the Writ of Novel Disseisin" continues putting forth these kinds of parameters, and it outlines the procedure by which jurists will issue an assize and how the sheriff, for example, will go about delivering it. The chapter also explains the roles of the courts, the bailiffs, and the serjeants (*sic*) of the king as well as those who bring the complaint and wish to dispossess the tenant of his property. The author also notes that the writ of novel disseisin must have a time limit and does not extend beyond that limit.[292] *Fleta* justifies the condition by arguing that "time is a means of getting rid of an obligation and an action because time runs against the slothful and those who are scornful of their right."[293] The plaintiff, therefore, may lose "his right of action and his seisin by his negligence" and the person holding the land would engender an exception against that plaintiff.[294]

Joshua Tate's more recent work on novel disseisin addresses the influence of the *ius commune,* or the blending of Roman and canon law, on disseisin law, and he argues that this influence may have been greater than other historians (S.F.C. Milsom, in particular) once thought. Tate's analysis indicates that Roman jurists carefully distinguished between ownership, or the title of land, and possession, the actual

[292] "Chapter 5: Of the writ of novel disseisin," in *Fleta: Volume III, Books III and IV,* ed. H.G. Richardson and G.O. Sayles (London: The Selden Society, 1972), 46. 58.

[293] "Chapter 5: Of the writ of novel disseisin," 58.

[294] "Chapter 5: Of the writ of novel disseisin," 58.

enjoyment of it.[295] He investigates whether or not this distinction also appears in early English common law, hypothesizing that if present, it might signify that "Roman ideas had some bearing on the development of the English system."[296] Ultimately, Tate concludes that right and seisin in English common law "were not interchangeable with Roman ownership and possession."[297] Furthermore, whether or not Roman canon law "influenced" common law, Tate posits, depends upon how one defines "influence." He argues that if one defines influence as appropriating the "specific tools of another legal system," then that kind of influence most likely did not take place in English common law.[298] The other definition of influence, however, has implications for the current study. Influence occurred, Tate notes, if one defines it as "drawing on a concept from one system and building a new framework that departed in significant ways from the original system."[299]

Bracton and *Fleta*, based on their presentation of laws governing novel disseisin as well as other statutes, reflect their predecessors like Glanvill and Justinian. Legal statutes came about from a culture of texts, a textual milieu that constituted written law in the mid to late thirteenth century. *Fleta* represented one part of this milieu as well as a larger community of written discourse about law, and it shared a common discourse with texts like *Bracton*. While it drew upon concepts from *Bracton*, which, itself, drew on

[295] Joshua C. Tate, "Ownership and Possession in the Early Common Law," *American Journal of Legal History* 48, no. 3 (2006): 281, https://ssrn.com/abstract=938715.

[296] Tate, "Ownership and Possession," 282.

[297] Tate, 313.

[298] Tate, 313.

[299] Tate, 313.

concepts from the Romans, *Fleta* played a role in the further development of common law by offering a further articulation of legal procedures. It embodied a legal proceduralism that had become even more prevalent in the thirteenth century.

CHAPTER V

THE SIGNIFICANCE OF *FLETA* IN THE TEXTUAL HISTORY OF ENGLISH COMMON LAW

Fleta represents one of the earliest collections of written statutes, and the author likely intended it as a handbook for jurists traveling from town to town or county to county. They could use *Fleta* as a reference tool and guide for resolving disputes in cases related to, for example, novel disseisin. Furthermore, *Fleta*'s author wrote his text in context and in concert with other legal discourses that emerged from formation of textual community and, furthermore, *Fleta* has helped write a textual history of English common law. Full exploration of that textual history resides outside the scope of this present study; nevertheless, it serves as a starting point for a more complicated, nuanced, and involved conversation about this history. To that end, this study can present conclusions that, at the very least, begin to foreground *Fleta* as an object of study very much worthy of scholarly attention from historians, rhetorical and textual critics, and literary critics who study the relationship between law and literature as well as from legal scholars in the U.K. and the U.S.

In this study's examination, a more precise understanding of *Fleta*'s historical significance comes from situating it in the context of late-thirteenth century legal and legislative developments under Edward I and, as previously indicated, this text's relationship to Roman law through its connection with *Bracton*. *Fleta*'s derivation from

Bracton, however, was not without good reason as its author was applying the law to new concerns at the end of the thirteenth century. Edward I's legislative reforms, for example, created an exigency for the *Fleta* author in which he could make the law applicable in the years following those reforms. Assuming the author's identity as Matthew Cheker, he also most likely wrote *Fleta*, at least in part, to garner favor from a king who had also imprisoned him. The treatise, as a compendium of statutes, also potentially functioned as a handbook of sorts for members of the legal community practicing law during Edward's time. A justice, for example, traveling from town to town could carry *Fleta* with him and, much like modern-day attorneys and judges, refer to statutory law contained on its pages when deciding specific cases. Its author responded to changes and sweeping reforms, but he also offered the legal community of his day something of practical use.

Fleta shared a discourse in common with other similar texts, texts like *Fet Asaver* and *Hengham Magna*, both of which preceded *Fleta* by a few decades. A question remains, though, as to whether or not the treatise became significant beyond only reflecting the common legal discourse of the late thirteenth and early fourteenth centuries. An answer to this question may lie in *Fleta*'s "Prologue," as it had some influence in later centuries specifically related to its claims regarding kingship and royal authority. Latter passages of this chapter will describe how *Fleta* and, specifically, John Selden's dissertation on it influenced Thomas Hobbes's theories of kingship from *Leviathan*, and *Fleta*, albeit perhaps indirectly, influenced seventeenth-century and Enlightenment political thought in Europe through Selden's work. Finally, as part of a legal textual milieu, *Fleta* may have helped formulate the legal procedural system of the late Middle Ages while also helping to lay the foundation for the Year-Books.

Fleta in a Thirteenth-Century Legal/Textual Milieu

Fleta existed in a milieu with other late thirteenth-century legal and statutory texts, such as *Hengham Magna* and *Fet Asaver*, the two of which are closely related. The key to understanding the relationship between these two texts, as Thomas McSweeney has surmised, lies with the *Bracton* treatise.[300] McSweeney argues that the relationship between *Bracton*, *Hengham Magna*, and *Fet Asaver* "opens up exciting possibilities for the study of the legal-literary culture of the justices and clerks of the royal courts."[301] McSweeney sees *Fet Asaver*, in particular, as a treatise that broke with *Bracton* in ushering in a new legal literature and offering a novel line of legal thought that departed from Romanist tradition and, more precisely, Justinian's *Digest*.[302] In summarizing T.F.T. Plucknett, he relates that *Fet Asaver* "represented the sensibilities of the new professional pleaders, the serjeants, laymen who had little use for learned tomes that attempted to explain English law in terms of the two learned laws" thereby suggesting a shift away from *Bracton*, which was written for justices with training in Roman and canon law.[303] *Hengham Magna*, on the other hand, represents one of two treatises "that have traditionally been attributed to Ralph de Hengham (*c.* 1235-1311)," who, at one time, served as a clerk to justices but then became a justice himself, serving as chief justice of

[300] Thomas J. McSweeney, "Creating a Literature for the King's Courts in the Later Thirteenth Century: *Hengham Magna*, *Fet Asaver*, and *Bracton*," *The Journal of Legal History* 37, no. 1 (2016): 42, http://dx.doi.org/10.1080/01440365.2016.1143222.

[301] McSweeney, "Creating a Literature," 42.

[302] McSweeney, 67.

[303] McSweeney, 67.

the King's Bench and the Common Bench.[304] Historians have traditionally believed that Hengham wrote this treatise as well as a second, known as *Hengham Parva*, in the late thirteenth century.[305] *Fet Asaver*, however, "appears in over eighty manuscripts of the late thirteenth and early fourteenth centuries," and similar to *Hengham Magna*, "it was copied into many of the small-format miscellanies that we often call statute books."[306] According to McSweeney, however, *Fet Asaver* differs from *Hengham Magna* in that "it is written in French, the language spoken in the court, and makes no claim to being a civilian *summa*."[307]

Like *Bracton* and *Fleta*, *Hengham Magna* became a procedural text addressing a number issues including complaints and answers as well as delaying tactics a litigant could use in court. Most of the treatise "takes its reader through all the twists and turns of bringing an action by writ of right, from acquiring the writ onward."[308] McSweeney explains that *Hengham Magna* offered up twelve different variants of the writ of right most likely taken from the register of writs.[309] *Hengham Magna*'s treatment of the writ of

[304] McSweeney, 43.

[305] McSweeney, 43.

[306] McSweeney, 52.

[307] McSweeney, 52. A *summa* was a text written with the intent to make it accessible to a wider audience. *Hengham Magna* and *Hengham Parva* are sometimes referred to, respectively, as *Summa Magna* and *Summa Parva*. McSweeney notes that one might characterize *Hengham Magna* as "pretentious and difficulty" and *Hengham Parva* as more "simple and direct." *Hengham Magna* was the longer of the two treatises and, according to McSweeney, was possibly never finished.

[308] McSweeney, 48. A "writ of right" pertains to a common law writ for restoring property to its owner if another party held that property.

[309] McSweeney, 48.

right for restoring lands to owners necessarily paralleled the treatment of seisin and novel disseisin in *Bracton* (and *Fleta*, subsequently), particularly related to how the treatises expressed the procedures for issuing a writ and under what circumstances an owner could possess or repossess land.

Hengham Magna borrowed *Bracton*'s organization, an organization with which *Fleta*, too, shared a great deal in common. *Hengham Magna*, for example, followed the order of *Bracton*, except for chapters eleven and twelve, but it eliminated the subject headings from the *Bracton* treatise.[310] *Hengham Magna* presented the material in the same order, but the author eliminated *Bracton*'s chapters or "tractates" on specific topics like writ of right, default, and warranty.[311] In lieu of these sections, *Hengham Magna* presented a hypothetical and fictionalized case "brought by writ of right, taking it from the baronial court to the county court, then from the county court to the king's court, and following it as it makes its way through multiple appearances in the king's court."[312] McSweeney argues that the author of *Hengham Magna* had obviously read *Bracton* and had seen usefulness in the structure, but *Hengham Magna* had chosen "to rewrite all of the material itself and to outline the material differently" and do so in a diurnal way or "day by day rather than topic by topic."[313]

[310] McSweeney, 50.

[311] McSweeney, 50.

[312] McSweeney, 50.

[313] McSweeney, 50.

McSweeney explains that *Fet Asaver* shared an organizational pattern with *Hengham Magna* with both texts mostly "tracking" with *Bracton*'s structure.[314] *Fet Asaver*'s first "manere," for example, also covered the writ of right as well as several other categories of writ (e.g., writs of entry, writs of escheat). But McSweeney also points out that *Fet Asaver* related important themes for thirteenth-century land cases, such as the concept of "delay" and the types of essoins (excuses) a defendant could use in court.[315] *Fet Asaver* described the process of "forcing and delaying appearance," and it related "exceptions" a defendant could bring to a writ. Furthermore, *Fet Asaver* addressed "voucher to warranty, that process by which a defendant could bring his own lord or another who had the obligation to do warranty for the land into court to defend the defendant's claim to the land on his behalf, a process which could itself delay litigation."[316] Here, it becomes important to identify that *Fet Asaver*'s treatment of these issues parallels *Fleta* as *Fleta*'s author, too, had devoted lengthy passages to, for instance, exceptions and warranties. "Delay" also represents an important aspect of *Fleta,* as it did with *Hengham Magna* and *Fet Asaver* as well as *Bracton*.

McSweeney's concluding remarks on *Hengham Magna* and *Fet Asaver* provide something valuable when one considers not only textual history but also textual community as it pertains to *Fleta*. He suggests that assuming two different clerks wrote the two treatises under consideration in his study, then it becomes possible that "these two texts were being written within a small circle of people who were part of the judicial

[314] McSweeney, 53-55.

[315] McSweeney, 53.

[316] McSweeney, 53.

establishment and that those people had close ties to each other."[317] He posits that these clerks seemingly had access to each other's writings and, moreover, to *Bracton* and, possibly, Henry de Bracton, himself.[318] McSweeney notes that solitary authors did not perform the "textual production of the royal courts" but that clerks and justices "in dialogue with each other" produced these texts. He also emphasizes the relationship between these texts as a critical factor in understanding their development. [319] Under these kinds of assumptions, it becomes less difficult to argue that the author of *Fleta* was also connected to other clerks and members of the royal court preparing statutory treatises between 1250 and 1300.

Fleta also shares a common discourse with another treatise written at approximately the same time and one in which Edward I, himself, likely commissioned. While also based upon *Bracton*, *Britton*, according to T.F.T. Plucknett, "is a rather different book" in that it was authored in French, not Latin, and reflects the form of a code, not simply a collection of statutes.[320] Plucknett raises the possibility that Edward I had "entertained the idea" of codifying English law based upon the fact that he had done something similar with the Statute of Wales in 1284.[321] Furthermore, *Britton* had "enjoyed a great popularity for many centuries" whereas *Fleta*, as a legal treatise, was

[317] McSweeney, 68.

[318] McSweeney, 68.

[319] McSweeney, 68.

[320] T.F.T. Plucknett, *A Concise History of the Common Law*, 265.

[321] Plucknett, 265. The Statute of Wales established the constitutional basis for Wales from 1284 until 1536.

less successful; the likely reason for this lack of success probably lies in the notion that over time, common lawyers read Latin with less ease and, therefore, turned to the more familiar French of *Britton*.[322] *Britton* also shares in common with *Fleta* the question of its authorship. The name itself lacks clarity, although many have taken it to suggest John le Breton, the bishop of Hereford, as its author. Plucknett disagrees with this assertion, arguing that most scholars have agreed that no real evidence exists to support John le Breton as the author of *Britton*.[323]

Upon cursory examination, *Britton*'s organizational pattern is very comparable to *Fleta's* structure. It opens with an introduction and is organized according to chapters with each chapter titled in a similar way to *Fleta*. Every chapter begins with "de," or "of," followed a brief descriptor of the chapter's content (e.g., "Of Coroners," "Of Rape," "Of Homicides"). The treatise is much shorter than *Fleta*, containing only twenty-five chapters including the introduction, and its first chapter is titled "Of Coroners," and its concluding chapter is titled "Of Appeals of Mayhems."[324] Both *Britton* and *Fleta* explain specific laws and then the procedure that justices must follow in the event someone violates the law surrounding homicide, murder, rape, larceny, and so on. Like *Fleta*, *Britton* makes definitional distinctions between crimes like "homicide" and "murder," but it mostly establishes the laws governing crimes without explicitly addressing civil

[322] Plucknett, 266.

[323] Plucknett, 266.

[324] See *Britton*. *Containing the antient pleas of the crown, translated; and illustrated with references, notes, and antient records*. Trans. Robert Kelham. London: H. Woodfall and W. Straham, Law-Printers to the King's most excellent Majesty, 1762. Reprinted by Eighteenth-Century Collections Online Print Editions, 2010.

matters, namely seisin, disseisin, and writ of right. Nevertheless, *Britton* represents another text that helped establish legal procedure in late thirteenth-century England.

A commentary on these related texts dovetails with Stock's "textual community" as this study's overarching conceptual framework. The story of *Fleta* becomes a story of how the English legal community of the thirteenth century engaged with texts and textuality – how they sought to adapt previously written texts for their time. *Bracton* had appropriated Justinian, and *Fleta*'s author borrowed extensively from *Bracton* in his efforts to adapt statutes in response to legislative changes under Edward I. Stock's textual community also helps illustrate the legal/textual milieu of the Middle Ages in which *Fleta* existed. Guyora Binder, for example, has addressed the relationship between text and community formation, although he focuses on events transpiring in the late eleventh and early twelfth centuries. Binder refutes Harold Berman's thesis that two core values of the law, that law should be a vehicle for social change and that law should be autonomous from politics, are reconcilable.[325] According to Binder, Berman makes two key claims in that "since the eleventh century, (1) legal thought has been the moving force in western history, and (2) legal scholars have sought social progress."[326] Binder says Berman is wrong, contending that medieval social change actually generated scholastic legal thought and not the other way around.[327] He maintains that scholastic

[325] Guyora Binder, "Angels and Infidels: Hierarchy and Historicism in Medieval Legal History," *Buffalo Law Review* 35, no. 2 (1986): 527, http://ssrn.com/abstract=1933906. Binder identifies Harold Berman as a "recognized giant" in comparative law. He is referring here to Berman's acclaimed work, *Law and Revolution: The Formation of the Western Legal Tradition* (1983).

[326] Binder, "Angels and Infidels," 528.

[327] Binder, 528.

legal thought "was hostile to social change," and Berman only believed that legal thought supported social change because he erroneously identified hierarchical authority with social progress.[328]

Binder refutes Berman's argument, but without using the term, he shows how an eleventh-century legal scholastic community also represented a textual community. The scholastic community, as a textual community, sought to understand the world, but "not as a means of understanding the world as a process of change."[329] According to Binder, that for "scholastics to understand a worldly phenomenon meant to grasp that which was unchanging about it."[330] The concept of sempiternal illustrates this point. Sempiternal became a way to explain natural law if divine law was eternal and natural law was temporal. Scholastics, therefore, maintained that while the human body only lasted a very short time, the human species endured.[331] Binder explains that "it was the sempiternal aspect of the world – its enduring or regular features – that indicated that it was a divine creation. If sempiternity did not redeem the world, it revealed the world's capacity, its potential worthiness, for redemption."[332] Binder suggests that scholastics learned of the

[328] Binder, 528. See Nicholas Aroney, "Law, Revolution, and Religion: Harold Berman's Interpretation of the English Revolution," *Journal of Markets and Morality* 8, no. 2 (2005), 355-385 for a fuller explication of Berman's thesis as articulated in *Law and Revolution* and *Law and Revolution II* (2003). A more concise summary of Berman's views also appears in John Witte Jr.'s "Harold Berman as Historian and Prophet," *Rechtsgeschichte Legal History* 21 (2013), 224-27.

[329] Binder, 565.

[330] Binder, 565.

[331] Binder, 565.

[332] Binder, 565.

sempiternal realm from other texts (e.g. Aristotle), but they then used the idea to write about the nature of social change and the human condition of their time.

Fleta, Scribal Culture, and Literacy

As previously indicated, *Fleta* existed as one piece of a textual community and a synthesis of other texts that were, in and of themselves, syntheses of other legal texts. *Fleta*, however, as well as these other texts also exemplify the growth of a scribal culture as well as a greater reliance on written texts. Matthew Fisher notes, in his analysis of scribal authorship in writing a history of medieval England, that "historiography requires a strange form of composition, in which literary invention is mediated by a reliance upon sources in order to narrate what happened in the past."[333] Those sources, he claims, "were originally oral, but by the end of the twelfth century were more typically written."[334] Fisher, in referring to writing history, describes a scribal process of "intertextual transfer" that relied upon "generations of texts and narratives" that scribes copied, modified, and situated in new texts.[335] One can apply the same explanation to other texts, not strictly historical, but legal texts such as *Fleta*. The *Fleta* author acted as a kind of scribe in that he copied from *Bracton*, who had copied from Glanvill and Justinian among others, and altered the text as he deemed necessary while situating it within the context of Edward I's reign and his legislative reforms.

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[333] Matthew Fisher, *Scribal Authorship and the Writing of History in Medieval England* (Columbus: The Ohio State University Press, 2012), 1-2.

[334] Fisher, *Scribal Authorship*, 2.

[335] Fisher, 2.

M.T. Clanchy draws a parallel between scribal culture and the manuscripts of both *Bracton* and *Fleta*, as both are *summae*. Clanchy identifies the main elements of a *summa* as compiled for instruction, as a selection of authoritative statements, and as a systematically organized text.[336] Furthermore, *Bracton* and *Fleta*'s author, like writers of other *summae*, copied from other sources:

> Bracton can be accused of plagiarism, as the treatise to which he gave his name had been put together a generation earlier by his own masters in English law. But in manuscript culture, without a distinction between hand-written and printed copy, it was harder for an author to distinguish between his own text and his notes from various sources. As a conscientious compiler and publisher, it may have occurred to Bracton that he was guilty of theft of intellectual property. A generation later his treatise was in its turn superseded by Fleta, who made similarly bold claims...[337]

Clanchy says that a scribal practice possibly resulted in inadvertent copying of other manuscripts, and if one argues that *Bracton* and *Fleta*'s author were in some way scribes, then they necessarily were engaging in habits not necessarily uncommon for the time. He explains that *summae*, which *Bracton* and *Fleta* both exemplify, were intended to "instruct a wider public" and included "a variety of formularies and treatises which instruct by citing examples in how to conduct law courts, draft charters, cast financial accounts, manage estates, and so on."[338] Compiling *summae*, according to Clanchy, "was a reaction to the proliferation of documents and books in the twelfth and thirteenth centuries; they were intended as a guide through the maze, although sometimes they added to the confusion."[339] *Fleta*'s author, therefore, likely intended his treatise as a

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[336] Clanchy, *From Memory to Written Record*, 109.

[337] Clanchy, 110.

[338] Clanchy, 110.

[339] Clanchy, 110.

handbook of sorts and one that could make law accessible to both the lay public and members of a late-thirteenth century English legal profession.

Clanchy's analysis not only situates *Fleta* as a *summa* and, as such, contributing to a textual community in the thirteenth century, but it also dovetails with Stock as related to community and literacy. Clanchy argues, for example, that literacy grew during the Middle Ages for practical purposes, which he identifies as "pragmatic literacy."[340] Pragmatic literacy necessitated that non-legal professionals become literate of written legal texts. Clanchy, for example, notes that "laymen became more literate in order to cope with written business, initially in England with writs from the royal government demanding information or money."[341] Furthermore, knights and peasants acting as manorial reeves "needed to be able to read the warrants presented to them and to keep records themselves in order to make adequate answers."[342] He also cites other law-related examples such as bailiffs needing to make written records of tools, horseshoes, and "everything that remained on the manor, great or small."[343]

Here, it is appropriate to return to Stock's analysis of a marriage between the strong and weak literacy theses. The strong thesis assumes that no writing existed before and came about in some seminal moment for the community while the weak thesis presupposes a more complicated interaction between orality and written literacy. The weak thesis posits the written word as something not completely novel for a textual

[340] Clanchy, 329.

[341] Clanchy, 329

[342] Clanchy, 329. A "reeve" is an administrative agent of the king.

[343] Clanchy, 329.

community. His marriage of the strong and weak theses bridges the two ideas by taking into consideration the evolutionary aspect of written literacy. Clanchy's study depicts this evolution in legal literacy through the written word and that a trend toward written records, legal documents, writs, and warrants necessitated that members of the legal community as well as laypersons engage with the written word. A legal textual community, through written text, grew to include people playing multiple societal roles (e.g., bailiff, peasant, lawyer, scholastic) and people who needed knowledge of the law for addressing a number of diverse legal exigencies (e.g., land ownership, theft, murder).

Fleta, not unlike *Bracton*, was written to make the legal textual milieu more accessible to a thirteenth-century audience. This statement reflects an assessment of *Fleta*'s intent. The treatise was not widely distributed, but regardless, it retains significance as a text that existed alongside other similar texts (e.g., *Bracton*). In a way, treatises like *Fleta* acted as centripetal and unifying forces that helped bring together the textual community. It was written to help the legal community of England comprehend statutes, but it also helped write a history of those statutes based upon other texts like *Bracton*. *Fleta* represented one piece of a larger textual community comprising other texts, and while it could potentially act as a unifying element, it could also potentially aid, to use Stock's terminology, historicizing the community. In short, it could help write a history for an English legal community as well as embody a shared language and discourse for that community.

Fleta's Influence

A question remains, however, as to whether or not *Fleta* retains any historical significance after 1300. Generally, the statutes from *Fleta* were applied in future

centuries and ostensibly still inform present-day English (and likely American) law. More precisely, though, *Fleta*'s author articulated themes, particularly in the introduction, that resonated with key historical figures in, for example, the seventeenth century. A case for this resonation is that of Thomas Hobbes and his keen interest in the ideas from *Fleta* as those ideas pertained to the monarch's sovereign power and the inalienability of that sovereignty, which represent dominant themes of Hobbes's *Leviathan*. Kinch Hoekstra explains that Hobbes's *The Elements of Law*, which published in 1640 and a few years before *Leviathan*, gives his first treatment of the rights of sovereignty and the inalienability of such rights.[344] In *The Elements of Law*, Hobbes argues "that the sovereign must retain the legislative power and the power to ensure the laws are observed," and that "appointing and limiting magistrates and ministers" becomes, according to Hobbes, "an inseparable part of the same sovereignty, to which the sum of all judicature and execution hath already been annexed."[345] For Hobbes, the sovereign power "must have impunity," but it cannot possess impunity if it delegates any of the essential powers; these rights of sovereignty, moreover, "are necessarily absolute" and "cannot be limited or separated."[346] Hoekstra cites Hobbes description of the sovereign monarch's rights as the power to make laws and levy taxes as well as to make peace and war, command the militia, and prohibit the making of other laws.[347] Hobbes steadfastly

[344] Hoekstra, "Leviathan" in its Intellectual Context," 243.

[345] Thomas Hobbes, *The Elements of Law Natural and Politic* qtd. in K. Hoekstra, 243.

[346] Hoekstra, "Leviathan" in its Intellectual Context," 243.

[347] Hoekstra, 244.

maintained these rights as indivisible, and the sovereign monarch must always retain them otherwise he will be "thereby divers times thrust out of their possession."[348]

Hoekstra notes that Hobbes, in *Leviathan,* withheld information about his sources, but he was explicit about engaging the works of Edward Coke and John Selden, particularly as those sources addressed the issue of the monarch's inalienable sovereign rights. Hoekstra ponders the possibility that "if Hobbes underscored the inalienability of sovereign rights at this time, he may have been provoked by a lawyerly treatment of the topic."[349] He then raises the possibility of John Selden's dissertation on *Fleta* as an "impetus" for this treatment of sovereign rights.[350] Hoekstra briefly relates the story of Hobbes exclusive friendship with Selden, and Hobbes, himself, in *Leviathan* refers to Selden's dissertation on *Fleta* as a "most excellent Treatise."[351] His praise for Selden's work leads Hoekstra to believe that "Selden may have been on Hobbes's mind particularly when he was writing about the inalienability of sovereign powers."[352] Hobbes, through Selden's dissertation, became especially attracted to *Fleta*'s treatment of inalienable rights and privileges of the king that could not be divided or minimized and, thus, the king could not diminish his authority.[353]

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[348] Hobbes qtd. in Hoekstra, 244.

[349] Hoekstra, "Leviathan" in its Intellectual Context," 247.

[350] Hoekstra, 248.

[351] Hobbes qtd. in Hoekstra, 248.

[352] Hoekstra, 248.

[353] Hoekstra, 248.

Selden, however, had taken issue with *Fleta* – as well as with *Bracton* and others – over its treatment of the *lex regia*, a Roman legal concept pertaining to the people turning over power to the emperor.[354] Selden perceived a "distortion of the *lex regia*" in *Fleta,* and he argued that *Fleta* had departed "from reliable and authoritative sources available" that described how power was transferred from the people to the ruler.[355] The people, therefore, were "wholly stripped of rule."[356] Selden, according to Hoekstra, said that the *Fleta* author, for instance, framed his "interpretation to fit the English situation and the power of Parliament, not wanting to incur the people's displeasure or diminish the power of their lawyerly caste."[357] Hoekstra indicates that Selden argued for the proper interpretation of *lex regia* as the Roman people giving up sovereignty to their rulers, but after making this argument, Selden dismantled the notion that Roman law was relevant or had authority in England.[358] Hoekstra claims it possible that Hobbes wanted to avoid "the danger, the clutter, and the indeterminacy of the legal historical argument by postulating a kind of theoretical principle without the ambiguity of the *lex regia*" and with an even greater "nullifying power" than *Fleta* had given it.[359] The one time, according to Hoekstra, that Hobbes quoted from *Fleta*, "he did so precisely to assert sovereign

[354] Hoekstra, 249.

[355] Hoekstra, 249.

[356] Hoekstra, 249.

[357] Hoekstra, 249.

[358] Hoekstra, 249.

[359] Hoekstra, 249.

inalienability."[360] Hoekstra's footnote indicates that Hobbes explicitly cited *Fleta* in *A Dialogue Between a Philosopher and a Student, of the Common Laws of England* (ed. Alan Cromartie, Oxford: Clarendon Press, 2005). Hobbes noted, "Again you'll find in *Fleta* that Liberties (*sic*) though granted by the King, if they tend to the hinderance of Justice, or subversion of the Regal Power, were not to be used, nor allowed."[361] Essentially, Hobbes chose to ignore Selden's analysis of *Fleta* in favor of his own interpretation of the text as related to monarchical sovereignty.

Fleta's expression of sovereign authority served Hobbes's agenda, and the concept manifested in *Leviathan,* one of the most significant treatises on western political theory. Evidence from Hoekstra's article supports that *Fleta*, albeit through the work of John Selden, had influence beyond the thirteenth century. Another question remains, though, related to its significance. That is, did *Fleta* have impact in the legal community itself and in centuries following the thirteenth? For an answer, one can turn to the Year-Books, or the law reports published annually in England between the thirteenth and sixteenth centuries or roughly from the time of Edward I until the time of Henry VIII. As Sir William Holdsworth has explained, "they give us an account of the doings of the king's courts which is either compiled by eye-witnesses or form the narratives of eye-witnesses. They are the precursors of those vast libraries of reports which accumulate wherever the common law, or any legal system which has come under its influence, is studied and applied."[362] The Year-Books still retain value for legal historians and

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[360] Hoekstra, 249.

[361] Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, ed. Alan Cromartie (Oxford: Clarendon Press, 2005), 37.

[362] Sir William Holdsworth, "Chapter V: The Fourteenth and Fifteenth Centuries: The Working and Development of the Common Law," *A History of English Law, Volume II*, 5th ed,,

scholars and give considerable insight into early legal developments in the formation of English common law.

Holdsworth also explains that the Year-Books provide first-hand accounts of "the legal doctrines laid down by judges of the fourteenth and fifteenth centuries, who, building upon the foundations which had been laid by Glanvil (*sic*) and Bracton, constructed the unique fabric of the mediaeval common law."[363] If one accepts Clanchy's assertion that *Fleta* superseded *Bracton* a generation later, then it makes sense to place *Fleta* alongside Glanvill and *Bracton* in Holdsworth's contention that those twelfth and thirteenth century texts laid a framework for legal decisions in the following centuries. From this perspective, *Fleta* becomes seminal, not only with its implications for literacy, textuality, and community, but also for its possible influence on actual English case law. At the very least, *Fleta*'s parallels with *Bracton* and Glanvill suggest its significance in this regard.

Fleta and Legal Proceduralism

Fleta, as a contemporary of *Bracton*, contributed to constructing the basis for the Year-Books, and statutes from *Fleta* found their way, although implicitly, into legal cases in later centuries. Yet *Fleta* also reflects an emphasis upon legal procedure as integral to a late thirteenth-century English legal textual community. In her seminal contribution, "On the Historical Genesis of Legal Proceduralism," Dominque Bauer explicates the transition to a "procedural socio-political order" from customary legal formalism that

ed. Sir William Holdsworth (London: Methuen & Co. Ltd. and Sweet and Maxwell Ltd, 1956), 525.

[363] Holdsworth, "Chapter V: The Fourteenth and Fifteenth Centuries," 525.

began in the eleventh century.[364] Legal formalism positioned justice and legitimacy or validity as completely connected, and the "formalistic law of proof that was highly primitive, irrational, and ritualistic."[365] No better "expression" of legal formalism, according to Bauer, is that of the "ordeal" in which calling upon divine intervention dictated a person's guilt or innocence.[366] She describes how the ordeal ritual required the "champions of both the parties" to "hold their arms stretched out towards the cross," and the person who could keep this pose the longest "won his cause and the one who gave up literally fell down at the cross and lost his cause."[367] Because no distinction existed between the divine and temporal orders, the ordeal's legitimacy "was based upon the interference of the divine order into the temporal order."[368] Bauer argues that what constituted legitimate power was absent because, according to the tenets of legal formalism, legitimate and sacred power were one in the same. She identifies the elements of legal formalism as "the justification of power" lying "outside temporal reality," the exercise of power to achieve justice, and justice itself transcending secular society.[369] Bauer claims, however, that from the eleventh century onward, "a new concept of the relation between temporal and divine gradually appeared" that posed consequences "for

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[364] Dominique Bauer, "On the Historical Genesis of Legal Proceduralism," in *Ius Brabanticum, ius commune, ius gentium: Opstellen aangeboden aan prof. mr. J.P.A. Coopmans ter gelegenheid van zijn tachtigste vejaardag,* ed. E.J.M.F.C. Broers, B.C.M. Jacobs, and R.C.H. Lesaffer (Nijmegen, 2006), 212-13.

[365] Bauer, "On the Historical Genesis," 212.

[366] Bauer, 212.

[367] Bauer, 212.

[368] Bauer, 212.

[369] Bauer, 213.

the legitimacy and definition of political and public order."[370] Moreover, it had consequences "for the way in which power and justice were perceived."[371]

Bauer cites the ecclesiastical reform movement, known as "Gregorian Reform," as a major catalyst for these changes.[372] Although this reform movement "took a distinctively legal and institutional turn," its initial aim lie in separating the church from "secular intervention" by taking away the "sacred foundation" of the imperial power and "by reserving it exclusively as the basis for ecclesiastical power."[373] Bauer explains that the reform movement sought to remove legitimacy from the secular power as "only ecclesiastical power was legitimate, because only the latter was sacred."[374] Bauer then identifies the *Decretum Gratiani* as critical for understanding the features of legal proceduralism. As textbook and the "first scholarly presentation" of canon law, the *Decretum Gratiani* "brought into existence a system of law that was highly procedural and that gradually replaced legal formalism."[375]

Three major characteristics of legal proceduralism emerged from the *Decretum Gratiani*. First, it differentiated between "what is just and what is legally valid," and it separated justice from validity.[376] Bauer explains that validity became an important

[370] Bauer, 213.

[371] Bauer, 213.

[372] Bauer, 213.

[373] Bauer, 213.

[374] Bauer, 213.

[375] Bauer, 215.

[376] Bauer, 216.

organizing principle for the text, and what ties together the cases in *Decretum Gratiani* was not their "moral reprehensibility" but a "question of their validity."[377] Second, Bauer notes that the "development of procedures functions in a performative way."[378] She uses the example of excommunication to illustrate this point; "excommunication takes effect when the sentence of excommunication is pronounced," she explains, and "not when the criminal act is committed."[379] Last, validity and legitimacy, as Bauer puts it, "become interchangeable" because institutionalized decisions and actions have their own legitimacy by definition.[380]

Fleta embodied legal proceduralism and a trend that began, according to Bauer, in the eleventh century. The chapters that comprise Book VI of *Fleta* illustrate an emphasis on proceduralism possibly to a greater degree than the other parts of the treatise. Much of this last volume focuses upon legal "exceptions" with the word "exception" found in several of the chapter titles. The author also takes great pains to detail what jurists and relevant parties should do in these cases of exception, especially in matters related to seisin and disseisin, and he identifies "essoins," or excuses, as well as under what circumstances excuses are acceptable.[381] The last paragraph of *Fleta*'s last chapter, titled

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[377] Bauer, 216.

[378] Bauer, 217.

[379] Bauer, 217.

[380] Bauer, 218.

[381] See "Book VI, Chapter 10: Of the Essoin of Bed-Sickness," in *Fleta: Volume IV, Books V & VI,* ed. G.O. Sayles (London: The Selden Society, 1984), 126-132. The author details under what circumstances a person told to appear in court can use "bed-sickness" as a legitimate excuse.

"Chapter 55: Of Prescription [By Lapse] of Time," exemplifies *Fleta*'s proceduralism with a specific set of instructions regarding jurists' rejection of an exception:

> When the judge refuses to allow an exception propounded before him, it is provided that the exceptor should ask for the exception to be set down in writing and that one or more of the justices should seal it in testimony, and if one of them refuses, let another of the group seal it. And if it happens that a complaint is made of what a justice has done, the king should cause the record to come before him and if the said exception is not found enrolled and the plaintiff shows the aforesaid sealed bill, let the justice be ordered to be on a certain day to acknowledge or deny what was done. And if the justice acknowledges what was done to be his own work, let them proceed to judgement in accordance with the said exception as to whether it should be allowed or quashed.[382]

Here, *Fleta* gives its reader what is legally valid and not what is legally just. In other words, the author has chosen not to argue whether granting or rejecting an exception represents a just decision. Rather, the author explains under what circumstances an exception can be legally valid. The text reveals that its author has considered all of the procedural permutations associated with a judge rejecting an exception and the steps taken to ensure the exception remains valid or legitimate.

The focus on proceduralism also necessarily says something about the growing ubiquity of the written word in the legal textual culture of late thirteenth-century England. Bauer's explication of proceduralism coincides with Clanchy's analysis of pragmatic or practical literacy in legal textual communities with *Fleta* exemplifying both trends in the late thirteenth century. *Fleta* was intended as a tool for navigating the increasing procedural and legal complexity of its time, and the legal world of England in the late Middle Ages had become increasingly tied to written texts for transmitting law. In short, the written word and legal proceduralism were intertwined as procedures necessitated a need for written texts.

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[382] "Book VI, Chapter 55: Of Prescription [By Lapse] of Time," in *Fleta: Volume IV, Books V & VI*, ed. G.O. Sayles (London: The Selden Society, 1984), 194.

Bauer's remarks from the introduction of her article summarize the implications of legal procedural texts, like *Fleta*:

> Within a procedural system, the status of any substantive content that could define the socio-political framework remains problematic. The stronger proceduralism grows the less substantive content can be accounted for in legitimising. This means that, for a procedural system to be legitimate, no substantive legitimisation is needed. The legitimacy of the procedural system seems to lie in the correct development of procedures and therefore appears to result from the validity of that development. The more proceduralism embraces the socio-political sphere, the more problematic substantive content becomes, because (substantive) content can never immediately be accounted for in a system the legitimacy of which resides in validity. Throughout the evolution of the tension between proceduralism and the status of substantive content, the concept of legality itself has taken on a procedural form…The self-sufficient character of legal proceduralism also comes to the fore in debates on the boundaries between the normative and the empirical in the legal interpretation and treatment of social reality. In the analysis of adjudication, for example, it may not be a successful strategy to make distinction between the *is* and the *ought* because of the performative character of law. Law creates reality in terms of the application of legal categories such as accountability. Self-sufficiency and proceduralism seem to be at the heart of a socio-political order that is governed by instrumental rationality and that is subject to the erosion of common values legitimising and defining society, the political order, and the individual.[383]

Fleta possibly reflects the effects of proceduralism that Bauer describes in this passage. *Fleta* as a procedural and statutory text had embraced the "socio-political" sphere in the "Prologue," as the author had positioned it under the authority of King Edward I and his legal and legislative reforms. Bauer critiques proceduralism for lying at the "heart of a socio-political order" and one "governed by instrumental rationality." Proceduralism becomes a manifestation of instrumental rationality the impact of which becomes an "erosion of common values" that legitimize, define, and organize society, the socio-political order, and the individual person. One can argue that *Fleta* exemplifies instrumental rationality, but did it contribute to the eroding values and ordering society in negative ways? In detracting from "substantive" legal content? Such questions go beyond

[383] Bauer, "On the Historical Genesis," 209-210.

the scope of the present study; however, Bauer's argument that proceduralism and procedural texts epitomizing an instrumental rationality undermining common values would support the idea that *Fleta*, too, would contribute to the "erosion" of which she speaks. In addition, *Fleta* helped create legal categories and articulated application of those categories thereby, according to Bauer, creating reality. This assessment, too, would point to *Fleta* as a rational legal text.

D'Avray's analysis, however, suggests a more nuanced view of rationalities:

> The instrumental/value rationality distinction cuts across the substantive/formal rationality distinction. The tendency in the scholarly literature to equate formal rationality with instrumental rationality and substantive rationality is potentially a source of great confusion, sufficient to rule out these identifications from the set of useful conceptual schemes. On the one hand, substantive rationality need not have anything to do with values: as when formal rules for making fair appointments or allocating contracts are ignored for reasons of personal or power-political advantage. On the other hand, formal rationality commonly works within a value framework, even if the values are as general as even-handedness and consistency. Formal legality can indeed be a tool of value systems that go far beyond that, as was the case with the formal procedures and rules of the Congregation of the Council, which served the values embodied in the Council of Trent. Cases decided by the congregation were given a good deal of space in the body of the book as a reminder that formal rationality, defined in any useful way, has no necessary association with modernity or secularisation.[384]

D'Avray's concept of "substantive rationality" represents a potentially useful way to think about legal texts like *Fleta*. *Fleta* embodied a set of values and legality reflected in legal statutes, and as a written text that conveyed legality, it did indeed serve as a tool of a value system under King Edward's rule. D'Avray also suggests that rationality *can* work to the advantage of the political order, but it does not always do so. It can work within a framework of values; therefore, legal texts can also work within a framework of values that does not necessarily result in an "erosion."

[384] D'Avray, *Rationalities in History*, 186-7.

Regardless, texts are useful for not only considering the impact of rationalities on societies but also for studying how communities originated and evolved while organizing around ideas found in those texts. To quote Stock:

> The concept of text is merely a more practical intellectual tool than that of literature. It is not neutral, for no idea is. Nor is it more capable than "literature" of reflecting the genetic possibilities of both oral and written development. It is more useful because it is more manageable. Societies may be chartered by myths that we call literature, but no society is ever motivated by more than a small part of its heritage at a given time or a place. Action is normally based on small units – scripts, scenarios, and parts of bigger narratives. The historian or ethnographer must read a whole society's archive, but he or she must also listen carefully for those key texts.[385]

This study has addressed how one can "listen carefully for those key texts" comprising thirteenth-century English common law. *Fleta* was one of those texts that existed in an atmosphere with other seminal texts of its day (e.g., *Bracton*, *Hengham Magna*, *Fet Asaver*, *Britton*). It shared a language and discourse with these other texts with all of them helping to provide a set of organizing legal principles in the form of statutes. Each of these texts with its respective chapters also reflects texts within texts; for example, short chapters that comprise longer sections of longer volumes that ultimately aid in providing a narrative of thirteenth-century English law. As previously mentioned, *Fleta* and these other texts historicize a textual community of legal professionals.

Oliver Wendell Holmes once said about the practice and study of law:

> The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism (*sic*), that is, towards a deliberate reconsideration of the worth of those rule. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step.

[385] Stock, *Listening for the Text*, 14.

> The next is either to kill him, or to tame him and make him a useful animal.[386]

Holmes criticized the overemphasis on history in law and thought that law, in his day, had become essentially a study of history. He argued that lawyers, judges, and law students should embrace the law as its own discipline with intrinsic value. In doing so, the legal profession needed to unleash the "dragon" and then, ideally, "tame" him thereby making "him a useful animal." Holmes's analogy of the law as a deadly, mythological beast that breathes fire captures how he viewed the practice and study of law, but it fails to consider that the legal history of any society is very much part of that dragon in the cave. Uncovering and illuminating the legal past remains just as critical as learning theories of contracts or comprehending tort reform.

Many members of the legal profession in both the U.K. and the U.S. may indeed see as "revolting" the study of law as the study of history. The fact remains, however, that on some level, law *is* history. Statutes, cases, and precedents all represent events that took place in context with other events (and other texts). Studying law means studying context and the importance of that context for future generations, but it also means studying the context to determine how that context shapes the content of law. This study has sought to position itself at an intersection of law, history, and textuality. In doing so, it has tried to reflect the use of both historical methods and close examination of the historiography of English common law as well as close textual analysis to illuminate *Fleta* and its meaning for an audience. Bringing together necessarily disparate disciplinary approaches and perspectives not only aids in an understanding of the creation

[386] Holmes, *The Path*, 18.

of legal texts but it assists those affected by law comprehend both its short and long-term consequences.

Bibliography

Aristotle. *The Rhetoric and Poetics of Aristotle*. Edited by Edward P.J. Corbett. Translated by W. Rhys Roberts. New York: Random House, 1984.

Aroney, Nicholas. "Law, Revolution, and Religion: Harold Berman's Interpretation of the English Revolution." *Journal of Markets and Morality* 8, no. 2 (2005): 355-385.

Baker, J.H. *An Introduction to English Legal History*. 4th ed. Oxford: Oxford University Press, 2011.

Baker, Sir John. *The Reinvention of Magna Carta, 1216-1616*. Cambridge: Cambridge University Press, 2017.

Bauer, Dominque. "On the Historical Genesis of Legal Proceduralism," in *Ius Brabanticum, ius commune, ius gentium: Opstellen aangeboden aan prof. mr. J.P.A. Coopmans ter gelegenheid van zijn tachtigste vejaardag*, edited by E.J.M.F.C. Broers, B.C.M. Jacobs, and R.C.H. Lesaffer, 208-219. Nijmegena, 2006.

Biancalana, Joseph. "The Writs of Dower and Chapter 49 of Westminster I." *Cambridge Law Review* 49, no. 1 (1990): 91-116, https://www.jstor.org/stable/4507371.

Binder, Guyora. "Angels and Infidels: Hierarchy and Historicism in Medieval Legal History." *Buffalo Law Review* 35, no. 2 (1986): 527-599. http://ssrn.com/abstract=1933906.

"Book I." In *Fleta: Volume II, "Prologue," Book I, Book II*, 13-104. Edited by H.G. Richardson and G.O. Sayles, 13-104. London: The Selden Society, 1955.

"Book IV." In *Fleta: Volume III, Books III & IV*, 46-123. Edited by H.G. Richardson and G.O. Sayles. London: The Selden Society, 1972.

"Book VI, Chapter 10: Of the Essoin of Bed-Sickness." In *Fleta: Volume IV, Books V & VI*, 126-132. Edited by G.O. Sayles. London: The Selden Society, 1984.

"Book VI, Chapter 55: Of Prescription [By Lapse] of Time." In *Fleta: Volume IV, Books V & VI*, 193-194. Edited by G.O. Sayles. London: The Selden Society, 1984.

Brand, Paul. "George Osborne Sayles, 1901-1994." *Proceedings of the British Academy* 90 (1996): 441-463.

Brand, Paul. *The Making of the Common Law*. London: The Hambledon Press, 1992.

Brand, Paul. *The Origins of the English Legal Profession*. Oxford: Blackwell Publishers, 1992.

Bracton, Henry de. *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne. Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977. Accessed February 11, 2019. http://amesfoundation.law.harvard.edu/Bracton/index.htm.

Bracton, Henry de. "Introduction." Volume 2, page 19. In *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne. Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977. Accessed February 4, 2019. http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/19.htm.

Bracton, Henry de. "Introduction." Volume 2, page 22. In *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne. Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977. Accessed February 4, 2019. http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/22.htm.

Bracton, Henry de. "Introduction." Volume 2, page 23. In *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne. Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977. Accessed February 6, 2019. http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/23.htm.

Bracton, Henry de. "Introduction." Volume 2, page 24. In *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne. Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977. Accessed February 6, 2019. http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/24.htm.

Bracton, Henry de. "Of Persons." Volume 2, page 33. In *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne. Cambridge, Massachusetts: President and

Fellows of Harvard College, 1968-1977. Accessed February 13, 2019. http://amesfoundation.law.harvard.edu/Bracton/ Unframed/English/v2/33.htm.

Bracton, Henry de. “Of Acquiring the Dominion of Things.” Volume 2, page 122. In *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne. Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977. Accessed February 20, 2019. http://amesfoundation.law.harvard.edu/Bracton/ Unframed/English/v2/122.htm.

Bracton, Henry de. “Of Actions.” Volume 2, page 282. In *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne. Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977. Accessed February 18, 2019. http://amesfoundation.law.harvard.edu/Bracton/ Unframed/English/v2/282.htm.

Bracton, Henry de. “Of Actions.” Volume 2, page 283. In *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne. Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977. Accessed February 18, 2019. http://amesfoundation.law.harvard.edu/Bracton/ Unframed/English/v2/283.htm.

Bracton, Henry de. “Of Defaults.” Volume 2, page 290. In *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne. Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977. Accessed February 20, 2019. http://amesfoundation.law.harvard.edu/Bracton/ Unframed/English/v2/290.htm.

Bracton, Henry de. “Of Defaults.” Volume 2, page 294. In *De Legibus Et Consuetudinibus Angliae* (*On the Laws and Customs of England*), edited by George Woodbine and translated by Samuel E. Thorne. Cambridge, Massachusetts: President and Fellows of Harvard College, 1968-1977. Accessed February 20, 2019. http://amesfoundation.law.harvard.edu/Bracton/ Unframed/English/v2/294.htm.

Brasington, Bruce Clark. “Advice to the Judge: The Distinctio "Delicto coram iudice manifestato" with a Note on the Question of "Unjust Mercy" in Medieval Canon Law,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 134 (2017): 131-145.

Britton. Containing the antient pleas of the crown, translated; and illustrated with references, notes, and antient records. Translated by Robert Kelham. 1762. Reprint, London: Eighteenth-Century Collections Online Print Editions, 2010.

Caenegem, R.C. Van. “Part Two, Chapter IV. The Common Law Writs of Naifty, Prohibition and Account.” In *Royal Writs in England from the Conquest to Glanvill*, 336-346. London: The Selden Society, 1959.

Clanchy, M.T. *From Memory to Written Record: 1066-1307*. 3rd ed. West Sussex, UK: Wiley-Blackwell, 2013.

Davis, R.H.C. *A History of Medieval Europe: From Constantine to Saint Louis*. 2nd ed. New York: Longman, 1988.

D’Avray, D.L. *Medieval Religious Rationalities: A Weberian Analysis*. Cambridge: Cambridge University Press, 2010.

Denholm-Young, N. “Matthew Cheker.” *The English Historical Review* 59, no. 234 (1944): 252-257. https://www.jstor.org/stable/554004.

Denholm-Young, N. “Who Wrote ‘Fleta’?” *The English Historical Review* 58, no. 229 (1943): 1-12. https://www.jstor.org/stable/553805.

Fisher, Matthew. *Scribal Authorship and the Writing of History in Medieval England*. Columbus, OH: The Ohio State University Press, 2012.

Hamil, Frederick Coyne. “Presentment of Englishry and the Murder Fine.” *Speculum: A Journal of Mediaeval Studies* 12, no. 3 (1937): 285-298. https://www.jstor.org/stable/2848624.

Hazeltine, Harold Dexter, ed. *Iohannis Seldini ad Fletam Dissertatio*. Translated by David Ogg. Cambridge: Cambridge University Press, 1925.

Hellwarth, Jennifer Wynne. “'I wyl wright of women prevy sekenes': Imagining Female Literacy and Textual communities in Medieval and Early Modern Midwifery Manuals.” *Critical Survey* 14, no. 1 (2002): 44-63. http://www.jstor.org/stable/41557147.

Herskowitz, Jack L. “Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine.” *University of Miami Law Review* 21, no. 423 (1966): 423-456.

Hobbes, Thomas. *A Dialogue Between a Philosopher and a Student of the Common Laws of England*. Edited by Alan Cromartie. Oxford: Clarendon Press, 2005.

Hoekstra, Kinch. “Leviathan” and its Intellectual Context.” *Journal of the History of Ideas* 74, no. 2 (2015): 237-257. https://www.jstor.org/stable/43948736.

Hogue, Arthur R. *Origins of the Common Law*. Bloomington, IN: Indiana University Press, 1966. Reprint, Indianapolis, IN: Liberty Fund, 1986.

Holdsworth, Sir William. "Chapter V: The Fourteenth and Fifteenth Centuries: The Working and Development of the Common Law." *A History of English Law, Volume II,* 5th ed., 406-597. Edited by Sir William Holdsworth. London: Methuen & Co. Ltd. and Sweet and Maxwell Ltd, 1956.

Holmes, Oliver Wendell, Jr. *The Path of the Law*. 1897. Reprint, American Classics Library, 2012.

Hudson, John. *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta*. London: Addison Wesley Longman Limited, 1996.

Hudson, John. "Maitland and Anglo-Norman Law." In *The History of English Law: Centenary Essays on 'Pollack and Maitland,'* 21-46. Oxford: Oxford University Press, 1996.

Hyams, Peter R. "The Action of Naifty and Proof of Villein Status." In *King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries*, 162-183. Oxford: Clarendon Press, 1980.

Jacob, E.F. *Studies in the Period of Baronial Reform and Rebellion, 1258-1267*. Herts, UK: Octagon Press, 1974.

Kantorowicz, Ernst H. *The King's Two Bodies: A Study in Mediaeval Political Theology*. Princeton: Princeton University Press, 1957. Reprinted with new introduction by Conrad Leyser. Princeton: Princeton Classics, 2016. Page references are to the 2016 edition.

Kantorowicz, Ernst H. "The "Prologue" to *Fleta* and the School of Petrus de Vinea." *Speculum: A Journal of Mediaeval Studies* 32, no 2. (1957): 231-249. https://www.jstor.org/stable/2849115.

Maitland, Frederic William, and Francis C. Montague. *A Sketch of English Legal History*. New York: G.P. Putnam's Sons: The Knickerbocker Press, 1915. Reprinted with notes and appendices by James F. Colby. Clark, NJ: The Lawbook Exchange, Ltd., 2010. Page references are to the 2010 edition.

Maitland, Frederic William. "Introduction." In *Bracton's Note Book: A Collection of Cases Decided in the King's Courts During the Reign of Henry the Third: Volume 1: Apparatus*, 1-138. Edited by F.W. Maitland. London: C.J. Clay & Sons, Cambridge University Press Warehouse, 1887. Reprint, Cambridge: Cambridge University Press, 2010. Page references are to the 2010 edition.

McSweeney, Thomas J. “Creating a Literature for the King’s Courts in the Later Thirteenth Century: *Hengham Magna*, *Fet Asaver*, and *Bracton*.” *The Journal of Legal History* 37, no. 1 (2016): 41-71. http://dx.doi.org/10.1080/01440365.2016.1143222.

Miller, S.J.T. “The Position of the King in Bracton and Beaumanoir.” *Speculum* 31, no. 2 (1956): 263-296. https://www.jstor.org/stable/2849413.

Milsom, S.F.C. *A Natural History of the Common Law*. New York: Columbia University Press, 2003.

Nederman, Cary J. “Chapter 19: Arguing Sovereignty in the Seventeenth Century: Bracton’s Readers” in *Lineages of European Thought: Explorations along the Medieval/Modern Divide from John of Salisbury to Hegel*, 304-322. Edited by Cary J. Nederman. Washington, D.C.: The Catholic University of America Press, 2009. https://www.jstor.org/stable/j.ctt285181.23.

O’Brien, Bruce. “Authority and community.” In *A Social History of England, 900-1200*, 76-97. Edited by Julia Crick and Elisabeth Van Houts. Cambridge: Cambridge University Press, 2011.

O’Brien, Bruce R. “From Mordor to Murdrum: The Preconquest Origin and Norman Revival of the Murder Fine.” *Speculum* 71, no. 2 (April 1996): 321-357. https://www.jstor.org/stable/2865416.

Pelteret, David A.E. “Power and powerless.” In *A Social History of England, 900-1200*, 142-151. Edited by Julia Crick and Elisabeth Van Houts. Cambridge: Cambridge University Press, 2011.

Plucknett, T.F.T. “Chapter 10: Law and Statutes.” In *Legislation of Edward I: The Ford Lectures Delivered in the University of Oxford in Hilary Term 1947*, 1-20. Edited by T.F.T. Plucknett. London: Oxford at the Clarendon Press, 1949.

Plucknett, Theodore F.T. *A Concise History of the Common Law*. 5th ed. Indianapolis, IN: Liberty Fund, 1956.

Plucknett, T.F.T. *Early English Legal Literature*. Cambridge: Cambridge University Press, 1958.

Pollack, Sir Frederick, and Frederic William Maitland. *The History of English Law Before the Time of Edward I, Volume I*. 2nd ed. Cambridge: Cambridge University Press, 1898. Reprint, Clark, NJ: The Lawbook Exchange, Ltd., 2013. Page references are to the 2013 edition.

Powell, James M. “Introduction.” In *The Liber Augustalis or Constitutions of Melfi Promulgated by the Emperor Frederick II for the Kingdom of Sicily in 1231*, xiii-

xxxviii. Translated by James M. Powell. Syracuse, NY: Syracuse University Press, 1971.

"Prologue." In *Fleta: Volume II, "Prologue," Book I, Book II,* 1-3. Edited by H.G. Richardson and G.O. Sayles. London: The Selden Society, 1955.

"Prooemium." In *The Liber Augustalis or Constitutions of Melfi Promulgated by the Emperor Frederick II for the Kingdom of Sicily in 1231*, 3-5. Translated by James M. Powell. Syracuse, NY: Syracuse University Press, 1971.

Prestwich, Michael. "Chapter 10: The Statues and the Law." In *Edward I*, 267-97. Edited by Michael Prestwich. New Haven, CT: Yale University Press, 1997. https://www.jstor.org/stable/j.ctt1bh4bss.16.

Richardson, H.G. "Azo, Drogheda, and Bracton." *The English Historical Review* 59, no. 233 (1944): 22-47. https://www.jstor.org/stable/554236.

Sayles, G.O. "Introduction." In *Fleta: Volume IV, Book V and Book VI,* ix-xxv. Edited by G.O. Sayles. London: The Selden Society, 1984.

Selden, John. *The Dissertation John Selden, Annexed to Fleta. Translated, with Notes. By the Editor of Britton. Translated and illustrated.* London: J. Worrall, and B. Tovey, at the Dove, in Bell-yard, near Lincoln's-inn, 1771.

Stein, Peter. *Roman Law in European History*. Cambridge: Cambridge University Press, 2004.

Schulz, Fritz. "Bracton on Kingship." *The English Historical Review* 60, no. 237 (1945): 136-176. https://www.jstor.org/stable/555534.

Seipp, David J. "Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law." *Law and History Review* 7, no. 1 (1989): 175-217. https://www.jstor.org/stable/743780.

Stein, Peter. *Roman Law in European History*. Cambridge: Cambridge University Press, 1999.

Stock, Brian. *Listening for the Text: On the Uses of the Past*. Baltimore: The Johns Hopkins University Press, 1990. Reprint, Philadelphia: University of Pennsylvania Press, 1996. Page references are to the 1996 edition.

Tate, Joshua C. "Ownership and Possession in the Early Common Law." *American Journal of Legal History* 48, no. 3 (2006): 280-313. https://ssrn.com/abstract=938715.

Tierney, Brian. “Bracton on Government.” *Speculum* 38, no. 2 (1963): 295-317. https://www.jstor.org/stable/2852455.

Thorne, S.E. “The Text of Bracton’s ‘*De Legibus Angliae*.’” In *Essays in English Legal History*, 93-110. Edited by S.E. Thorne. London: The Hambledon Press, 1985.

Treharne, Elaine. “Chapter V.6: Textual Community (Vernacular).” In *A Social History of England, 900-1200*, 341-351. Edited by Julia Crick and Elisabeth Van Houts. Cambridge: Cambridge University Press, 2011.

Tubbs, J.W. *The Common Law Mind: Medieval and Early Modern Conceptions*. Baltimore, MD: The Johns Hopkins University Press, 2000.

Turner, Ralph V. “Who was the Author of Glanvill? Reflections on the Education of Henry II’s Common Lawyers.” *Law and History Review* 8, no. 1 (Spring 1990): 97-127. https://www.jstor.org/stable/743677.

Vincent, Nicholas. *Magna Carta: A Very Short Introduction*. Oxford: Oxford University Press, 2012.

Webber, Teresa. “Chapter V.5: Textual Community (Latin).” In *A Social History of England, 900-1200*, 330-340. Edited by Julia Crick and Elisabeth Van Houts. Cambridge: Cambridge University Press, 2011.

Witte, John, Jr. “Harold Berman as Historian and Prophet.” *Rechtsgeschichte Legal History* 21 (2013): 224-27. http://dx.doi.org/10.12946/rg21/224-227.