

# ***Statuta* v. Acts: Interpretation, Music, and Early English Legislation**

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## I. INTRODUCTION AND METHODOLOGY

### A. *Statutes and Motets*

Look at the monumental change that has been wrought between the *Magna Carta* or the *Carta Forestæ* of Edward I and the prodigious legislation of the Tudors. In language, form, and style, these written laws seem almost unrelated; the former are as impenetrable and limited in scope as the latter are arrogant in their power and authority. Yet one grew with the utmost gradualness from the other. Listen to the miraculous changes that have been rung between the two-part *organa* and plainsongs of the thirteenth century and the prodigious motets of Thomas Tallis, with up to forty distinct vocal lines in mazy coalition. Here, too, there has been so much formal and stylistic development that it is hard to imagine that one is an ornate variation of the other. The languages of law and of music each effected changes in purpose and normativity that an inquiry into aesthetic and semiotic considerations will reveal. The similarities between these parallel historical transformations suggest that these changes extended far beyond the narrow boundaries of each discipline and implicated every corner of the lives of those who lived then.

This Article is about the purposes and means of reading legal texts, offering a broader understanding of the why and how of legal interpretation. Many modern readers—and writers too—treat reading as miners treat the earth. They are insensitive to the environment of the text, its connotative play of light and shadow. In fiction and nonfiction alike, they search for syllogisms, arguments that can be extracted and stored, and discard the rest as mere impedimenta. Ideas, facts, and events are nuggets of meaning; everything else is just a bunch of old rocks. The result of this discursive strip-mining is a

wasteland in which more has been lost than gained, and much that has always been there is never found.

Any attempt to move beyond these routine strategies of reading requires development through a practice, for interpretation is an act to be done and not just a thought to be imagined. This Article deals with early English statutes from the *Magna Carta*<sup>1</sup> (first obtained from King John in 1215 and confirmed by Henry III in 1225) to the laws passed in the reign of Henry VIII (from 1509 to 1547). At the dawn of the common law, the statute had not yet achieved its present authoritative status and clarity of form. It took its place alongside a variety of other techniques of lawmaking, including the common law system of judicial decisions, writs, plea rolls, charters, Year Books, and so on. In fact, statutes were not a routine product of government until toward the end of the period I am considering; at the same time, the line between statutes and less formal pronouncements remained unclear. Legislation is nonetheless the most discrete and tangible kind of lawmaking, and the powers behind its generation and control are especially overt. By trying to understand these lawmakers' attitudes toward the meaning and role of the texts they created, we can gain a view of the ways in which those with power saw the role of the law. How, I ask, can we look at these particular legal documents? How do they appear to look at us? How did their authors look at the world?

In making these historical inquiries, I am particularly interested in changing ideas of normativity and the law. Why does law exert a normative authority over its citizens—in other words, why do we obey the law? For John Austin, there can be no law without a sanction, and it is from the threat of harm that our duty to obey arises. Both Austin's model of the legal system and H. L. A. Hart's hypothetical discussion of the formative period of English legal order, which in this respect follows Austin's model, seem to be based on this understanding of "primitive" English law as a simple matter of force.<sup>2</sup> On one reading, the earliest English statutes, assembled in the 1786

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1. 9 Hen. III (1225) (Eng.); 20 Edw. I (1292) (Eng.). These materials are readily available in the original and translated in various editions of the *Statutes at Large*. RUFFHEAD'S STATUTES AT LARGE (Christopher Runnington ed., 1786) [hereinafter Runnington] and STATUTES AT LARGE (Thomas Thomlins ed., 1811) [hereinafter Thomlins] provide different editions and different commentaries. On the early English translations of the Latin and French, see Howard J. Graham, *Our Tong Maternall Maruellously Amendyd and Augmentyd: The First Englishing and Printing of the Medieval Statutes at Large, 1530-1533*, 13 U.C.L.A. L. REV. 58 (1965); see also RICHARD HELGERSON, *FORMS OF NATIONHOOD: THE ELIZABETHAN WRITING OF ENGLAND* (1992).

2. See Runnington, *supra* note 1; JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (John Murray ed., 5th ed. 1954); H.L.A. HART, *THE CONCEPT OF LAW* 50-55 (1961).

edition of the *Statutes at Large*, exemplify this conception of law as a matter of coercion. According to Owen Ruffhead, these early statutes seem "in particular instances, rather to be Provisions extorted by some predominant influence, rather than laws instituted by the concurring Assent of a regular legislature."<sup>3</sup> Ruffhead cites many statutes that were enacted without any formal indication whether or how they received Parliamentary assent. As late as 1400, one bill apparently became law even though it was rejected by the House of Commons.<sup>4</sup> According to Ruffhead's reading, Austinian in its implication, the laws of these early times exacted compliance from the community simply because of the force behind them and not because, as modern positivists argue, they were the formal and therefore *legitimate* products of a recognized procedure of legislative development.<sup>5</sup>

Retreating from his initial conclusion, however, Ruffhead insists that we ought not judge the validity—that is, the communal legitimacy—of a thirteenth-century enactment according to the formal procedural criteria of the eighteenth century. The dichotomy between coercion and formality as alternative normative frameworks is anachronistic.<sup>6</sup> Certainly it is true that lawmaking practice, like Parliament itself, was amorphous and unsettled in the first few hundred years after the Norman invasion. But we must go much further. It is not only *procedure* that changed in all that time. We cannot assume that the meaning and normative authority of law itself was the same then as it is now. To adopt such an assumption would be to indulge in a presentism more grievous than that condemned by Ruffhead, for it would be to judge the meaning of the thirteenth-century legal order by the experiences of the twentieth century. What was the purpose of statutes, then, and to whom were they addressed? Who was expected to obey the law, in what capacity, and why? What was the changing nature of the normativity of English law to which I have alluded?

These are the questions I wish to explore in an effort to recapture the radically different understanding of the province of statute and law which molded and constrained the attitudes of early English lawmakers. In pursuing these questions I trace the shift over a period of 300 years in a wide range of attitudes toward legal purposes and effects, from a legal world-view very different from one that is

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3. Runnington, *supra* note 1, at v.

4. *Id.* at v-xiv; 2 Hen. IV, ch. 15 (1400) (Eng.).

5. See HART, *supra* note 2; JOSEPH RAZ, *AUTHORITY OF LAW* 47-50, 150-53, 233-61 (1979) [hereinafter *AUTHORITY OF LAW*]; see also Joseph Raz, *Authority, Law and Morality*, 68 *THE MONIST* 295 (1985) [hereinafter *Authority, Law and Morality*].

6. See Runnington, *supra* note 1.

recognizably “modern.” The story I tell is to some extent a familiar one, and it is frequently presented in terms of the growth of political power and administrative machinery, the ambitions of the Norman invaders gradually being matched by their capacity.<sup>7</sup> This administrative-political story, however, is too simple an explanation. Rather, we are witnessing nothing short of a change of consciousness here, a change in the understanding of the purpose and functions of law and of the relationship of the individual to the forces of legal order. The statute has undergone a sea change between the thirteenth and the sixteenth century.

This consciousness manifests itself to us through all our senses. It affects how we see and how we hear. It should not surprise us to find, therefore, that parallel structural developments appear in markedly different disciplines.<sup>8</sup> Take an alternative locus of normativity—the church—and consider one of its most significant means of expression—music. Explore one of the most complex and important forms that musical discourse took, the motet, a form as significant in the development of medieval music as the statute was in the development of medieval law. The dramatic evolution in the form and style of the motet, and the remarkable parallels which are evident in the evolution of the statute, illustrate the profundity of the changes that were taking place in ideas of normativity and consequently illustrate the limitations of adopting a purely legal or political explanatory model.

The history of English music resonates with a progression of changes very similar to those found in the development of the statute and also illustrates an emergence from a medieval to a modern perspective on the world.<sup>9</sup> The word “motet” is used in England from the fourteenth century onward to describe any polyphonic vocal music written almost exclusively for liturgical use. It derives from the diminutive form of the French *mot*, or word, and although the early motets are quite different from the monophonic Gregorian chants that preceded them, they share with them a commitment to the priority of the text. This commitment is honored in the simplicity of the motet’s

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7. See THOMAS PLUCKNETT, *EARLY ENGLISH LEGAL LITERATURE* (1958); THOMAS PLUCKNETT, *LEGISLATION OF EDWARD I* (1949); THOMAS PLUCKNETT, *STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY* (1922) [hereinafter PLUNCKNETT, *STATUTES AND THEIR INTERPRETATION*]; FREDERICK POLLOCK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW* (1895).

8. See, e.g., MICHEL FOUCAULT, *THE ORDER OF THINGS* (1973).

9. See DONALD J. GROUT, *A HISTORY OF WESTERN MUSIC* (1960); FRANK L. HARRISON, *MUSIC IN MEDIEVAL BRITAIN* (1958); PETER M. LEFFERTS, *THE MOTET IN ENGLAND IN THE FOURTEENTH CENTURY* (1986); F.W. STERNFELD, *MUSIC FROM THE MIDDLE AGES TO THE RENAISSANCE* (1973); DAVID F. WILSON, *MUSIC OF THE MIDDLE AGES: STYLE AND STRUCTURE* (1990).

line and organization, in which the musical interest of the composition never detracts from or overwhelms the words it speaks. The sacred word is paramount. By the sixteenth century, however, motets have also undergone a sea change. The motet begins to give effect to complex forms of polyphonic organization which would have been beyond imagining when the first motets were sung. So, too, the statute had begun to give effect to complex forms of legal and social organization that would have been beyond imagining when the first statutes were enacted.

With its emphasis on the word and the form of words, the motet is a metaphor for this Article's focus on statutory words and statutory form. In addition, the motet is a genre of tremendous social and cultural significance that underwent growth and transformation parallel to changes affecting statutes. The musical sources illustrate the nature and causes of those changes. Music also provides an alternative language and thus a different way of imagining and expressing the arguments. The changing sound and form of the motet captures and communicates, in a different medium, fundamental shifts in the processes of social order. The motet is not only a metaphor for the development of the statute but an *exemplification* of it.

## *B. Interpretative Dimensions*

### *1. Gazing at the Statute*

The development of the motet acts as a counterpoint to my analysis of the development of the statute and is one way in which I propose to take a fresh approach to these sage old texts, to develop a sensitivity to meaning beyond the literal, and to excavate the hidden truths and treasures of legal interpretation which are buried there. But my use of music is not the only way in which I approach early statutes with a fresh eye and ear. Let us start with the contention that legal conclusions in a judicial opinion or a statute, for example, are influenced not only by rational ideas and legal doctrine but also by aesthetic and formal considerations. Just as we listen to a piece of music with an ear to its form and style, its structure and design, we can learn much about the meaning and implications of "law" through a thorough evaluation of these same factors. Musical and legal interpretation turn out to have much in common.

The use of these factors in exploring the genesis and exegesis of legal texts suggests above all a *way of looking*, in which the text is treated as an elaborate and enlightening sign system in and of itself. Clearly this is an approach much influenced by legal semiotics, from the broad range of tools displayed in Roberta Kevelson's anthologies

to Peter Goodrich's provocative essays.<sup>10</sup> What are the consequences implied by this way of reading? What are the interpretative choices involved in the reading of a legal document, such as a statute, that such a methodology might suggest?

First, this kind of analysis focuses almost exclusively on the texts themselves, rather than on, say, the economics, history, or sociology of the culture in which they appear. The text is treated as a discrete object worthy of separate study. It is bracketed as a work of art is bracketed, removed from its quotidian functions and isolated for contemplation.<sup>11</sup> There is nothing unusual in this from the point of view of legal research. As I have emphasized, however, this textuality is not intended as a kind of legal formalism but, on the contrary, as a means of revealing aspects of the social attitudes and values behind the text.

Second, I am very much concerned with the words of a text. Our society is uniquely literary. Other cultures set great store in the senses of hearing, touch, and even smell as means of access to the "truth," but modern Western society has accorded an unparalleled and almost exclusive priority to the sense of sight. "Seeing is believing" runs the old saw, while the rest of the sentence ("but touching's the truth") is now forgotten. Other cultures transmit myth and social meaning through nondiscursive artistic representation or oral tradition, but we inhabit a culture in which the alphabet, writing, and words—abstract, visual, linguistic—dominate as nowhere else in the world. We are, says Marshall McLuhan, "typographic man" and woman. In such a culture, texts occupy a unique cultural position.<sup>12</sup> But semiotics goes far beyond semantics, an analysis of the "meaning" of words. Against a background of deconstruction and contemporary jurisprudence alleging the indeterminacy of texts, this would beg the

10. See, e.g., *LAW AND SEMIOTICS* (Roberta Kevelson ed., 1987-89); PETER GOODRICH, *LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS* (1990); BERNARD S. JACKSON, *SEMIOTICS AND LEGAL THEORY* (1985); Roberta Kevelson, *Semiotics and Methods of Legal Inquiry*, 61 *IND. L.J.* 355 (1985).

11. See Martin Heidegger, *The Origin of the Work of Art*, in *POETRY, LANGUAGE, THOUGHT* (Albert Hofstadter trans., 1971). The formalism of a work of art is further emphasized and indeed overemphasized in, for example, MONROE C. BEARDSLEY, *AESTHETICS: PROBLEMS IN THE PHILOSOPHY OF CRITICISM* (1958) and MARY MOTHERSILL, *BEAUTY RESTORED* (1984).

12. For more on the prioritization and acuteness of the senses in different societies, and on the origins, meaning, and implications of Western visuality and the dominance of written language, see *THE VARIETIES OF SENSORY EXPERIENCE: A SOURCEBOOK IN THE ANTHROPOLOGY OF THE SENSES* (David Howes ed., 1991); JACK GOODY, *THE LOGIC OF WRITING AND THE ORGANIZATION OF SOCIETY* (1986); MARSHALL MCLUHAN, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* (1969). See also the works of Derrida on the tension between writing and speech in Western culture. JACQUES DERRIDA, *OF GRAMMATOLOGY* (G.C. Spivak trans., 1976); *A DERRIDA READER: BETWEEN THE BLINDS* (Peggy Kamuf ed., 1991).

question; rather, it is an approach attuned in particular to the implications of word choice for the ways in which language is used and to style and grammar. How meaning is conveyed is itself a significant factor in interpreting a text. The kind of reading I am undertaking involves a heightened sensitivity to the *connotations* of words—to the ambient, the metaphorical, and the rhetorical effects of language.<sup>13</sup>

Third, if we take seriously the priority of the visual in Western society, we must explore not only the connotations of words but also the very look of the documents themselves. When I speak of the “look” of a document, I am engaged in an evaluation of its form and design and am positing meaning behind these elements. A complete analysis of these questions would also ask us to pay attention to the feel of the book: the coloring of the binding and paper, the dusty sobriety of its pages, and so on. The law looks and feels a certain way; this appearance is part of its intimidating authority. I leave such matters for the future, however, pausing only to note that Peter Goodrich has provided a suggestive introduction to such a project.<sup>14</sup> This point aside, however, I am interested not in the *content* of a text (the legal details, for example, of an Act) but in its style and design. A piece of music, for example, is not simply “about” its subject matter; its structure and style also communicate, aesthetically and noncognitively. The same is true of a statute. The formal and structural features of the text, the design of the document—in short, all those aspects that connect, order, and present the concepts of a text—are also analytical tools which help us understand how those who created and recorded the text saw their world and the place of law within it. These ideas about the “presentation” of documents echo Monroe Beardsley’s aesthetic theory.<sup>15</sup> The difference is that, according to Beardsley, an appreciation of formal elements should be entirely removed from the contaminants of culture and social value; here these formal elements will be a mirror of and a window onto them. Far from being radically removed, form and content are radically entwined.

By focusing on the presentation, structure, and style of legal documents rather than just their literal meaning, we approach the world in which they were written through variables that were generally deployed and altered subconsciously. We discern meaning

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13. The distinction between denotation and connotation is discussed in relation to the work of Roland Barthes in JACKSON, *supra* note 10, at 22-24.

14. See the discussion of the shape and form of law reports in GOODRICH, *supra* note 10, at 233.

15. See generally BEARDSLEY, *supra* note 1.

in those matters of which legal authors were often unaware—look and sound, style and form. What is revealed through the assumptions and procedures that a society does not question will often tell us more about its collective values than will that which is debated and contentious. That which is self-evident is evidence of the self.<sup>16</sup> I therefore contend that an analysis of the properties of legal texts *apart* from their content (except in the most general terms) can yield evidence that will help us understand the role of law at different times and in different places.

This exploration is not without implications for contemporary practices. A semiotic and aesthetic interpretation of legislative form can be valuably carried on to the present day; later, I suggest some possible directions for such an analysis. Why, then, explore the style and form of statutes through a historical example, rather than by means of contemporary materials? By dealing with the formative period of English statutes, we are in a position to assess those formal and stylistic features which we now take for granted at the very moment of their emergence. Our attention is drawn to the various elements of the language and structure of the statutory form because, one by one, we are privy to the processes of their birth and crystallization. The adoption of a historical perspective thus allows us to see the commonplace in a stark and novel context. Distance in time permits distance in view. It is only with an eye sensitized by contact with the strange that we can look anew at the familiar; it is only with an awareness of the mutability of form that we can begin to question the apparently eternal style of the present.

## 2. *The Gaze of the Statute*

This method of textual analysis is not just about where one seeks legal meaning but also about why. It offers an expansion in the melodic range of legal interpretation as well as an enrichment of its harmonic resources.<sup>17</sup> The law is an imperfect mirror, but a mirror nevertheless, of the world beyond its bounds. If we study it carefully, the law reflects back to us aspects of the world which birth to it. Such a reading could not be further from a formalist interpretation of the law, which excludes from consideration and interest all but the text and the allegedly “legal” principles which generated it.<sup>18</sup>

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16. On the importance of background values to interpretative theory, see Lawrence Lessig, *Understanding Changed Readings*, 47 *STAN. L. REV.* 395 (1995). For an analysis of style as an interpretative technique, see PETER GAY, *STYLE IN HISTORY* 7 (1974).

17. This is a process of multidimensional enlargement that, it is often argued, has been underway in Western music for the past 700 years or more.

18. See Ernest Weinrib, *The Jurisprudence of Legal Formalism*, 16 *HARV. J.L. & PUB. POL'Y* 583 (1993); Ernest Weinrib, *Corrective Justice*, 77 *IOWA L. REV.* 403 (1992); Ernest Weinrib,



It is undoubtedly true that the information contained in a case may be faulty or flawed. If I wanted to know about the risks of blindness associated with the use of certain drugs, surely I would go to a medical text and not a legal case which touched upon the subject. More generally, there is every reason for disbelief as to whether or not the understanding of poverty, racism, or sexism contained in the pages of a law report tells us much about the reality of those problems. It is not, however, the *information* contained in a legal document that is of interest here, but the way the document expresses a world-view of those with power. Beyond the subject matter with which it deals and the principles it seeks to enshrine, a judgment or a statute may tell us about the way of looking at the world that called it forth. Such a document provides us with a way of understanding what was meant by “law” and “order” in the society that produced it. It tells us about the role, power, authority, and responsibility attributed to and claimed by legal institutions. Although they are typically the ground and not the figure of legal texts, these are legal questions in the most general sense, for they tell us how those who wrote the law thought about the law itself.

My inquiry into statutory form, style, and connotation has a particular focus. It asks how the texts that are the subject matter of this Article reveal to us their authors and how they saw the world. An analogy to the interpretation of a painting—encapsulated by words such as seeing, looking, and perspective—may prove helpful. Michael O’Toole, for example, seeks to understand art not only by considering what a work of art “represents,” but also by evaluating its “composition” and “mood.” “Mood” here refers to how the painting “looks at” observers, the ways in which it tries to entice them into its world or, alternatively, to exclude them. For example, are there people in the painting? How do they look at us or past us? How is perspective used? These and similar questions all relate to the “mood” of a work of art and the nature of *its* gaze rather than our own.<sup>19</sup>

What a painting “represents” corresponds to the meaning and purpose of a statute, and a painting’s “composition,” like that of a piece of music, corresponds to the form and structure of a law. But can a law have a “mood”? Can it *gaze* at you? One key to this

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*“Legal Formalism”: On the Immanent Rationality of Law*, 97 YALE L.J. 984 (1988); Ernest Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987); see also Ken Kress, *Coherence and Formalism*, 16 HARV. J.L. & PUB. POL’Y 639 (1993); Stephen R. Perry, *Professor Weinrib’s Formalism: The Not-So-Empty Sepulchre*, 16 HARV. J.L. & PUB. POL’Y 597 (1993); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); *Symposium, Corrective Justice and Formalism*, 77 IOWA L. REV. 403 (1992).

19. MICHAEL O’TOOLE, *THE LANGUAGE OF DISPLAYED ART* (1994).

question may be found in the work of Michel Foucault, for whom “gaze” (*regard*) was essential in explaining power. For Foucault, the fact that the state so closely observes every aspect of the lives of its citizens is a defining characteristic of the modern world. In the Middle Ages, to be powerful was to be seen; it is now the case that to be powerful is to *see*—to see everybody, to know their every move, and to subject them to a penetrating and controlling gaze.<sup>20</sup>

To consider the mood or gaze of a statute is thus to consider what aspects of life or which groups are made visible to it. To whom does the law “speak”? Does its gaze fall on everybody in the community or only some? In what capacity are they addressed? A law may address people on the horizon of its visibility in three ways. Are those “captured” in this gaze treated as *agents*, whose role it is to carry out the law—for example, where the law is procedural or administrative in character? As *subjects*, who are expected to fit in with the way the law orders the world around them? Or as *objects*, whose behavior the law is intended actually to modify—as with, perhaps, our modern understanding of the criminal law? Laws “look” at different groups in different ways. The mood or gaze of the statute, the dramatic changes it underwent from the thirteenth to the sixteenth century, and the meaning of those changes in terms of law as a normative order are the focus of this Article.<sup>21</sup>

In my analysis of issues of normativity and law, the related ideas of aesthetics and semiotics serve three main functions. They mandate an interpretative process that sheds insight on the manifold meanings of a text, by focusing on the content, structure, and mood of a statute—the way that statutes *look* to us. They provide a direction

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20. See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (1975); MICHEL FOUCAULT, *THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION* (Sheridan Smith trans., 1975); see also HUBERT L. DREYFUS & PAUL RABINOW, *MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS* (WITH AN AFTERWORD BY AND AN INTERVIEW WITH MICHEL FOUCAULT) (1983). *Discipline and Punish* explains a fundamental shift in the nature of political power at the end of the eighteenth century in terms of the institutional development of the gaze. In *The Birth of the Clinic*, Foucault explores the notion of gaze at this time as an exercise of medical and not political power, but this book more than any of his others explains the power, intrusiveness, and political implications of ways of seeing. As the first sentence explains, “This book is about space, about language, and about death; it is about the act of seeing, the gaze.” *THE BIRTH OF THE CLINIC*, *supra*, at ix.

21. “The law’s gaze,” understood literally, would be an error of anthropomorphism. A law surely cannot look at us. Furthermore, like any text, it is constructed only by reading; it does not come to us fully determined. Nonetheless, it is my contention, first, that through a legal text we can decipher the gaze of its authors and, therefore, learn about their understanding of the purpose and power of law. We see them gazing at the world through the window of the laws they have written. Second, from the “other end” of the line of sight, those who are subject to the law often *experience* law as watching them. We speak of what “the law” demands of us and how “it” controls us. This is not merely a figure of speech but a phenomenon. When I employ the imagery of “the law’s gaze,” I therefore wish to emphasize both a metaphorical and experiential dimension.

for the interpretative inquiry, by focusing on the ways in which a statute's gaze constructs its audience—how statutes' authors *saw*. Finally, they invite a parallel focus of inquiry by suggesting ways in which we can learn from analogous developments in the structure and aesthetics of the motet—how the changing world of the statute was *heard*. These three dimensions guide our exploration of ideas of law and normativity and our excursion into the early history of English legislation. And throughout, an underlying message urges a complexity of reading and of inquiry that is often lacking in legal interpretation: Look. And listen.

## II. ENGLISH STATUTES FROM THE THIRTEENTH TO THE SIXTEENTH CENTURY

### A. *The Thirteenth Century: Statutes Without Norms?*

#### 1. *The Language of Law*

*Statutes at Large*, that great compilation of English enactments, begins with the famous statutes of the thirteenth century, such as the *Magna Carta* and the *Statute of Westminster*, and proceeds year by year “down to the present day.”<sup>22</sup> First published in the late eighteenth century, it is the most accessible historical record of statutory law in England. With the opening words of the *Magna Carta*, we enter a legal world very different from our own. Like all statutes prior to 1275, the *Magna Carta* is written in Latin.<sup>23</sup> Even the word “statute” is a translation, and one should, strictly speaking, write of one *statutum* and several *statuta*. Indeed, Latin was generally not a spoken language at all and was only understood by a small administrative and ecclesiastical elite. The Latin used, moreover, was not even classical Latin, but “law Latin”—verbose, difficult, and idiosyncratic.

These statutes are not *normative*, if by normative we mean the handing down of norms and values to a community with the assumption that its members will or ought to take heed. Indeed, despite the protodemocratic mythology that now surrounds them, *Magna Carta* and other *statuta* of the period did not speak to the community at all; they were intended to function as a record or document, only accessible to a privileged few. We cannot even ask about the basis on which *statuta* were *obeyed* at this time, since for the vast majority of

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22. Runnigton, *supra* note 1, at v.

23. The question of language is obviously important to this Article. Further clarification as to the original language of statutes quoted in the text will be given in the footnotes. In all cases the translations are those of *Statutes at Large*.

the population they were literally incomprehensible. This constitutes a fundamental difference from our current perception of the purpose of statutory law.

These texts were shrouded in mystery. Like the meaning of sacred objects, their significance was obscured to all but a few initiates; for the rest, their power stemmed, if at all, from the very fact of their incomprehensibility.<sup>24</sup> Writing at this time was still close to its origin as a series of *hieroglyphs* or “priestly signs” cloaked in the veil of religion. Throughout his corpus, Jacques Derrida has argued that Western thought, “logocentric” in nature, has treated writing as a species of secondhand speech rather than recognizing its unique qualities. In an illiterate society, however, these qualities derive solely from the fact of written text rather than from its content. In the early thirteenth century, then, law’s power was a matter of form and not of meaning.

The use of Latin suggests that these statutes were more concerned with iconic power than with specific norms of conduct—a message of obedience to someone, rather than to some principle. The specific wording of the statutes provides further evidence. Translated from Latin, the confirmation of the *Magna Carta* begins:

Henry by the grace of God, King of *England* . . . to all Archbishops, Bishops, Abbots, Priors, Earls, Barons, Sheriffs, Provosts, Officers, and to all Bailiffs and other our faithful subjects, which shall see this present Charter, Greeting.<sup>25</sup>

Here, the gaze of the statute is directed to a very small class of people who are addressed personally, as if in a letter. “Greeting,” says the King. This beginning is commonplace. “Edward, to all to whom these Presents shall come, sendeth greeting,” begins the *Carta Forestæ*. “The King to his Treasurer and Barons of the Exchequer, Greeting,” says another statute. “The King unto his Justices of the Bench, greeting,” is also typical. The same form is used in various writs which gave the king’s judges jurisdiction over cases.<sup>26</sup> The

24. See PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* 21-27 (1987); Peter Goodrich, *Literacy and the Languages of the Early Common Law*, 14 J. LAW & SOC. 422, 424-30 (1987) [hereinafter Goodrich, *Literacy*]; see also, e.g., DERRIDA, *supra* note 12; A DERRIDA READER, *supra* note 12.

25. 9 Hen. III (1225) (Eng.); 20 Edw. I (1292) (Eng.). The original of this statute, and all statutes quoted in the text through footnote 48 *infra*, is in Latin unless otherwise indicated.

26. 9 Hen. III (1225) (Eng.); 28 Edw. I (1300) (Eng.); Statute of Rutland, 10 Edw. I (1282) (Eng.); Statute de Anno et die bissextili, 21 Hen. III (1236) (Eng.). For other examples of the type, “[t]he King to the Justices of his Bench sendeth greeting,” see 7 Edw. I, 1 & 2 (Eng.); 13 Edw. I, 4 (Eng.). I have noted the form as late as 7 Edw. II (1313) (Eng.). The distinction between legislative and judicial functions was, therefore, not clearly distinguished in these early years; see the work of the great thirteenth-century legal scholar HENRY BRACON, *ON THE LAWS AND CUSTOMS OF ENGLAND VOLS. 1-4*, (G. Woodline ed., S. Thorpe trans., 1977) and *BRACON’S NOTE BOOKS, VOL. 1* (F. Maitland ed., 1889).

statutes are addressed to supervisors and not to the general population; they do not establish norms but procedures. In sum, the King was less interested in establishing communal norms of behavior than in setting up an administrative structure to oversee legal norms generated elsewhere.

This is, of course, the origin of the notion and power of the "common law," for normative principles were filled in on a case-by-case basis as the need arose. In this process the King showed little interest; rather, his gaze fell upon a small group of functionaries, whom he saw as "agents" and not "subjects." Indeed, the whole structure of the common law "writ system" reflected this priority. The annual Year Books, which had become central legal documents by the end of the reign of Edward I, are complex records of the practice of pleading; the substantive decisions of the cases they record are largely irrelevant. Time and again, once questions of procedure have been resolved, the Year Book simply notes, "and so to judgment." As Thomas Plucknett concludes, "What the judgment was, nobody knew and nobody cared."<sup>27</sup> The subject matter of law was not important; *who* administered it was. This question of control was especially important because the Normans, a conquering feudal aristocracy in a foreign land, saw entrenchment of their institutional power as paramount. Thus the endurance of the substantive Saxon common law was not just unimportant, its preservation was indeed a strategy of successful conquest—a pittance for the conquered.

The form and style of English vocal music exemplifies many of these non-normative aspects of mood and gaze. By the beginning of the thirteenth century, the heyday of Gregorian chant was past, but the early polyphonic forms that soon came to be known as "motets" had not yet been fully developed. Polyphony—the interweaving of a number of independent musical lines—developed in *organum*, in which a second part paralleled the tenor line of a plainsong (or, later, a freely composed *pes*) at an interval of an octave or fifth; within a few decades, the second part began to be sung in contrary motion to the tenor, that is, corresponding note for note with the plainsong, but rising where it fell and vice versa. Thus, although the two lines of an *organum* differed, there was in these early works no independence of parts; the second line was as yet entirely derivative of the tenor.<sup>28</sup> Furthermore, there was not yet a modern system of notation, and the meaning of early English notation, despite the many innovations it pioneered, remained ambiguous and contextual for another cen-

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27. PLUCKNETT, *supra* note 7, at 103-04.

28. GROUT, *supra* note 9, at 75-95; WILSON, *supra* note 9, at 119-29.

ture.<sup>29</sup> For these reasons, an improvisational and informal character pervades this music. The written record serves, as we shall see in relation to statutory writing, as a memorial to the past rather than as a prescription for the future. The writing of music—or of law—is addressed to, and reminds, a small group of performers of their parts; it is not intended to control the actions of a larger group.

The vocal line lacks beat or accent; it is highly ornamented, melismatic rather than syllabic. Rhythmic variation is either nonexistent or merely constituted by repeating one of a small number of preset patterns or “modes.” This limited approach to rhythm characterizes English polyphony through the fifteenth century.<sup>30</sup> Listen to the cryptic contours of the music, whose steady undulations reflect an introspective rapture. It is an expression of rapture strangely confined. The tonal range of the earliest polyphonic writing rarely exceeds six notes within a single line, or a tenth from the lowest part to the highest.<sup>31</sup> There is no consciousness of rhythm or harmony as independent musical variables. At every turn, the music is the product of a limited gaze, a secret compact between performers which seems, by its meandering, regular, interwoven lines, to exclude non-participants rather than draw them in. This is sacral and iconic music, alien to our modern ears, but not without force. One needs only to listen to the cavernous, acoustical grandeur of Gregorian chant to appreciate its ability to instill obedience, not through any direct communication, but through spacious mystery. Is not some of this character present in the statutes of the time, too—majestic, fligid, iconic, secret?

As with the early law discussed above, there is no evidence here of normative intent. Statute and early polyphony are not intended to communicate the power of the word to a lay audience. Unlike the secular and vernacular love motets which came to occupy French composers by the fourteenth century,<sup>32</sup> the motet in England remained as it was in the beginning, the product of established institutions, using Latin texts for liturgical purposes. Both music and law record the conversations of an elite, for an elite, in a language and form that exclude the common man. Yet both early forms convey, by the *fact* of the word or its sound, as distinct from its meaning, the salutary awe that power inspires. In *statutum* or *organum*, authority is not communicated but made manifest.

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29. GROUT, *supra* note 9, at 198; LEFFERTS, *supra* note 9, at 117-20.

30. LEFFERTS, *supra* note 9, at 142; WILSON, *supra* note 9, at 275.

31. WILSON, *supra* note 9, at 240, 284.

32. *See id.* at 236.

## 2. *The Content of Laws*

Turning now to the subject matter of thirteenth-century statutes, we find further evidence to support our understanding of their limited purpose. They contain few provisions that can be interpreted as establishing general norms of behavior; generally, their purpose was either to clarify the procedure for obtaining writs before the King's courts or to regulate the conduct of the King's officials throughout the country. The mood is often that of a master bringing his unruly agents to heel. For example, in one 1266 statute, "bailiffs, sheriffs, and other officers" are instructed to "make account to the Treasurer." So too, *An Ordinance for Ireland* (1288), a kind of letters patent to the Justice of Ireland, likewise sets limits on his personal authority.<sup>33</sup>

Goodrich has emphasized the sacred and iconic nature of Latin texts of the Middle Ages, arguing that they were not functional documents but relics of sovereignty. Statute laws had this character for the illiterate peasantry, but their immediate effect on a literate ruling elite was, on the contrary, decidedly administrative and practical. While they may have seemed to *most people* to be "holy mysteries . . . stored in sacred hiding places"—a characteristic we have already noted in both statutes and music—they were not addressed to most people.<sup>34</sup> To their intended audience, statutes were, paradoxically, instructions and not icons.

The non-normativity of *statuta*, then, can be found both in their iconic communal authority and in the narrow focus of their contents. Here, too, we are dealing with a language that was opaque and mysterious to the majority of the population, for Latin was the language of music as it was of religion and law. But it is not merely the language of musical texts which suggests the limited normative compass of these early forms. A motet, recall, is "a little word," an etymology that reflects the prevailing attitude that music ought not distract from the holy words it conveys. This view of the subordinate function of music dominated the Catholic church at least until the Renaissance and, to a considerable extent, still guides Orthodox liturgy. Monophonic writing such as Gregorian chant provides a clear example: for those few who understood it, the words of the liturgy were of primary importance, and music merely the vehicle for their communication. Consequently, even at its most melismatic, the line and rhythm of the music closely parallel the words in question.

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33. Statute de Scaccario, 51 Hen. III, 5 (1266) (Eng.); *An Ordinance for Ireland*, 17 Edw., chs. 1-8 (1289) (Eng.). See also Statute of Westminster, the 1st, 3 Edw., chs. 24, 26-31 (1275) (Eng.).

34. See Goodrich, *Literacy*, *supra* note 24, at 430.

Although florid at times, the musical demands of the composition never detract from the focus on the “little words” it speaks.

Early polyphonic writing likewise did not attempt to convey to a wider audience, by the use of musical form, the meaning of Latin words; music was the channel through which the words were given voice, but it was not a symbolic language on its own. Rhythm, melody, key, and harmony—music *qua* music—were not yet independent variables imbued with independent meaning. Furthermore, early English composers made no attempt to relate the text to the music. A motet was an abstract, formal vehicle for the delivery of words, but while it “presented” a text or texts, it did not “project” or express them.<sup>35</sup> The music itself did not convey value and meaning. It is true that for those who could understand the Latin being sung, the musical form may perhaps have served as a channel for its transmission, but even this limited communicative aspect of the motet must not be overstated. Most motets in the thirteenth and fourteenth centuries were polytextual as well as polyphonic: different singers sang not only different musical lines simultaneously, but different texts as well. It is likely, then, that at this point the motet was not even an effective transmitter of the words of the text.<sup>36</sup>

Admittedly, the *Dies Irae* and other “sequences” that originated in twelfth-century Gregorian chant did attempt to use music’s expressive potential to convey the mood and ideas of the words. The “Day of Wrath,” whose sound and beat instills the terror described in the text, is an archetype of the persuasive force of music, then and now. But it was not until centuries later, in the part-writing of composers such as Josquin or Thomas Tallis, that this idea of a specific relationship between words and music—word painting—becomes pronounced. At that point, when music was actually designed to persuade the listener, aurally and emotionally, of the truth of the words it set—of the mercy of Jesus, the grandeur of the Lord, or the sorrowful peace of the dead—then and only then did music begin to exert a normative effect on its listeners. Only then had music developed from an imperfect *medium* for communication to a *means* thereof.

In their early forms, then, neither English music nor law attempt to originate norms applicable to the community as a whole. On the contrary, many early statutes merely *confirm* existing and customary principles of law. *Magna Carta* and *Carta Forestæ* are typical, declaring that “the city of *London* shall have all the old liberties and customs, which it used to have,” that no one “shall be distrained to

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35. LEFFERTS, *supra* note 9, at 155, 187-89; WILSON, *supra* note 9, at 285, 320, 344.

36. HARRISON, *supra* note 9, at 126; LEFFERTS, *supra* note 9, at 155.



make Bridges and Banks, but such as of old time and of right have accustomed to make them," and that the ownership of forests and the practice of the King's Rangers shall be "as it hath been accustomed at the time of the first Coronation of King Henry our Grandfather" (who himself had upheld the law as it existed in the time of Edward the Confessor).<sup>37</sup> Such references to keeping things as they were in the days of Henry III was quite common.<sup>38</sup>

The reduction of a custom to writing undoubtedly has some effect, for it reinforces that state of affairs and gives official imprimatur to a principle that might previously have existed only informally or imprecisely. Moreover, it may restore principles that have been neglected or fallen into abeyance. It is, however, a very different and more limited kind of lawmaking than that which we now understand legislation to be. In claiming that this kind of lawmaking is not normative, at least as we now tend to understand that word in relation to statutes, I mean to emphasize that the reduction to statutory form of existing customs does not itself generate new or refined norms or values within a community. Declaratory law is different in both its function and status.

This argument addresses a difference of opinion between Charles McIlwain and Thomas Plucknett. McIlwain argues that early statutes affirmed the common law and did not "make" new law, while Plucknett rejects this argument and uses evidence, such as the Year Books, to assert that statutes were seen as instituting "special" or "novel" law. Acknowledging the possibility of the creation of novel law by statute, however, does not detract from the generalization that I am making about statute law as a whole. In addition, Plucknett by and large discusses a period a century later than my current focus, by which time attitudes toward statutory law had already changed, as I shall later explain. In fact, in discussing slightly earlier statutes dating from the reign of Edward I (1272-1307), Plucknett himself emphasizes that the line between statute and common law was weakly drawn. He suggests that statutes were received not as superior law but as part of the common law. "[T]hose charters and statutes are merely adjuncts to the unwritten common law, and . . . wholly partake of its nature."<sup>39</sup> The prime function of this written portion of unwritten

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37. Magna Carta, 9 Hen. III, chs. 9 & 15 (1225) (Eng.); Carta Forestæ, 9 Hen. III, chs. 4 & 5 (1225) (Eng.).

38. For another example, see Statute de Marlberge, 52 Hen. III, ch. 10 (1267) (Eng.): "[T]he Turn shall be kept as it hath been used in the Times of the King's noble Progenitors." Almost a century later this same phrase was used to confirm the validity of those statutes and, in particular, Charters which had been made in the past. See 36 Edw. III, ch. 1 (1362) (Eng.).

39. PLUCKNETT, LEGISLATION OF EDWARD I, *supra* note 7, at 14.

law was declaratory; as Plucknett says, a statute was “a memorandum about a point of custom.”<sup>40</sup>

What was called a *statutum* often seems to modern eyes more like a narrative or a history, intended to record the events of the court rather than to alter the law or, *a fortiori*, social behavior. In other words, the statute fulfilled a descriptive rather than a prescriptive function. The following statute on bastardy, which dates from 1235, is a good example:

All the bishops instanted the Lords, that they would consent, that all such as were born afore Matrimony should be legitimate, as well as they that be born after Matrimony . . . foreasmuch as the Church accepteth such as legitimate. And all Earls and Barons with one voice answered, that they would not change the Law of the Realm, which hitherto have been used and approved.<sup>41</sup>

Undoubtedly, this tale of the rejection of the Bishops' appeal is a way of describing and confirming the current law, but according to our modern understanding of a statute, nothing happened. No law was passed; there was no change to the Law of the Realm. This “statute” is merely the story of a political event. Law, politics, and history here are hardly distinguishable.<sup>42</sup>

The law in early statutes does not presume to generate or define social norms. The normative grounds of the wrong are not to be found in legislation. They are rooted instead in popular custom or noble power. In this sense, *statuta* in this period provide no independent “reasons for action.” Even apparently “penal” laws demonstrate this character. In the *Carta Forestæ*, for example, it is written: “No man from henceforth shall lose either Life or Member for killing of our Deer: But if any man be taken, and convict for taking our Venison, he shall make a grievous fine.”<sup>43</sup> The law did *not* make it an offense to kill royal venison—it nowhere stated, “No man shall kill our deer.” The offense (that is, the normative principle) was assumed to exist prior to and independent of the passage of the law. The statute only dealt with—and, admittedly, substantially amended—the kind of punishment that was to be imposed. This statute is typical in the way in which it built on pre-existing normative principles.

40. C.H. MCLWAIN, *THE HIGH COURT OF PARLIAMENT* (1910); C.H. MCLWAIN, *MAGNA CARTA AND THE COMMON LAW* (1917). These are discussed in PLUCKNETT, *STATUTES AND THEIR INTERPRETATION*, *supra* note 7, at 26-31; PLUCKNETT, *LEGISLATION OF EDWARD I*, *supra* note 7, at 13-14. See also the similar point made in POLLOCK & MAITLAND, *supra* note 7, at 178-80.

41. 20 Hen. III, ch. 9 (1235) (Eng.).

42. PLUCKNETT, *STATUTES AND THEIR INTERPRETATION*, *supra* note 7, at 20 (“Parliament at this time meant an event rather than an institution.”).

43. 9 Hen. III (1225) (Eng.); 28 Edw. I (1299) (Eng.).

Another law dealt with the penalty for “the ravishment of a ward,” but it, too, did not establish the meaning or wrongfulness of the conduct in the first place.<sup>44</sup> Modern statutes, by contrast, invariably begin with a statement and definition of the offense and treat the question of penalty as subsidiary. Undoubtedly, the wrongfulness of, for example, taking venison or ravishing wards was a necessary implication of the statute. Nevertheless, the implication of wrongfulness did not arise from the statute but from what everybody already knew constituted wrong conduct.

Those few laws which did establish penalties and punishments were vague and open to judicial discretion. While the judge thus had more power than modern law allows, being free to impose any penalty he deemed appropriate, written law had less power than its modern counterparts. Providing a *specific* penalty for an offense was almost unheard of. In reading these documents, one gets the impression that lawmakers at this time did not conceive of the concrete application of their laws. They did not imagine the transgression of laws or the punishment of transgressors. Such details were left for others to fill in, just as the improvisational character of music gave enormous freedom to the individual performer of an *organum*. For modern legislators, of course, the specific offense and the specific penalty do go together. The modern judge, like the modern musician, is subject to far greater constraint. From one angle, this is a consequence of the intrusiveness and detail of contemporary laws, but from another angle it reflects how little the King and his advisers in the thirteenth century saw the law as a means of literally enforcing their will on the population. It is a mistake, then, to conceive of early statutes as an expression of coercive power, when the act of coercion was not envisaged by those in power and, on the contrary, was left for others to fill in as they saw fit.

The lack of specific penalties was, to be sure, partly a function of the limited reach of the King’s power and of the very limited machinery through which laws could be enforced. England was still over 350 years away from a standing army and almost 600 years from a regular police force. A lack of resources, however, was not the only factor that thwarted the establishment of a comprehensive and rational system of penalties and punishments. Systems of penalties were not unknown, having existed in some detail in the codes of the Anglo-Saxon kings. Furthermore, the practical difficulty of a particular course of conduct is never a fully satisfactory explanation for its nonexistence. What is done in a society—and what is left

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44. 20 Hen. III, ch. 6 (1235) (Eng.).

undone—is valuable evidence of how that society thought. Except during those great moments in history when the boundaries by which acceptable conduct is determined become wholly inadequate to the needs of society and new boundaries of the conceivable force a redefinition of the possible, thought and behavior live in symbiotic harmony.

It could also be argued that leaving so much to judicial discretion merely reflected the close relationship between King and bench. Parliament was also a court, and judges were members of the King's council. It would be wrong to think, then, that statutes conveyed instructions to a mysterious, removed, or abstract judiciary. Despite these close relations, however, silence conveys meaning, and the absence of certain matters within statutes must be explained. Given the mystique and status of statutory law, the fact that statutes were the principal means of speaking to absent officials (whether removed in space or time), and that many cases *were* decided away from Parliament and the Crown—given this, what was included and what was omitted seem important indications of what was most valued.

Where statutes did actually “change the law,” justification seems to have been required. The *Statute de Marlberge*, as if by way of apology, begins, “The Realm of England of late had been disquieted with manifold Troubles and Dissensions; for Reformation whereof Statutes and Law be right necessary . . . .”<sup>45</sup> Yet even here, about 70 percent of the “chapters” (the subdivisions of the statute) are either procedural, declare the existing law, or provide limited exceptions to it.<sup>46</sup> In general, then, *statuta* are descriptive, not prescriptive; they organize the legal system but do not change the law, and in the main they are addressed to functionaries. According to Austin's theory of the law, we are not in the province of jurisprudence at all, since laws that are declaratory, or specific rather than general in application, or to which no sanction applies, are “imperfect” or “improperly termed” laws.<sup>47</sup>

45. 52 Hen. III (1267) (Eng.).

46. *Id.* at chs. 3, 5-11, 13-16, 18, 20, 23-24, 26-29. The meaning of “chapter” has changed over the years, a matter I discuss below. In the period presently under consideration, the word “statute” was generally used to describe the document recording all the enactments of a parliamentary session (normally one a year); the “statute” is divided into chapters, each of which covers a particular issue or problem. A statute therefore is a historical unit and a chapter a purposive subdivision of it. It is with this distinction in mind that I use these words in this Article, although the distinction was not as clear or systematized in the period about which I am writing. See *infra* note 90. The use of the word “chapter” to divide each statute perhaps suggests a narrative quality to modern ears. But this is anachronistic, for the association of “chapter” with *literary* structure is relatively modern. A chapter originally denoted merely a division or heading (from *caput*, head); we still refer to organizations or religions as having chapters, meaning branches. See 3 OXFORD ENGLISH DICTIONARY, 28-29 (2d ed. 1989).

47. AUSTIN, *supra* note 2, at 97-98, 102-03.

## B. *The Later Thirteenth Century: A Changing Mood*

### 1. *Visibility: The Statute of Westminster*

Throughout my discussion, I have intentionally used words related to sight, although, as I have noted, this imagery in part reflects merely the dominance of the visual in Western culture. The majority of the English population was not yet illuminated in the eyes of the powerful; therefore the application of the law to them was neither important nor even clearly imagined. Legislation was seen largely as a means of communication between the King and those associated with him, and the character of statutes reflected this narrow and personal gaze. This pattern of lawmaking continued for many years, but an important signpost of change appeared with the enactment of the first *Statute of Westminster* in 1275. Coming across it in the grey and desiccated pages of the *Statutes at Large* (how apposite is that word *parch-ment*), one feels a sudden shock at the new tenor of the law, its passion, its determination, and its mood. After over half a century of Henry III's dusty rule, King Edward took command, raising a new voice in the realm:

And because the State of his Kingdom and of the Holy Church had been evil kept, and the Prelates and religious Persons of the Land grieved many ways, and the People otherwise intreated than they ought to be, and the Peace less kept, and the Laws less used, and the Offenders less punished than they ought to be, by reason whereof the people of the land feared the less to establish . . . .<sup>48</sup>

Here are the beginnings of a change of consciousness with profound legal effects. For the first time, a statute refers not to Archbishops and Bishops, Sheriffs, and Bailiffs, not even to "freemen,"<sup>49</sup> but to "the People." The substantive clauses of the statute continue in the same spirit: "First the King willeth and commandeth . . . that common Right be done to all, as well Poor as rich, without respect for Persons."<sup>50</sup> Not only are the words different but so is the language in which they are expressed; the *Statute of Westminster* is the first English statute written in French rather than Latin. As Frederick Maitland noted, it is hardly now possible to write a paragraph of law without using words of French derivation: contract, tort, property,

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48. Statute of Westminster, the 1st, 3 Edw. I (1275) (Eng.). The original of this statute, and all statutes quoted in the text through footnote 100 *infra*, is in French unless otherwise indicated. All emphasis henceforth is in the original translation.

49. See *Magna Carta*, 9 Hen. III, chs. 9 & 15 (Eng.).

50. Statute of Westminster, the 1st, 3 Edw. I, ch. 1 (1275) (Eng.).

treason, crime, and misdemeanor; parliament, court, judge, juror, plaintiff, and defendant, to name only the most obvious.<sup>51</sup> French was, admittedly, the language of the conquering Normans and was not by any means the “common tongue.” Neither was “law French” the same as “spoken French,” but rather a written language distorted by complex grammatical rules and highly technical terminology. It is fair to say that it only *resembled* spoken French, much as *cheez wiz* resembles *hollandaise*. Nevertheless, unlike Latin, “law French” was based on and recognizable as a living, spoken language; in fact, “law French” was constituted so strangely exactly because, unlike Latin or English, it had no prior history of written use at all.<sup>52</sup> The official language of Parliament became, as its French etymology implies, a *spoken* language.

What does this change imply? First, as Plucknett suggests, a powerful class of legal specialists was developing, clerks and not clerics, “who understand Latin but are really only fluent in French.” At the same time, the use of law French represented an effort to communicate directly to a wider audience, an attempt to make law something that was not only written down for those few who could read but also spoken so that many could hear. Legislators clearly intended the *Statute of Westminster* to become widely known.<sup>53</sup> This implies the assumption that a statute can change behavior and attitudes, and, further, that adequate knowledge of its terms *itself* has this result. With this statute, we witness the very birth of normativity in English statutes—that is, of law understood not only as an administrative tool and an icon of power, but also as a means of influencing what people do and what they believe to be right. The little words of the law are beginning to be seen as a mind-altering substance.

Of course, invoking “the people,” in the thirteenth or twentieth century, is frequently a way of facilitating their exploitation and manipulation. Whether or not we are cynical about the King’s use of such language, the emergence of this kind of rhetoric is significant. For the first time, the law *saw* the common people and acknowledged that they were subject to the legal system and that their support for it somehow mattered. They were now on the horizon of visibility. It was now possible for the people to be “subjects” and “objects” of statutes, *dramatis personae* in the legal system, and not merely its scenery. This gaze, beginning to be focused ineluctably upon the

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51. POLLOCK & MAITLAND, *supra* note 7, at 80-81.

52. POLLOCK & MAITLAND, *supra* note 7, at 82; Goodrich, *Literacy*, *supra* note 24, at 433-36.

53. PLUCKNETT, *LEGISLATION OF EDWARD I*, *supra* note 7, at 81. See also PLUCKNETT, *STATUTES AND THEIR INTERPRETATION*, *supra* note 7, at 11.

whole of humanity, did not prove an unmitigated boon. Without it, however, our modern legal system and our modern understanding of law simply could not be.

Foucault dates the emergence of *individual visibility* as an instrument of social control from the eighteenth century, but evidently people began to be “seen” much earlier. Philippe Ariès, for example, records that in and around the thirteenth century, the European view of death began to change. We see the slow individualization of tombs, of wills, of bequests—all techniques designed to record the existence and guard the memory of the deceased as an individual, and not simply as part of the ebb and flow of the community. In Ariès’s words, we pass from an era in which death was “tame” to one in which people were acutely aware of “the death of the self.” We are witnessing the emergence of a self-awareness of individuality.<sup>54</sup>

It is often said that the world of the Gregorian chant, like that of the early English statute, is devoid of subjectivity and individualism. There is a two-dimensionality here because only one line of music is heard at a time. But by 1275, the date of the *Statute of Westminster*, the motet had developed with surprising rapidity toward part differentiation, independent melodic lines, and greater rhythmic variety.<sup>55</sup> Musical notation, too, had developed with some rapidity and inventiveness in England, striving to express not only a standard corpus of rhythmic modes or relations but also the precise value of each individual note. Franco of Cologne’s important musical treatise, *Ars musica mensurabilis* (circa 1280), brought coherence to these developments, which soon spread to England.<sup>56</sup> In all these ways, the motet evinces an entirely different vision from plainsong, a vision that recognizes the individuality of each participant. The changing style and form of a composition, like the wording of a statute, reflect the contrasting priorities of its authors. Earlier artists and musicians—and earlier lawmakers—were not incompetents, struggling along with techniques and powers inadequate to their tasks and desires; their intentions were different, the product of a different aesthetic.

The *Statute of Westminster* and the developing motet both reflect a revolutionary awareness of the wider world, and the gaze of each expresses the all-encompassing perspective of its authors. Undoubted-

54. PHILIPPE ARIÈS, *THE HOUR OF OUR DEATH (HOMME DEVANT LA MORT)*, 5-202 (H. Weaver trans., 1991); see also MCLUHAN, *supra* note 12 (giving a more specific look at the sources of individuality in the alphabet and the printing press); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

55. GROUT, *supra* note 9, at 52, 109. Indeed, early motets display a more complete independence of line than later writing, since there is as yet little awareness of harmony. Consequently, the melodic lines of the motets of this period are surprisingly dissonant. The emphasis at this time on individuality in part writing is also reflected in the use of polytextuality.

56. WILSON, *supra* note 9, at 255.

ly the statute, at the very beginning of this process, signifies in legal as well as artistic terms only the first stirrings of a trend. Until 1324, statutes frequently revert to Latin, which was used for centuries thereafter in writs and legal jargon, and, until 1731, as the official language of judicial records.<sup>57</sup> Many of the provisions of the *Statute of Westminster* were administrative instructions to officials that, in particular, aimed to curb their abuses and corruption, but not all its provisions were of this kind. Chapter 13 of the statute, for example, provided that, in the case of rape, the King may bring an action if no other action is brought within forty days and expressly established a penalty of at least two years imprisonment. In contrast to the earlier statute for "ravishment of a ward," here enforcement and punishment were specifically articulated. The law was beginning to be a physical presence in people's lives.

## 2. Normativity: The Statute of Winchester

The statutes in the years immediately following the *Statute of Westminster* generally remained products of a limited and administrative gaze. They dealt, for example, with the procedure to be followed by a coroner, or they announced certain aspects of the law, not to enhance its normative power, but rather to create "a perpetual Memory" thereof.<sup>58</sup> The functions of statutes as declarations and records of the law still seemed to outweigh their use as a vehicle of change. The *Statute of Westminster*, however, marked an important beginning in which the law's gaze began to widen and the purposes ascribed to it began to change.

It is a gradual process. By and large, where the law was cognizant of "the people," they were seen more as its subjects than its objects. The second *Statute of Westminster*, written ten years after the first, generally provided for remedies in situations where none previously existed, facilitating the community's use of the legal system, but not directly operating on the attitudes of its members. It is in this sense that I mean that people were not yet "objects" of the law. While the general population were now seen as subjects of the law, there was not yet a common belief in the capacity of the words of the law to change their values or conduct. Rather, procedures and rules were still largely seen as the legal objects to be formed and reformed by the law.

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57. See 4 Edw. I, Stats. 1-3 (1276) (Eng.); 4 Geo. II, ch. 26 (1731) (Eng.); POLLOCK & MAITLAND, *supra* note 7, at 83.

58. De Officio Cornatoris, 4 Edw. I, Stat. 2 (1276) (Eng.); Statute of Bigamy, 4 Edw. I, Stat. 3 (1276) (Eng.).



Laws relating to felonies, however, had gained greater prominence in the statutory law by this time, and this is precisely the kind of law that treats its audience members as “objects.” One chapter of the second *Statute of Westminster* is particularly interesting:

That if a Man from henceforth do ravish a Woman married, Maid, or other, where she did not consent, neither before nor after, he shall have judgment of Life and a Member. And likewise where a man ravisheth a Woman married, Lady, Damosel, or other, with Force, although she consent after, he shall have such Judgment as before is said . . . .<sup>59</sup>

This is the clearest statement so far of the felony of rape. In contrast to earlier penal provisions, the text *itself* states and defines the terms of the crime and provides a specific penalty for its breach. Henceforth, rape is truly a statutory offense.

Significantly, in a 34-page-long statute, these eight lines are practically the only ones in French.<sup>60</sup> While written law French was hardly well understood in semiliterate England, it reached a wider audience than did Latin, and from this wider base the terms of the law could be further spread by word of mouth. This striking use of French indicates that lawmakers saw the chapter as a different kind of law requiring a more accessible language. We are dealing here with an especially normative provision, and, conscious of this, a special effort was made to render its terms more widely comprehensible. The idea was gaining ground that a statute should communicate to all people (rather than just to certain officials), should affect the conduct of all people, and if necessary should force their compliance through the imposition of punishment. The system of legislation had begun to take on a recognizably modern form, reflecting an ideal of state control over every aspect of social life.

So, too, the musical notation promulgated by Franco of Cologne took hold in England by the beginning of the fourteenth century. This was a language able, at last, not just to represent a standard repertoire of rhythmic precedents but also to define with precision the relative duration and pitch of each individual note, a way of writing that differed from its predecessors such as English mensural notation

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59. Statute of Westminster, the 2nd, 13 Edw. I, ch. 34 (1285) (Eng.).

60. *Id.* The rest of chapter 34 is in Latin and concerns the lands of women who abscond and the abduction of nuns. Chapter 49, which prohibits the King's servants from taking land, church, or tenement which is the subject of a legal dispute, is also in French. Lord Coke suggests that this is because the chapter relates to an earlier statute written in French; it has also been suggested that chapter 49 belongs to a later statute and was recorded here by mistake. *Id.* at ch. 49. See the footnotes to this statute in Thomlins, *supra* note 1.

as the alphabet differs from hieroglyphics.<sup>61</sup> It was a system of musical language in a recognizably modern form, reflecting an ideal of authorial control over every aspect of performance.

The *Statute of Winchester*, also dating from 1285, is wholly in French and demonstrates a stronger commitment to the normative force of the law. Here we find provisions relating to the apprehension of felons and robbers that require "people dwelling in the country" to assist in the apprehension of offenders or to answer themselves for the damage done.<sup>62</sup> This law is not merely declaratory or procedural; common people are laid under new obligations purely by virtue of the statute. *They* are now treated as agents who are expected to obey and carry out the law.

Three structural features of this provision underscore its normative character. First, a date is set for its entry into force: "Easter next following."<sup>63</sup> The year 1285 marks the debut of a provision saying when a statute is to begin to apply, now a characteristic of every modern statute. The second *Statute of Westminster* is still clearer: "All the said Statutes shall take Effect at the Feast of St. *Michael* next coming."<sup>64</sup> What does this mean? The statute is not just seen as a statement of intent or as a record, but as an *event* with concrete effects. The provision that assigns a date for a statute's entry into force represents a fundamentally new attitude; the statute is no longer seen as an inert string of words but is now seen as a statement of intention to alter events in the future. On the one hand, such a provision represents an increased awareness of the "real world" and a desire to increase the statute's interaction with it. On the other hand, it represents a new faith in people's capacity to change their behavior. The relationship of the idea of law both to the possibility of change and to the scope of its world is being reconstructed here. It is only in this context that the question of "when" arises. *When* is this law to change the world? It is the formulation of this novel question that makes entry provisions necessary.

Second, the entry into force provision of the *Statute of Winchester* was postponed. It "shall not incur immediately, but it shall be respited until *Easter* next following, within which Time the King may see how the Country will order themselves, and whether such Felonies and Robberies do cease."<sup>65</sup> The King evidently believed that the

61. For the normative implications of the alphabet in the development of Western consciousness, see IVAN ILLICH & BARRY SANDERS, *ABC: THE ALPHABETIZATION OF THE POPULAR MIND* (1988); MCLUHAN, *supra* note 12.

62. Statutum Wynton, 13 Edw. I, Stat. 2, chs. 1-2 (1285) (Eng.).

63. *Id.* at ch. 3.

64. Statute of Westminster, the 2nd, 13 Edw. I, Stat. 1, ch. 50 (Eng.) (original in Latin).

65. Statutum Wynton, 13 Edw. I, Stat. 2, ch. 3 (1285) (Eng.).

mere threat of the impending statute might change people's conduct. No more normative and instrumental understanding of law could be imagined. The fact of the law, and even the fact of future law, was expected to have a behavioral effect.

Third, normativity requires communication. Only if the content of the norm is adequately and widely communicated can it influence behavior and attitudes. Accordingly, the law requires "[t]hat Cries shall be solemnly made in all Counties, Hundreds, Markets, Fairs, and all other Places where great Report of People is, so that none shall excuse himself by Ignorance."<sup>66</sup> This change, from written law to spoken law, appears to be a logical extension of the change from Latin to French. Just as the *Statute of Westminster* introduced a law that could be spoken as well as read, the *Statute of Winchester* provided for a law that was not only to be spoken but to be *heard*. Statutory law was becoming increasingly prominent, reflecting a rapidly growing faith in its capacity to enter our minds.

Later, the *Articuli Super Cartas* confirmed again the *Magna Carta*, the *Carta Forestæ*, and the *Statute of Winchester*, with the important addition that the statutes were to be read publicly four times a year by the sheriffs. *De Tallagio non Concedendo* was to be read in cathedral churches, and those who broke its terms were to be excommunicated.<sup>67</sup> Members of the public were now expected to obey the law and to change their lives accordingly. Given these expectations, ignorance of the law emerged as a problem which public readings were meant to overcome. It is not enough to say that public visibility of the law was becoming a vital part of its normative ambitions. The law was now more than visible—it was *audible*—while music, on the other hand, benefiting from the development of a comprehensive system of notation, was now more than audible—it was visible.

### C. *The Fourteenth & Fifteenth Centuries: Validity and Normativity in the Structure of Statutes*

#### 1. *The Form of Introduction*

We are on the threshold of normativity, but normative laws assume that most people obey the law. We are therefore, more accurately, on the threshold of a jurisprudential question: subjected now to the gaze of the law, on what grounds were people expected to obey it?

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66. *Id.* at ch. 1.

67. *Articuli Super Cartas*, 28 Edw. I, chs. 1, 17 (1300) (Eng.); *De Tallagio non Concedendo*, 34 Edw. I, ch. 6 (1306) (Eng.); *see also*, 7 Edw. I, Stat. 1 (1278) (Eng.): "We command you, that ye cause these Things to be read afore you in the said Bench, and there to be enrolled." Originals in Latin.

In rough outline, three broad answers might be given. Nineteenth-century British and American positivists, of whom John Austin is the best known, characterized all laws as commands issued by a political superior. Austin's position is more subtle than is commonly supposed. Contrary to the interpretation placed upon his work by some later writers, Austin does not dismiss the relevance of morality to law.<sup>68</sup> For Austin, however, there can be no law without a sanction, and it is from the threat of punishment that our duty to obey arises: "Being liable to evil from you if I comply not with a wish which you signify . . . I lie under a *duty* to obey it."<sup>69</sup> For Austin, and for Oliver Wendell Holmes and Hans Kelsen among later writers, legal obligation is rooted in coercion.<sup>70</sup>

This position has been attacked on a variety of grounds. For instance, natural law theory may be taken to imply that moral conclusions, no less than scientific ones, can be objectively deduced from first principles, whether these first principles are divinely ordained or (since the Enlightenment) rationally determined. If, as the contemporary theorist of natural law, John Finnis, argues in *Natural Law and Natural Rights*, it is possible to *reason* from largely uncontentious first principles to the solution of moral problems, then each of us has the capacity to discover for ourselves those laws that are morally justifiable and those that are not.<sup>71</sup> Such an approach suggests that we are not required, morally or legally, to obey a law which by such a process of objective reasoning we discover to be "immoral." Reason imposes a greater claim upon us than power.<sup>72</sup>

68. See in particular ROBERT N. MOLES, *DEFINITION AND RULE IN LEGAL THEORY* (1987), which attempts a resurrection of the work of John Austin, especially from Hart's interpretation of him in HART, *supra* note 2, chs. 2-4.

69. Admittedly, he argues that "where there is the *smallest* chance of incurring the *smallest* evil, the expression of a wish amounts to a command" (emphasis added). This might suggest that for Austin, coercion is an analytical and not a sociological necessity of the legal system. In considering the problem that arises when one's understanding of the obligations of "divine law" contradicts the commands of positive law, however, Austin concludes that our duty is to obey whichever provides the greater sanction: "if human commands conflict with the Divine Law, we ought to disobey the command which is enforced by the less powerful sanction." The dictates of morality are of no consequence. The duty to obey any law—divine or positive—arises from the power that affirms it; the greater the power, the greater the duty, for "it is our interest to choose the smaller and more uncertain evil." AUSTIN, *supra* note 2, at 90-91, 215. Further evidence for Austin's understanding of law as a system of power relations can be found in *id.* at Lecture I.

70. *Id.* at 90-93; Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (A. Wedberg trans., 1961). See also the discussion of Austin in ROGER B.M. COTTERRELL, *THE POLITICS OF JURISPRUDENCE* 59-67 (1989).

71. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 34-125 (1980); see also Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

72. Finnis tries to subvert this implication, arguing that the obligation to obey the law is *itself* a "relatively weighty" moral obligation: "Such an ambitious attempt as the law's can only succeed in creating and maintaining order, and a fair order, inasmuch as individuals drastically

Somewhere between Austin's coercive legal order and the specter of untrammled freedom evoked by the natural law tradition, modern positivists like H. L. A. Hart have sought to ground legal obligation in the authority of legal texts. According to Hart, the fact that a law exists provides those subject to it with a compelling reason for compliance. In this regard, Hart emphasizes the existence of "rules of recognition," which determine the validity of primary rules of obligation. A statute, for example, duly passed by Parliament, is legal and authoritative, and thereby provides citizens with an adequate reason for following the course of action prescribed in it.<sup>73</sup> On this analysis, it is neither truth nor power that grounds obedience to the law, but the validity of its social sources. Joseph Raz argues even more emphatically for a "sources thesis," arguing that the legitimacy of the formal "sources" of a law, such as a properly enacted statute or an authoritative judicial interpretation, establishes a separate reason to obey the law, apart from the justice of its contents.<sup>74</sup> This attitude of respect does characterize the approach of many people to the legal system in which they live; they justify a law not because of its reasonableness but because of the "systemic validity" of the process by which laws are established.<sup>75</sup>

Although debate may surround the merits of a particular piece of legislation (both before and after its enactment), the modern statute,

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restrict the occasions on which they trade off their legal obligations against their . . . conceptions of social good." FINNIS, *supra* note 71, at 319. At best we can say that this argument stems from his own desire to safeguard the "Rule of Law" (quaintly capitalized), and from his assumption that the legal system basically does nothing more contentious than solve "communities' co-ordination problems"—such as which side of the road to drive on. This complacency is reflected in his assumption that in "normal times . . . the legal system is by and large just." *Id.* at 270-74, 357. Even in his own terms, however, the mere existence of the legal system cannot deny us our freedom to examine whether the laws under which we live are "by and large just," for the "relatively weighty" moral obligation he proposes is dependent upon that premise. At least to this extent and arguably far beyond it, a theory of natural law expects citizens to inquire into not only what the law is, but also what justifications support it.

73. HART, *supra* note 2, at 99-120.

74. AUTHORITY OF LAW, *supra* note 5, at 47-50.

75. *Id.* at 150-53, 233-61; see also *Authority, Law and Morality*, *supra* note 5. Certainly, Raz does attempt to place a further limit on this argument. He argues that "[n]o blind obedience to authority is here implied. . . . This brings into play the dependent reasons, for only if the authority's compliance with them is likely to be better than that of its subjects is its claim to legitimacy justified." AUTHORITY OF LAW, *supra* note 5, at 299. The extent of this caveat is unclear. If we are to believe the statements of lawmakers, they are invariably in a better position than the rest of us to weigh conflicting arguments concerning legal questions. In practice, however, one might doubt whether this is true. Moreover, Raz also insists that "all authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives." *Id.* Again, it does not take more than a wholesome and average cynicism to argue that many laws have been passed in which the actual reasons for enactment do not bear much relation to the reasons put forward. Are we to investigate the machinations behind every bill before pronouncing upon its authority? This suggests a kind of Kantian approach in which not the justice of the law itself, but the motivations of the lawmaker would be decisive. One doubts whether this was Raz's intent.

on its face, presents no justification for the law but the law itself. For example, the preamble of modern statutes has become almost irrelevant. This approach supports Raz's thesis: the fact that a piece of legislation has been passed in accordance with correct procedure provides us with reason enough to obey it.

Let us return to the radically different gaze of the second *Statute of Westminster*. What is the source of its normative force? Why were people expected to obey it, particularly when it claimed to change the existing normative rule? The answer is not simple. Many of its chapters follow a two-step process. First, the injustice of the present law is explicitly acknowledged: the law "seemed very hard," "was very hard," "was most hard," and so on. The same phrase is used in other statutes dating from this period.<sup>76</sup> "Hard" is a tactile word, possessing a physicality that contrasts starkly with words relating to more abstract senses such as sight. We see from afar, but we only experience hardness by direct contact, the felt and brute reality of a resisting object.<sup>77</sup> A "hard" law, therefore, is a law whose injustice is actually felt and not merely observed. The awareness of the legal system as something embedded in and *touching* the whole community thus continued to grow. Indeed, to speak of the "gaze" of the law is no longer entirely adequate. "Gaze" is a dispassionate, visual word; here, the legal system is starting not only to see a broader role for itself, but to *feel* it, too.

Second, the hardness of the present law having been established, the chapters of the second *Statute of Westminster* propose solutions and improvements with a consistent declaration that this is to be the law "from henceforth" (*de cetero* in Latin).<sup>78</sup> In contrast to those statutes of Henry III which studiously preserved the law as it had been in his grandfather's day, such an approach is future-oriented and corrective. To elicit conformity to the changes that are made, however, this legislation relies neither on the Crown's coercive power nor on the validity attaching to the formal procedures for the statute's enactment. Instead, a reason is given to accept the new law—namely, that the previous law was "very hard."

Indeed, the structure of these chapters is that of an argument—current law, criticism, solution—and not a declaration. The

76. 13 Edw. I, Stat. 1, chs. 1, 3, 9 (1285) (Eng.) (original in Latin). Similarly but less judgmentally, several provisions simply present the law "hitherto": "hitherto it hath been used in the Realm," "by the law and custom of the Realm hitherto," etc. *Id.* at chs. 5, 6; see also *id.* at chs. 9, 14. For another example, see *Quia Emptores*, 18 Edw. I (1290) (Eng.).

77. See Howes, *supra* note 12. C.S. Peirce's understanding of "thirdness," within the tripartite division of his semiotics, possesses something of the same physical undeniability.

78. Statute of Westminster, the 2nd, 13 Edw. I, Stat. 1, as in chs. 7, 10, 18, 19, 23 (thrice), 24, 26, 28-30, 40, 45-47 (1285) (Eng.).

normativity of this law stems not from its authority or power but from its appeal to justice and reason. The lengthy and emotive introductions to the first *Statute de Marlberge* and the *Statute of Westminster* provide further evidence for this suggestion. The more weighty a statute's ambitions were, the more imposing was the flourish of justification which had to accompany it. The authors of these normative provisions evidently took an approach akin to natural law theory, for obedience and respect were sought here through the strength of moral reasoning present in the legislation itself.<sup>79</sup>

During the thirteenth century, the marshaling of reasons ran through the substantive provisions of statutes like a commentary, melismatic as any *organa*, suggesting that the distinction between law, politics, and history remained extremely hazy. Indeed, one way of understanding this early statutory form is to see it as a document that, in the absence of other kinds of authoritative records, combined both substantive law and parliamentary debate—reasons and consequences. The style of statutes continued to change throughout the century, however, gradually shifting from an emphasis on the reasons behind the law to an emphasis on the validating procedures surrounding its enactment. If we jump forward to the second half of the fourteenth century (by which time the use of law French in statutes was uniform), a change was already apparent. The introductory reasons for enactment were now less specific than those we observed in the *Statute de Marlberge* and the *Statute of Westminster*, and increasingly they were confined to a structurally discrete part of the statute which we now recognize as a form of introduction. A statute passed in 1362 begins, "To the Honour and Pleasure of God, and Amendment of the outrageous Grievances and Oppressions done to the People, and in Relief of their Estate."<sup>80</sup> A rhetorical flourish like this could hardly have served as a reason justifying any particular part of the statute, which contained a number of unrelated substantive provisions.

In the following years, the introduction became ever more formal, referring to the way in which the statute was passed rather than to its content or purposes.<sup>81</sup> The formal procedure of the statute's

79. Much the same argument is made by Plucknett in evaluating judicial interpretation of both the common law and statutes in the reigns of the first three Edwards; judges' willingness to ignore or modify statutes also reflected an assumption that the enacted law was subject to reason and the *ius naturale*. PLUCKNETT, STATUTES AND THEIR INTERPRETATION, *supra* note 7 at 25, 49-81; see also H.D. Hazeltine, *Preface* to PLUCKNETT, STATUTES AND THEIR INTERPRETATION, *supra* note 7, at xxiii.

80. 36 Edw. III (1362) (Eng.).

81. 1 Rich. II (1377) (Eng.) is typical and by no means the first of this kind:

Know thou, that to the Honour of God and Reverence of Holy Church, for to nourish Peace, Unity, and Concord in all the parts within our Realm of *England* . . . with the Assent of the Prelates, Dukes, Earls, and Barons of this our Realm, at the Instance and

enactment was becoming more important than the reasons for enactment. By 1407, the form of introduction had become almost standardized, invariably referring to certain definite features, such as the date of the Parliament, the presence and concurrence of both Houses of Parliament, and the will of the Crown:

Because that divers Complaints have been made . . . in the Parliament holden at *Gloucester* . . . the same our Lord the King, willing to remedy the said Complaints, with the Advice and Assent of the Lords Spiritual and Temporal, and at the Instance and Request of the said Commons, hath caused to be ordained and established divers Ordinances and Statutes . . .<sup>82</sup>

By the middle of the fifteenth century all traces of rhetorical justification had vanished, and the introduction had become purely formal.<sup>83</sup>

We have traced the metamorphosis of the introduction as a structural item from a means of establishing the *reasons* for the enactment of a statute, to a means of establishing its *validity* or procedural legitimacy. Each chapter—the substantive units into which a statute is divided—still contained some explanation of the purpose of its enactment, and at times this explanation is grandiloquent, as in this example dating from 1483: “The King remembering how the commons of this his Realm, by new and unlawful Invention, and inordinate Covetise, against the law of this Realm, hath been put to great Thraldom and importable Charges and Exactions . . . to their almost utter destruction . . .”<sup>84</sup> Nonetheless, the general introduction to statutes had developed a significant and novel character. It now reflected the growing importance of procedure in establishing the authoritative nature of the law, suggesting the slow triumph of something like Raz’s “sources thesis” in the minds of law-makers—that people ought to obey the law because of *who* issued it, rather than *why* it was issued.

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especial Request of the Commons of our Realm aforesaid, assembled at our Parliament . . .

*Id.*

82. 9 Hen. IV (1407) (Eng.).

83. 3 Hen. VII, ch. 1 1487 (Eng.) is typical:

The King our sovereign Lord *Henry*, . . . at his Parliament holden at *Westminster* the Ninth Day of November, in the Third Year of his Reign, to the worship of God and Holy Church, and for the common Weal of this his Realm, by the Advice of his Lords Spiritual and Temporal, and the Commons in the present Parliament assembled, and by Authority of the same Parliament, hath ordained and established certain Statutes and Ordinances, in Manner and Form as hereafter ensueth.

*Id.*

84. 1 Rich. III, ch. 2 (1483) (Eng.).



## 2. *The Act of Parliament*

The increase of royal power and the establishment of a consistent legislative procedure reflected the increasing importance of procedural validity in grounding normativity. At the same time, we have seen how the legislative gaze slowly expanded to encompass the commons, and we have noted that law's purpose began to change from declaratory to imperative, from "is" to "ought." I have described this as a fundamental change in who was "seen" by the powerful, and in what way, but it also represented a profound change in the elite's view of the purpose and capacity of law itself.

Edward IV's first statute was enacted in 1461, in the midst of civil war. It is not surprising, then, to find therein a particularly detailed justification of Edward's claim to the Crown as against his rivals, dead and alive. The incorporations, authorizations, and statutes of the "late pretended Kings," "late in Deed and not in Right, Kings of England" are specifically confirmed.<sup>85</sup> But there is a subtler change here of more lasting significance. The first chapter of this statute confirms not only the "Judicial Acts" of his predecessors, but also their "acts and ordinances." The statute refers at several other points to "this Act" and "other Acts." Indeed, within a few years, each chapter would come to be called "An Act" to effect a particular purpose.<sup>86</sup>

What does this mean? I am immediately reminded of the "Acts of the Apostles," but despite the apparent similarity, the two uses of the word are quite distinct. An "act" is "a thing done; a deed, a performance,"<sup>87</sup> and the apostles' "acts" were clearly deeds or things done. The New Testament text which we call "Acts" is therefore primarily a description of those acts or activities. In other words, the *words* of the book we call "Acts" record "acts" done elsewhere.

An "Act of Parliament" is very different. Where, one might ask, is the "act" to which this "Act" refers? Undoubtedly, a judgment or a court's decision is an "act" in the literal sense for it has concrete

85. 1 Edw. IV, ch. 1 (1461) (Eng.).

86. *Id.* at xvii, xii, xxii, xxiv. Runnington, *supra* note 1, refers to 3 Edw. IV, ch. 2 (1263) (Eng.) as the first statute to use the word "Act" in its title, but this title and others of this period were added during the reign of Henry VIII, by which time the use of the word "Act" to describe a chapter of a statute was indeed conventional. Although less immediately apparent, 1 Edw. IV, ch. 1 is an earlier and genuine reference to "Act" in this sense.

It is not the earliest reference: 29 Hen. VI, ch. 2 (1450) (Eng.) and 33 Hen. VI, ch. 2 (1454) (Eng.) both say "this Act"; but 1 Edw. IV, ch. 1 (1461) (Eng.) uses the phrase more clearly and frequently. In particular, while the introductory portion of these earlier statutes declare that "Our Sovereign Lord King . . . hath ordained and established divers *Ordinances and Statutes*," the 1461 statute uses the phrase "*acts and ordinances*." *Id.* (italics added). This is the significant change.

87. 1 OXFORD ENGLISH DICTIONARY 91 (1st ed. 1933).

and immediate effects. A chapter of a statute is to a certain extent an "act" also. The act of writing the law, and of arguing over the words to be written, is a deed or thing done. Only in this sense, however, is it either an "act" itself or a record of the actions of others. The only act is the act of speaking and of writing. It could be termed a charter, a fiat, a decree, an ordinance, a missive, a treaty, a declaration, a communiqué, a proclamation, a writ. What after all does "writ" mean, but "that which is written"? All these words convey the sense in which, above all (and unlike the acts of the Apostles), statutes are words on paper. Even the word "statute" derives from the Latin "to stand" and suggests a concrete entity of words. A statute "stands written."<sup>88</sup>

But the use of the word "Act" to refer to a statute or part thereof—a technical meaning which is now commonplace—is confusing and ambiguous. The physical "act" or "deed done" is completed once the law is assented to. (To ease the confusion, I will use a capital "A" when using the word "act" in this legislative sense.) The "act of Parliament" is over with at the moment of *enactment*. In contrast, to enshrine an enactment as "An Act" implies something present and ongoing. This is enlightening, for it suggests that the statute, although written down, does not just "stand" still. In some way it continues to "act." The word "Act" thus translates the statute from marks on paper into energy which continues to operate in the world. It illustrates a world-view in which statutes came gradually to be seen not only as statements or historical records of events, but as acts with effects of their own, like the expanding ripples of a rock thrown into a pond. Additionally, in contrast to the earlier understanding of legislation as a declaratory instrument—a *statutum* whose function is to "stand written"—an "act" is active. It implies vigorous engagement with the world, a desire to intrude and change. An Act is not just an inert thing but is a way of *modifying* the world; it is a vector with direction and velocity.

I do not mean to suggest that I agree with this world-view; it demonstrates a rather facile and ill-conceived faith in the law's ability to remake the world in its own image. I do, however, contend that the use of the word "Act" signifies this understanding of law, now orthodox. Statutes that specify a time for their entry into force are, as I noted, the earliest examples of such an understanding, but it was only later that the Act became disembodied from its physical origins as a document and began to take on a life of its own. The steady

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88. See HANS-GEORG GADAMER, *On the Contribution of Poetry to the Search for Truth, in THE RELEVANCE OF THE BEAUTIFUL AND OTHER ESSAYS* 110 (R. Bernasconi ed. & N. Walker trans., 1986).

expansion in the number, size, and detail of laws, from the fifteenth century until the present day, reflects the same assumption that to pass a law is to *set something in motion*. What else can an Act do, Edward's court may have thought, but act?

The Act therefore symbolizes the law's vigor and its determination to interact with the world of things. This is radically different from the passive understanding of law we have largely encountered hitherto. We have not yet, however, reached a particularly sophisticated understanding of the nature of the statute, for there is a sense in which the novel use of the word "Act" which I have been explaining carries the implication that a miraculous transformation will somehow take place, as if the mere proclamation of the law can somehow by itself set in motion the new reality it proposes. There is here a faith in some sort of magical osmosis between word and world. Such naiveté stems from an inadequate appreciation of the complexities of the "real world." In the fifteenth century, this inadequacy reflected a still-limited gaze, for the court's understanding of "the People" was far from sophisticated. Lawmakers' inability to foresee creatively the process by which the intentions behind a statute could be realized, the human steps of application and enforcement required, and the resistance that might be faced from people with opposing values and practices may have led them to assume that the passing of an Act alone did the job. Although the King's gaze now fell *upon* the people, it did not enter into their lives. It did not adequately appreciate how extraneous and partial a paper law can sometimes look to those expected to reconfigure their world in its light. Empathy, the ability to gaze as if through other's eyes—to see the law as it looks to those subject to it—is a skill that was still largely absent.

Nor, of course, is it notably present in the twentieth century. Indeed, the moral entrepreneurs of our own time have often insisted upon the legal prohibition of behavior, frequently denying the reality of how people, regardless of the law, choose to live their lives. This insistence suggests an overweening faith in the importance of law, grounded in the instrumentalist fallacies and aesthetic failings that we first begin to notice during the statutes' formative period.

Although flawed, the idea of the "Act" is nevertheless important—you cannot readily believe in the normative power of law unless you assume that laws act in the world. The change from "statute" to "Act" therefore represents a crucial milestone in the trend toward normativity begun earlier. The structure of written law also reflects this trend toward greater normativity. The earliest statutes were, as we have seen, narrations of political events. The *statutum*, a historical record of the decisions of a particular session of Parliament, was the

fundamental legislative unit, divided into "chapters" merely for the sake of clarity and convenience. By the fifteenth century, a change was underway. Statutes had more chapters than ever before, many of which were themselves subdivided into several articles or sections. Statutes no longer had titles; chapters soon gained them. At the same time, as we have seen, the introduction of the statute was becoming more formal and less important. By the time of Henry VIII, it had disappeared altogether and had been replaced by a similar formula at the beginning of each chapter.<sup>89</sup> The chapter is now known as an "Act" of Parliament. The statute is merely an omnibus of these Acts, bound together at the end of the regnal year. We witness here the demise of the statute as the fundamental unit of legislative structure and its replacement by the chapter.

These structural changes reflect a conceptual change, for while statutes were distinguished chronologically, each chapter can be distinguished by its purpose. Why was it now seen as necessary to divide chapters into sections? Partly because of the details of control with which each law was increasingly concerned, but also because the chapter is a purposive unit. The sections all "belong" within a particular chapter because they are all steps designed to facilitate the same purpose. Lawmaking had therefore changed from a record of past events (stated in the statute) to an act of present will (captured by the chapter). Law was seen increasingly as purposive—each Act a discrete normative decision aimed at effecting a specified end. We know where this progress eventually leads. In the twentieth century, the word "statute" has lost its original meaning as a collection of legislation from a particular regnal year and is treated as synonymous with "Act" and (more rarely) "chapter."<sup>90</sup> Each "statute," understood in this sense, is designed to change the law in a particular way; it frequently includes hundreds of sections, all of which share, at least to some extent, a common purpose. Now, the statute is no longer a history at all, but rather the expression of an idea, normative and purposive throughout.

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89. The first statute not to have a form of introduction was 7 Hen. VII (1491) (Eng.), but this was a plague year and some irregularity of form was only to be expected. In 1492, the introduction reappears and remains until 1509.

90. While the argument as to the meaning of the changing arrangement of statutes and Acts holds, it must be noted that there is some evidence that in the earlier period, chapters were sometimes in fact called statutes themselves—the last chapter of the Statute of Westminster the 2nd, 13 Edw. I, Stat. 1 (1285) (Eng.), is one example, referring to "omnia predicta statuta." Inconsistency of terminology is hardly surprising at this time, but I do not believe this undermines the conceptual and structural points I am making as to the way in which the organizing principles of legislation changed. See PLUCKNETT, *STATUTES AND THEIR INTERPRETATION*, *supra* note 7, at 11-12.

We have, in fact, rung down the curtain on the medieval world and entered the Renaissance, an age of unbounded confidence in man's ability to change the world by an act of will. In fifteenth-century music, composers such as Ockeghem and, in England, Pycard and Byttering, began to refine the "canon," a musical form which later reached its apotheosis in the fugue.<sup>91</sup> A canon, however, is more rule-based in nature: the musical statement of one part is copied by other voices, either exactly or in accordance with predetermined principles of transformation. It is the realization of a musical *law*, in truth as well as in etymology. Like an Act, a canon continues to enforce its will upon the world. It is a composition subjected to the governance of principles and themes enacted in advance, and with whose terms composer and performer alike must obediently comply. There is, for example, in the formidable *Gloria* of Pycard, a five-part double canon, a heightened clarity of line and regulation of the form of musical expression— just as we have seen in the Acts of the period a heightened clarity of purpose and regulation of the form of legal expression.

### 3. *Legal Subjects*

On the Continent and particularly in England, the fifteenth century is above all notable for the triumph of *harmony* as a guiding aesthetic principle. On the one hand, musical harmony became enriched, principally by the declining use of parallel fifths and the increased use of thirds and sixths, previously considered "imperfect intervals" of little harmonic value.<sup>92</sup> The early fifteenth-century manuscripts collected in the Old Hall collection mark with particular prominence this cultural development.<sup>93</sup>

Simultaneous with this thickening in harmonic texture, the consonance of all melodic lines became a crucial task of composition. In fifteenth-century polyphonic music, then, each note must be studied and integrated, not only in relation to its own line, but also in relation to all the other notes being sung by different parts at the same time. The compositional gaze is directed vertically as well as horizontally, toward deepening the control exercised over harmony as well as toward the expansion of melodic range. The result is that the sound of Western music changed markedly, from spacious and hollow, to

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91. HARRISON, *supra* note 9, at 236-40.

92. Undoubtedly, English compositional style had long used these harmonies far more than had its European counterpart.

93. The "faburden" (faux Bourdon), basically an ornamented part in parallel sixths to the *cantus firmus*, became an almost routine aspect of three-part writing in fifteenth-century England. It was one of the foundations of musical education at that time. HARRISON, *supra* note 9, at 247-49; LEFFERTS, *supra* note 9, at 90.

lush and thick. From the single melodic line of plainsong, or the relatively simple structure and sound of the earliest motets, the field of the composer's gaze had widened vastly in all directions: melodically, rhythmically, and harmonically. There is a complexity of musical consciousness here, accompanied by an unprecedented complexity of musical organization and control. It is this complexity of writing and hearing that the "motet" came to represent.

The development of statutory form likewise reflects a heightened complexity of legal consciousness, an expansion of the depth and breadth of gaze, and an increasing interest in the consonance and coordination of the community. The idea that the purposes of the law are to reform, to act, and to provide norms, was well established by the fifteenth century and was applied to a much wider range of the King's subjects and over an increasing proportion of their lives. Law thus sought to harmonize the behavior of more citizens in ever more intricate ways.<sup>94</sup> Still, the *way* in which the law strove to harmonize the conduct of the community remained limited. As England's mercantile power grew, for example, there was a barrage of laws controlling trade, import, and the economic conditions of the country—Acts about coins, loans, boats, bread, and wool.<sup>95</sup> By and large, these Acts attempted to change the conditions of the world—people's status, their land, their property, their trade—and only indirectly did they attempt to influence their beliefs and desires. While these laws affect context in which people can act and the environment in which their attitudes are formed, they do not operate *directly* on them. To put it another way, the idea that the law is normative, that its terms control how people think and how they choose to behave—an attitude assumed by modern criminal law—conceives of the *mind* as an object which the law manipulates almost as if it were a loaf of bread or a bushel of wheat. While this approach had begun to be expressed, it had not yet triumphed.

Not all legislation was of this kind. We begin to notice at the same time the emergence of "private Acts," designed to modify the legal status and entitlements of specific individuals rather than of the public as a whole.<sup>96</sup> Such laws, for example, provide for the divorce or

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94. For a different approach to the notion of harmony in law, see Martin Boodman, *The Myth of Harmonization of Laws*, 39 AM. J. COMP. L. 699, 700-02 (1991).

95. See, e.g., 3 Edw. IV, chs. 1-5 (Eng.); 4 Edw. IV, chs. 1-10 (Eng.); 7 Edw. IV, chs. 1-3 (Eng.); 8 Edw. IV, chs. 1-2 (Eng.). In these years, typical of the years before and after, over 80 percent of the acts are of this character. These are certainly not the first acts dealing with such matters. See, e.g., *Assisa Panis & Cervisia*, 51 Hen. III, Stat. 1 (1266) (Eng.); *Statute of Money*, 20 Edw. I, Stat. 4 (1291) (Eng.). But in comparison with the preponderance of administrative materials to be found in thirteenth-century statutes, there is a different emphasis here.

96. It was thought for a long time that private acts began in the reign of Richard III, but in fact they began some years earlier, although the private acts of Richard III, and then of Henry

pardon of particular individuals, the settlement of land disputes, and the granting of titles to the nobility. In other words, they were a generally welcome involvement in the dealings of named members of the ruling class.

At first blush, this may seem to be a throwback to the thirteenth century, but nothing could be further from the truth. Certainly the thirteenth-century gaze focused on individuals, such as sheriffs and bailiffs, but it saw them as “agents” carrying out the King’s wishes. Here, on the contrary, the law was acting as the agent of these individuals, facilitating *their* desires. Statutory law was now acting for the interests of individuals and beyond the interests of the King. This trend became much more pronounced in the nineteenth century, when private Acts dealt with the incorporation of companies, provided authority to build bridges and roads, and so on—in short, when the statute book seems to have been nothing but an instrument of capitalism.<sup>97</sup>

In undertaking this enabling function as early as the fifteenth century, statutory law saw (a very limited class of) citizens as its “subjects,” whose actions were either circumscribed or facilitated by its terms. In contrast, the law’s view of them as “agents” representing the King lay in the past, and its view of them as “objects,” whose very *desire* for action may be made to conform to the rules of harmony, lay substantially in the future. This integration of each member of society into a whole community, subject to laws which determined in advance their attitudes toward and relationship with each other, constituted the triumph of the harmonic principle in law.

#### *D. The Sixteenth Century: Validity and Power*

##### *1. The Structure of the Preamble*

As the Wars of the Roses entered their final stages, the language of Acts seemed to reflect a greater consciousness of “the People” on whose behalf each side claimed to be waging bitter war. Perhaps in an attempt to establish popular legitimacy for his rule, the coronation of Richard III in 1483 saw another decisive linguistic change: then and thereafter, Acts of Parliament all were written in English. The change from French to English was not as sudden as it might appear, however. As early as 1362, a statute required that all cases should be pleaded and debated in English, and, around the same time, some

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VII, considerably surpass the earlier examples in quantity. See Thomlins, *supra* note 1, at 754.

97. Although it deals with this period in United States (rather than English) law, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

petitions to Parliament began to appear on the roll in English.<sup>98</sup> These were precursors to the comprehensive change accomplished a century later.

Now some trends that we observed in the preceding centuries began to congeal. The shift from Latin to French to English, for example, was a slow and significant one that represented an increasingly spacious gaze and a more normative understanding of law. The breadth of the modern legal gaze—that is, its attempt to reach and influence everybody in the community—is directly correlated to a heightened faith in the law as an instrument of social change, and a heightened expectation of social conformity. We can see the triumph of this attitude in our own day, with the emergence of “Plain English,” an ideology of writing and style now adopted by virtually all legislative drafters in the English-speaking world.<sup>99</sup> It reflects an attempt to make statutes more readily comprehensible, and it stems from the belief that the law has a strongly normative effect—that is, that the law really does provide powerful independent reasons for action among those who (are assumed to) read and know it. “Plain English” insists that the law will be effective, if only it is understood, and that it can be understood only if it is readable. Behind “Plain English” lies the assumption that the correct audience for a law is the community as a whole, and not only the community of lawyers. It is in this sense that it reflects the apotheosis of the modern gaze and the antithesis of the medieval.

Another theme that we observed over the preceding centuries has been the growing importance of the legal validity of an Act. The argumentative style of the introduction declined, and the formal details of, and procedure surrounding, statutes’ enactment grew in significance. By the time of Henry VII, whose accession to the throne in 1485 put an end to the Wars of the Roses, the location of these formalities had moved, so that every Act (i.e., chapter) itself stated, “It is ordained, established, and enacted by the Advice of the Lords Spiritual and Temporal, and the Commons in the said Parliament assembled, and by Authority of the same . . . .”<sup>100</sup> The chronological statute as an important conceptual entity thus disappeared and had been replaced by the purposive Act. By the

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98. 36 Edw. III, Stat. 1, ch. 15 (1362) (Eng.); see POLLOCK & MAITLAND, *supra* note 7, at 85-86. On the “Englishing” of Latin and French statutes in Tudor times, see Graham, *supra* note 1.

99. See Ian Turnbull (First Parliamentary Counsel in the Australian Office of Parliamentary Counsel), *Clear Legislative Drafting: New Approaches in Australia*, 11 STATUTE L. REV. 161 (1991). It is ironic that this trend among drafters nonetheless remains arcane and customary rather than written down and defined.

100. As in 1 Hen. VII, ch. 1 (1485) (Eng.). The original of this, and all statutes quoted in the text hereafter, is in English.



beginning of the reign of Henry VIII, as noted, the introduction had disappeared altogether from the annual statutes of Parliament. All that was left was a Preamble to each individual Act which cited both the reasons for its enactment and the grounds of its formal validity.

The emphasis on the legal validity of laws had not yet entirely eliminated their rhetorical character. Neither the validity of an Act nor even the threat of coercive measures were apparently yet sufficient to instill the habit of obedience.<sup>101</sup> The Preamble, it is true, was the central locus of this rhetoric, structurally distinct from the substantive clauses of each chapter. It was, furthermore, frequently framed with quotation marks as if it were a recital or a quotation. While such structural devices served to separate "rhetorical" language from "real" law in a way that would hardly have made sense a century earlier, the Preamble nevertheless continued to provide reasons for the passage of the Act. Admittedly, these reasons were becoming less and less important as the question of formal validity took on a conclusory function.<sup>102</sup> Nonetheless, in Tudor England, this phase had yet to be reached.

But the nature of the justifications contained in the Preamble was also changing. The language used was generally more specific than it had been in earlier examples, and it related not to the condition of the kingdom in general, but to the particular mischief which the Act was intended to remedy.<sup>103</sup> A further difference can be found in several of these Preambles, which are written in the form of a petition submitted by a group seeking Parliament's help. The Act which incorporated the Royal College of Physicians is a well-known example.<sup>104</sup> Containing no substantive clauses, the Act is entirely constituted of the petition it recites; it is a disembodied Preamble. An Act of 1512 likewise quotes an earlier Act relating to pewterers and continues with their plea:

101. See HART, *supra* note 2; *Authority, Law and Morality*, *supra* note 5.

102. In the present day, the Preamble, understood as a way of justifying a particular statute, is both rare and insignificant, although some argue that the use of declaratory or hortatory text in legislation, of which the Preamble is one species, is currently experiencing a rejuvenation. See V. Palmer, *The Style of Legislation in the United States: Narrative Norms and Constraining Norms*, AM. J. COMP. L. 15 (1994).

103. 1 Hen VIII, ch. 8 (1509-10) (Eng.) is typical: "For as much as divers of King's subjects lately have been sore hurt, troubled and some disherited by Escheators and Commissioners, causing untrue Offices to be founded . . . to the great Hurt, Trouble, and Disherson of the King's true Subjects . . ." See also, for examples at this time, 3 Hen. VIII, ch. 11 (1511) (Eng.), which declares that "the Science and Cunning of Physick and Surgery . . . is daily within this Realm exercised by a great Multitude of ignorant Persons . . ." or 4 Hen. VIII, ch. 2 (1512) (Eng.): "Whereas Robberies, Murders, and Felonies daily increase more and more, and be committed and done in more heinous and open and detestable wise than hath often been seen in times past . . ."

104. 14 & 15 Hen. VIII, ch. 5 (1522) (Eng.); see also 3 Hen. VIII, chs. 11 & 14 (1511) (Eng.).

Please it therefore your Grace and Wisdom, inasmuch as the said Act is thought good and profitable, that it be ordained, enacted and established by the Lords Spiritual and Temporal, the Commons in this present Parliament assembled, and by the Authority of the same, that the said Act may endure for ever.<sup>105</sup>

This Act and others like it are interesting for two reasons. First, strictly speaking, they enacted nothing. The Act concludes with an *entreaty* for the Parliament to act and a *plea* that it be so ordained, enacted, and established, but, although we can assume as much from its place in the statute book, the statute includes no positive statement that Parliament acceded to the petition. By the time of Henry VIII, then, lawmaking has to such a great extent become an activity to satisfy *others'* interests, that a mere statement of an interest group's petition seems to imply Parliament's acquiescence. The development of the legislative petition suggests the extent to which the law had become facilitative, and corporations and organizations its *subjects*.

Second, although the recital of a petition demonstrates that the reasons for a law were still important sources of its power, a subtle change here paradoxically points to the growing importance of law's formal validity. It is instructive to compare these petitions with the early statute on bastardy, which recorded the bishops' "petition" to the Lords.<sup>106</sup> In that case, the fact that the petition was recorded on the statute roll did not alter Parliament's inactivity, although it is true that, in that case, the statute also noted the Lords' opposition to the petition. By the sixteenth century, however, things had obviously changed. For what does it mean that the mere recording of the petition apparently sufficed to create law? It means that everything that appears in the statute book is taken to be "law." Raz, on the other hand, argues that a law's authority derives from the validity of the parliamentary process, that the statute itself possesses only a kind of evidential validity.<sup>107</sup> Just because a petition is placed on the roll, therefore, does not mean, according to Raz, that it has gone through the parliamentary *procedure* which entitles it to validity.

This was clearly not the understanding here. The statute book is, in a semiotic sense, "iconic" of law's validity.<sup>108</sup> A religious icon is

105. 4 Hen. VIII, ch. 7 (1512) (Eng.) (referring to 19 Hen. VII, ch. 6 (1503) (Eng.)). A similar approach in a different circumstance is taken in the case of Richard Strode, 4 Hen. VIII, ch. 8 (1512) (Eng.); see also the petition permitting the marriages of the six clerks of the High Court of Chancery, 14 & 15 Hen. VIII, ch. 8 (1522) (Eng.).

106. 20 Hen. III, ch. 9 (1235) (Eng.). See *supra* text accompanying footnotes 41 and 42 *infra*.

107. See AUTHORITY OF LAW, *supra* note 5.

108. Goodrich contends that statutes were sacred icons, symbols of authority, and not practical documents in the period after the Norman conquest. But I have argued elsewhere in

not only a “symbol” or image of a sacred person, but a sacred object in itself. In this case, the statute is not merely a symbol of law’s legitimacy, but *itself* renders authoritative and valid everything contained within it. The mere presence of a petition in the statute book miraculously seems to entitle it to be interpreted as law—because of the iconic power of the book in which it is set down. These words are legal icons that convey value and demand obedience simply by their presence on the page. It is this kind of validity of which we begin to catch a glimpse in the petitions of the sixteenth century.

## 2. *Penalties and Power*

The changing nature of the preamble in Tudor England demonstrates the growing importance of legal validity as the grounds of legal obedience. At the same time, we see the growth of coercion as a means of ensuring obedience. In marked contrast to the position of even fifty years earlier, the statutes of Henry VII display an Austinian consciousness of the importance of penalties in giving people a reason to obey the law. Each Tudor Act typically describes an offense and provides a specific penalty for each offense. No longer was the penalty just “a grievous fine” or “as the trespass requires,” but, for example, 6s/8d for the first offense, 13s/4d for the second offense, and 20 shillings for each subsequent offense.<sup>109</sup> A system of coercion operated here, enforcing obedience.

We have already noted that this coercive specificity implies a stronger appreciation of legal normativity and a more comprehensive “gaze.” As I have suggested, this can be characterized as the “objectification” of community members, the assumption that their behavior and beliefs can be molded by legislative intervention. There is no inconsistency here with the “subjectification” of law which I described above. Both were gaining strength in the minds of law-makers, although not at the same rate. The statutes of the sixteenth century treated citizens more as legal subjects than as objects; but in comparison with earlier centuries, both these approaches had gained ground. So, too, in our own time, law is seen as both the ultimate architect, redesigning the world according to its own blueprint, *and* as the ultimate evangelist, transforming our hearts and minds directly. If the latter, objectifying function of law is now more prominent, as

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this paper that, in relation to *statutes* anyway, this is not so. The power of the statute as icon arises along with normativity and not prior to it. See Goodrich, *Literacy*, *supra* note 24.

109. 11 Hen. VII, ch. 4 (1495) (Eng.). Of the 27 chapters of this statute, 14 establish offenses for which 15 penalties are detailed. Only in two cases, chapters 11 & 19, is no penalty set, although the penalty for the infringement of chapter 7, concerning riots, is said to be “such a sum of money as shall *seem* meet.”

was the former in the sixteenth century, it is not that our faith in legal architecture is waning—only that our belief in legal evangelism is particularly strong.

### 3. *The Gaze of the Preamble*

The legal system was doing two things here: recognizing that laws will be transgressed and standardizing punishments. An awareness of the power of law was accompanied by an awareness that law needed power if it was to be realized. This represented a more sophisticated imagination in which the law was conceived as it actually existed or had come to pass. It had ceased to be a floating abstraction. We can trace this developing understanding of the relationship of the law to the world in the changing formula of the Preamble. In the days of Henry VI, the following phraseology is typical: “The King, by the Advice and Assent of the Lords Spiritual and Temporal, and the Commons of this Realm of *England*, being in the said Parliament, and by Authority of the same Parliament, hath ordained . . . .”<sup>110</sup> The words “hath ordained” are important, for they place the King’s will firmly in the past tense. The statute was thus, as we have seen in other contexts, a historical record of an action (the King’s decision) which was over and done with. There was no perception that the statute continued to act in the world.

Soon after, however, we enter an ambiguous period in which the past and present merge. Phrases of the form “it is ordained and established,” or “it is enacted, ordained, and established,”<sup>111</sup> although carrying something of the past with them, are nevertheless in the present tense. As with the word “Act” itself, which first appears around this time, there is the implication that the mere description of the King’s will (in the past) is by itself enough to change the present. “It is enacted” and “it is established” mean “it is done.” Likewise, these phrases are written in the passive voice. There is, therefore, no sense of agency. The King’s will “is enacted,” somehow, by itself. The use of the passive voice leaves unexplained the process by which the statute is in fact to be established.

At the same time we begin to find examples securely wedded to the present: “The King . . . doth ordain, enact, and establish,” says one Act of 1483; “the King ordaineth,” says another from 1485.<sup>112</sup> Now this appears to be a statement of fact relating to the mind of the King—he ordains this or that to be so. The use of the active voice adds to this impression; it is not just “ordained,” the King ordains it.

110. 27 Hen. VI (1449) (Eng.).

111. 28 Hen. VI (1450) (Eng.), 1 Hen. VII (1485-86) (Eng.).

112. 22 Edw. IV, ch. 7 (1483) (Eng.); 1 Hen. VII, ch. 7 (1485-86) (Eng.).

This is an expression of the King's will, then, but still it reveals no awareness of *how* that will is made effective. The old style "it is enacted" implies that the world obeys the abstract word and is akin to the faith revealed in the word "Act." "The King ordains," although identifying the person whose intent is at stake, says nothing about how the world responds. On this reading the statute is a document that records a present intention but ignores how that intention is to be carried out.

This ambiguity between past and present soon dissipated. A petition dating from 1495 began, "Be it ordained and enacted by your Highness . . . ."<sup>113</sup> The words have the character of a wish and a request for someone ("your Highness") to act and for something to be done in the future. "Be it enacted" means "let it be enacted." This form became standard in all Acts and not merely in petitions. The substantive clauses of Acts begin, "Be it also enacted," "Be it ordained," "Wherefore be it enacted," "Be it therefore enacted, ordained, and established." By 1523, all Acts simply and uniformly declare, "Be it enacted."<sup>114</sup> Virtually unmodified, this form has come down to the present day. But what imagery does this phrase conjure up? Does it not still sound like a request—and if so, to whom is it addressed? Let it be enacted *by whom*? There is a clear image of command here. The King on his throne pronounces, "Be it enacted," and orders someone to satisfy his wishes.

This is no longer a mere floating abstraction. The phrase "be it therefore enacted" is a command instructing others to act to fulfill the will expressed. The phrase suggests an awareness that it is only by this consequent action that the King's vision can be realized, a recognition that laws must *be enacted* by future action. We have moved from will to action, and from the present to the future tense. We have also moved from a gaze that looks *at* the world to one that enters physically *into* it—applying, enforcing, punishing. An effort is being made to transform the world not just by relying on the sheer magic of words, but by muddy practice. This gaze is decidedly modern in outlook. After centuries of intellectual struggle and a gradually changing perception, it leaves the way open to the detailed legal control, subjectification, and objectification which we now take for granted. This change is idealized in Hans-George Gadamer's discussion of legal hermeneutics, in which he argues that law ought to

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113. 11 Hen. VII, ch. 12 (1495) (Eng.).

114. 11 Hen. VII, chs. 4, 12, 14, 15 (1495) (Eng.). "Be it therefore enacted, ordained, and established" was the standard form from 19 Hen. VII (1503) (Eng.); 14 & 15 Hen. VIII, ch. 2 (1523) (Eng.).

be interpreted "so . . . that the legal order fully penetrates reality,"<sup>115</sup> but in practice this consummation does not always appear to have been so desirable.

A gradual increase in the detail of control and depth of gaze has marked the history of statutory form from the *Magna Carta* to the Tudors. The development of musical form followed a similar trajectory. In Renaissance music, there is a consciousness of effect and an attempt to use music as a species of communication quite unlike the inward rapture of earlier times. The use of musical word-painting typifies this communicative spirit. The *Pie Jesu* or *Agnus Dei* of the Mass writers of the sixteenth century conveys the idea of mercy by strictly musical as well as linguistic means, utilizing at last the full normative power of the medium. This exploration of normative potential came somewhat later to English music; but even in the compositions of John Taverner or Robert Fayrfaxe, and still more so in the motets of Thomas Tallis (1505-85), there is a rhythmic variety, a differentiation of mood depending on the meaning of the text being set, and a focus on syllabic clarity in the vocalization of its words, all of which provide a stark contrast to the approach of the ancients.<sup>116</sup> Medieval music, like medieval legislation, existed in its own private space; in the Renaissance, there is a newfound and vivid engagement with the community—a belief that music itself, like the law, can enact and ordain changes in the minds of those who listen.

This expanded musical gaze and function influenced the composer's understanding of the resources at his disposal, too. Modern notation, effectively stabilized around 1400 in England as on the Continent, allowed an infinite subdivision of the beat, and therefore the expression of an infinite density and complexity of rhythm. At the same time, the tonal as well as the rhythmic range of the individual voice was expanding, so that the bass, for example, which had rarely sung below a C, was now pushed down to an F. In England, long in the forefront of broadening the vocal range used in composition, between 1400 and 1500 the compass of polyphonic settings grew from about two octaves (from the highest note of a setting to the lowest) to three, while the range of an individual part, in the compositions of John Cuk or Walter Frye, for example, now typically became a tenth or an eleventh and on occasion a sixteenth.<sup>117</sup>

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115. HANS-GEORGE GADAMER, *TRUTH AND METHOD*, quoted in GOODRICH, *LEGAL DISCOURSE*, *supra* note 24, at 160.

116. HARRISON, *supra* note 9 at 257-63.

117. HARRISON, *supra* note 9 at 261-63 (discussing Masses by Cuk and Frye); LEFFERTS, *supra* note 9 at 15; WILSON, *supra* note 9 at 284.

The changes that took place here were not merely technical, but conceptual. We see in the remarkable and prolific motets of Thomas Tallis an awareness not simply of abstract lines, but of *voices*, each with their own range and character.<sup>118</sup> Consider the note as Tallis must have considered it. It has a temporal dimension, harmonic implications, and timbral character; it is attached to a word, to emotions, and to meaning as never before. Realms of opportunity previously unimagined presented themselves to the Tudor and Elizabethan ear. It was an aural gaze (if we can call it such a thing) that offered a vast expansion in the means, aspects, and functions of musical control. How far removed in depth and complexity is Tallis's magisterial forty-part motet, *Spem in alium*, from the simple two-part *organum* from which it grew. Above all, there is a difference of sonority and feeling. The beauty of the music of the Middle Ages lay in its space, its parallel movement, the simplicity and stark perfection of its harmonies, and the constancy of its rhythm. By the Renaissance, these very factors had become undesirable and even ugly. We had witnessed a profound shift in perspective and in value, not primarily technological or administrative, but aesthetic.

### III. MOTETS AND LITTLE WORDS

There is something ironic in focusing so intently on the interpretation of early statutes when until the end of the fourteenth century, the judiciary did not even see statutory interpretation as an appropriate legal function. Indeed, in 1336, one statute concluded by demanding that the "aforesaid ordinances and statutes" should be kept "without addition, or fraud, by covin, evasion, art, or contrivance, or by the interpretation of the words." Statutory interpretation was a species of fraud.<sup>119</sup>

Yet the aesthetics of statutory interpretation has proven to be a vein rich in the ore of insight. Surveying 300 years of English statutes beginning with the *Magna Carta*, I have traced changes in the conceptualization of law as a normative order. Modern theories of validity (elaborated by Raz), power (emphasized in the writings of Austin), and reason (associated with natural law theory) may all be advanced to explain why people accept an obligation to obey the law. As I have noted, all these ideas have changed, developed, and intermingled. Despite these interconnections, the relative importance of various elements has changed over time. We have seen the relative

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118. See GROUT, *supra* note 9 at 182-221.

119. 10 Edw. III, Stat. 3 (1336) (Eng.); PLUCKNETT, STATUTES AND THEIR INTERPRETATION, *supra* note 7, at 164-67.

decline in the role of reason and rhetoric in legal justification, its steady replacement by notions of formal validity, and the gradual rise, too, in the value placed on legal coercion. We have also seen the role of legislation change from that of a document recording the past to that of a set of instructions for purposive future action, and its tone change accordingly from descriptive to prescriptive. The shift from the use of the word "statute" to the word "Act" symbolizes that steady movement.

At the same time, the related idea of legal normativity, with its implications regarding the power and efficacy of legislation in molding our lives and minds, was gradually gaining acceptance. These assumptions, now commonly accepted even by very different jurisprudential schools, were foreign to the earliest statutes, for the idea of legal normativity was neither "discovered" nor enhanced, but developed over time. The gradual shift from the use of Latin to French to English might be taken to embody this slow process. I have also related the growing normativity of law *qua* law to the growing normativity of music *qua* music. So persuasive is the language of music now, so ancillary are the words it sets—so far removed are we from the original meaning of the motet—that most of those who hear a Latin setting by Tallis, or a German setting by Bach or Brahms, have little idea of the meaning of the words, and less interest. Likewise, the written law now so assumes the independent normative influence of legislation, so expects popular knowledge of its terms—so far removed are we from the original nature of the statute—that those who question its efficacy or legitimacy are sometimes seen as a trifle perverse.

These changes were grounded in a constantly evolving understanding of the purpose and power of law, which was by no means presumed or given. The purpose of statutory law changed along with lawmakers' perceptions of "the People's" world—who was on the King's horizon of visibility, how thoroughly his gaze penetrated into their lives, and whether or not they were perceived as agents, subjects, or objects. Neither is this phenomenon of changing gaze, changing expectations, and changing normativity limited to the law. In music and in law alike, a gaze which expanded in scope and in intensity was reflected in changing purposes, form, and content.

These techniques of analysis can be extended much further. How, for example, has the history of legislative form and language unfolded over the *last* four hundred years? In considering this, one might discuss the utilitarianism of nineteenth-century Acts (and especially the enormous number of private Acts passed to facilitate industrial expansion) and their construction of the citizen as legal "subject." One might look at the explosion of legislation in the last one hundred



years and its reconstruction of the citizen as legal “object.” Moving away from questions of content, one might consider factors such as the growing artificiality of legal language in the eighteenth and nineteenth centuries, the emergence of the “definition section” as a vital and increasingly exhaustive element of Anglo-American statutory law, and the emergence of “Plain English” in recent decades. What do these elements say about how law and legislation have been understood, and which values they have embodied? I have suggested some tentative answers, but clearly much more work remains to be done.

Beyond specific questions of statutes and interpretation, however, I have tried to introduce the processes and potential of a nonliteral interpretation of legal forms. This Article has been an adventure in words: their voices, their arrangement, their purpose. The motet, in its finest flowering, embodied an unsurpassed depth, breadth, and sophistication, and an unquenchable faith in its own force and authority. The statutory form underwent the same intoxicating expansion. We have seen, then, the power of language and form in their ability both to structure and to exemplify patterns of thought—whether we are talking about the formal innovations of early modern music, the parallel developments of early modern legislation, or the linguistic implications of contemporary legislation.

The changing characteristics of the little words of law have much to teach us about the world of law’s writers and of its readers. The adoption of a formal, semiotic, and interdisciplinary approach to interpretation helps us understand law and power in two ways. On the one hand, as an interpretative tool or process, such an approach explores what words connote and texts look like; on the other hand, it also acts as the subject matter of the inquiry. To take the last point first, then, my argument is that one cannot understand the ideas and practices of lawmakers in any era without delving into the way they saw the world. But the process of my inquiry, no less than its subject, has been “aesthetic.” In order to develop this emphasis on the aesthetics of perception, I have focused on various aspects of the language, form, and “mood” of statutes, rather than, for example, on their content. The look and language of statutes is an important means of learning not only about specific laws, but also about the general attitude toward law and society which structures and constrains the enactment of specific statutes.

Our current understanding of the law has developed through a process stretching back over seven centuries and more. From our present standpoint, the form of modern legislation *seems* only “natural”—“Acts” written in “Plain English” (accompanied by conventions relating to short titles, formal clauses, substantive

provisions, the numbering of sections and paragraphs, provisions for entry into force, and so on), forward-looking, purposive, and reformist in nature, designed to change the world and change behavior. These assumptions all presume the instrumentalism and normativity of the law. Indeed, a world without such an extension of legal control and influence is, for us, virtually unimaginable. But for the one to be unimaginable, the other had first to be imagined. Through an interpretative argument and an aesthetic exemplification of it—by evaluating the changing look and sounds of various expressions of social orders, both musical and legal—this Article has attempted an exposition of some of the history and manifestations of that imagination.