

The Legal Writing of Sir Edward Coke, the Anglo-Saxons, and *Lex Terrae*

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Ian King has just completed his PhD in history at the University of Cambridge. His thesis examined legal-antiquarian scholarship on the Anglo-Saxon past in early modern England, and his doctoral research was funded by the Cambridge Law Faculty's F. W. Maitland Studentship in Legal History. Prior to his doctoral studies, Ian completed an MPhil in Cambridge's Department of Anglo-Saxon, Norse & Celtic.

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Abstract

This article examines the treatises and law reports of Sir Edward Coke (1552–1634), the Attorney General under Elizabeth I and later, Chief Justice of the courts of Common Pleas and King’s Bench. The article juxtaposes Coke’s expressions of the common law’s uniqueness and antiquity with the historical scholarship of Coke’s peers that illuminated English legal, cultural, ethnic, linguistic, and institutional identity. This antiquarian historicism increasingly located the source of English ethno-cultural identity in the Anglo-Saxon period of English history. Whilst Coke’s belief in an immemorial common law necessarily placed its origins in the native British past, the following argues that Coke was receptive to contemporary scholarship that had solidified the association of the Anglo-Saxons with a discrete sense of Englishness. Indeed, subscription to the burgeoning antiquarian consensus that the Anglo-Saxons were the first English people was not necessarily incongruous with belief in an immemorial, pre-Saxon common law.

Keywords: Sir Edward Coke; early modern antiquarianism; the Anglo-Saxons; ethno-cultural identity; medievalism.

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Abbreviations

BL	British Library.
CCCC	Cambridge, Corpus Christi College (the Parker Library).
CCD	Ayloffe, J. and Hearne, T., eds., <i>A Collection of Curious Discourses</i> , 2 vols., London: 1771.
CPH	Cobbett, W., <i>Parliamentary History of England: from the Norman Conquest, in 1066, to the year, 1803</i> , 36 vols., London: 1806–20.
CUL	Cambridge, University Library.
HH	Holkham Hall MSS, as listed in <i>A Catalogue of the Library of Sir Edward Coke</i> , edited by W. O. Hassall, London: Yale University Press, 1950.
Inst.	Coke, E., <i>The Institutes of the Laws of England</i> , qu and cited below in <i>The Selected Writings and Speeches of Sir Edward Coke</i> , edited by S. Sheppard, vol II., Indianapolis: Liberty Fund, 2003.
ODNB	<i>Oxford Dictionary of National Biography</i> , 60 vols., Oxford: Oxford University Press, 2004, cited below in the online edn.
Rem.	Camden, W., <i>Remaines of a greater worke, concerning Britaine, the inhabitants thereof, their languages, names, surnames, empreses, wise speeches, poësies, and epitaphes</i> , London: 1605.
Rep.	Coke, E., <i>The Reports of Sir Edward Coke, in thirteen parts</i> , qu and cited below in <i>The Selected Writings and Speeches of Sir Edward Coke</i> , edited by S. Sheppard, vol. I, Indianapolis: Liberty Fund, 2003.
S	Sawyer, P. H., <i>Anglo-Saxon Charters: an Annotated List and Bibliography</i> , London: Butler and Tanner, 1968 (charters cited by ‘Sawyer’ number, e.g. S 1201).
TNA	Kew, the National Archives.

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Introduction

Sir Edward Coke remains the best-known jurist of early modern England. He was Solicitor General under Elizabeth I, and served as Attorney General into the third year of the reign of James VI & I. He prosecuted Walter Raleigh, Robert Devereux, earl of Essex, and the conspirators of the Gunpowder Plot, and in 1606, he became Chief Justice of the Court of Common Pleas. As Sir John Baker has argued, after 1603, Coke's "chief preoccupation was the misuse of power by government", as "fears of absolutism had increased sharply" following James's English accession.² These fears were intensified by the Jacobean debate on the union, which, due to strong English opposition, ultimately resulted in the failure of James's project to unite England and Scotland politically.³ A sense of legal and philosophical incompatibility between the common lawyers and James was felt particularly strongly by Coke. By 1604, Coke had come to disdain Lord Ellesmere, the Lord Chancellor, for supporting James's desire to rule without Parliamentary interference. Ellesmere's view that James did not need to consult judges and could adjudicate cases personally ushered in a period of palpable tension between Coke and the king,⁴ and by the time James dismissed Coke from King's Bench in 1616, Coke had been affirming the antiquity and supremacy of the common law for some time.⁵ This affirmation did not yet amount to an ideological challenge

¹ For good reason, 'Anglo-Saxon' has become a controversial term for its racist associations and long history of misappropriation, a convention that took hold especially in the nineteenth and twentieth centuries, but one which has earlier origins. For a useful survey of the problematic legacies inherent in Anglo-Saxon studies, see Rambaran-Olm, Breann, and Goodrich, 'Medieval Studies: The Stakes of the Field', 356–70. However, 'Anglo-Saxon' has also been miscast as an ahistorical terminology in itself, and whilst 'Anglo-Saxonist' and 'Anglo-Saxonism' certainly do carry with them uncomfortable associations, Alfred the Great envisioned — and perhaps ruled over — a political entity he called the 'kingdom of the Anglo-Saxons'. As such, 'Anglo-Saxon' was a contemporary term — a bridge between the disparate Saxon, Anglian, and Jutish kingdoms of earlier medieval England and the 'kingdom of the English' that emerged in the tenth century. As Catherine Karkov retains 'Anglo-Saxon' in her recent monograph on later Anglo-Saxon studies because she explores 'an imagined place that was and is home to a specific type of identity', I employ it here for the same reason; see Karkov, *Imagining Anglo-Saxon England*, 2.

² Baker, 'The Common Law in 1608', 1485.

³ On James's union project and the circumstances of the debate, see Kanemura, 'Historical Perspectives' and Wormald, 'The Union of 1603'.

⁴ Baker, 'The Common Law in 1608', 1485–6.

⁵ See Baker, *The Reinvention of Magna Carta*, 46.

to royal prerogative akin to the political conflicts of the late 1620s, 1630s, and 1640s. Rather, Coke's legal history was a reflection of his understanding of the uniqueness of English legal customs and was, in the words of Ian Williams, part of an effort to celebrate the "prestige and importance" of the legal profession.⁶ What follows assesses Coke's published writing (namely his law reports and his four-volume *Institutes of the Laws of England*) through this lens with an eye to his implicit understanding of what made the common law English and how this institutional Englishness related to Coke's conception of ethnic and linguistic English identity.

Apart from his image as a foundational figure in the evolution of the Anglo-American custom of judicial review,⁷ Coke is remembered especially for his unwavering belief in the immemoriality of the English common law — that is, that the common law's origins were so ancient as to render them untraceable, lost in "time out of mind of man".⁸ This immemoriality, J. G. A. Pocock argued in his seminal study, *The Ancient Constitution and the Feudal Law*, facilitated a belief in the antiquity of the common law which "encouraged belief in the existence of an ancient constitution, reference to which was constantly made, precedents, maxims and principles from which were constantly alleged, and which was constantly asserted to be in some way immune from the king's prerogative action".⁹ Nevertheless, more recent scholarship has shown that the "common law mind", Pocock's shorthand terminology for this early modern *mentalité*, was not necessarily the predominant attitude toward the history or supremacy of English law, and that, as observed by David Chan Smith, the early modern common law profession was "a complex intellectual culture where even ancient constitutionalism had only a limited body of adherents".¹⁰ This intellectual culture, it will be shown, included a wider community of scholars who can be classified as "legal-antiquaries", whose interests were broader than doctrinal legal matters only. Most of these scholars were trained in the common law at the Inns of Court and many practised law in some form.

⁶ Williams, 'The Tudor Genesis', 105.

⁷ See Boyer, "Understanding, Authority, and Will", 43.

⁸ Pref. 3 *Rep.*, 62.

⁹ Pocock, *The Ancient Constitution*, 46.

¹⁰ See Smith, *Sir Edward Coke*, 12. See also Tubbs, *The Common Law Mind*, 141–72.

However, they were also concerned with the history of English institutions, customs, offices, and other terminologies and how these terminologies informed shared conceptions of Englishness and English identity. This practice in itself was not unique to England; legal traditions were integral to burgeoning senses of national and cultural identity in early modern Europe in general; however, the uniqueness of the “unwritten” English common law (relative to Continental civil law traditions derived from authoritative Roman and canon law texts) strengthened the perceived English case for legal, and by extension, cultural superiority.¹¹

This institutional Englishness also interested scholars who did not claim that the common law had ancient, immemorial origins and thus, who did not hold that the law was necessarily “native” to Britain. Indeed, a strand of “Gothicism” ran counter to Cokean immemorialism, whereby the common law was the result of the Anglo-Saxon importation of Germanic legal customs to England in the fifth century.¹² Whilst this Gothicism attitude took hold especially in the later seventeenth and eighteenth centuries,¹³ lawyers and antiquarian scholars such as William Lambarde had previously promoted similar views. Coke had consulted Lambarde’s edition of the Anglo-Saxon law codes, *Archaeionomia* (1568), in compiling his treatises on the history of the common law.¹⁴ This consultation, George Garnett has shown, was part of Coke’s broader effort to demonstrate not only the antiquity of the common law, but also the continuity of that law across the Norman Conquest of 1066. In short, Coke wanted to dispel potential arguments that the Conquest had disrupted the linear progression of English legal history from immemorial antiquity.¹⁵ As Williams has recently argued that Coke was “less concerned with the quality of the English laws [than] ... their age”,¹⁶ this article approaches Coke’s legal writing through a similar lens, examining Coke’s uses of the Anglo-Saxon past and its sources in order to gain a deeper understanding of his

¹¹ See Brackmann, *The Elizabethan Invention*, 217.

¹² *Ibid.*, 200–1.

¹³ See Kidd, *British Identities*, 79–98.

¹⁴ See Musson, ‘Sir Edward Coke’, 99.

¹⁵ See Garnett, “The ould fields”, 250.

¹⁶ Williams, ‘The Saxon Constitution’, 5. I am grateful to Dr Williams for sharing with me the latest version of this as yet unpublished lecture.

conception of Englishness. Indeed, Coke moved in the same circles as antiquarian scholars, like Lambarde, who focused squarely on subjects of exclusive and unquestionable Englishness. Many of these antiquaries had been trained in the common law at the Inns of Court, and whilst legal-antiquarian scholarship (including Coke's legal treatises and law reports) in the late sixteenth and early seventeenth centuries was not as "insular" as Pocock suggested,¹⁷ the following argues that the antiquarian identification of the Anglo-Saxons as the "progenitors" of the English people informed ethno-cultural attitudes in the scholarship of jurists, such as Coke, who held that the common law predated the arrival of the Saxons in the post-Roman fifth century.

Ethno-cultural Englishness and Coke's Antiquarian Milieu

From the 1560s, a small network of scholars known as "antiquaries" began to concern themselves with the English past, which they defined narrowly in ethnic terms. For these antiquaries, descent from the Anglo-Saxons became integral to Englishness and participation in the English identity.¹⁸ This applied equally to institutions, customs, language, and the English people themselves. Where the Roman presence in Britain and the antiquity of the ancient Celtic Britons might have appealed more to scholars' Renaissance sensibilities, some sixteenth-century antiquaries made a conscious decision to prioritise a younger, English identity with Continental origins. Indeed, ethnic, linguistic, and institutional definitions of Englishness were constructed and embraced by these scholars not as signifiers of nationhood or allegiance to the monarch or the common weal, but rather as reflections of a shared conception of what it meant to be English. This antiquarian trend ran counter to the ways in which most in sixteenth-century England engaged with the national past, visible in the literature of Spenser or Shakespeare, which tended to invoke the fabled narratives of the Celtic Britons.

¹⁷ Pocock, *The Ancient Constitution*, 56. For a more recent revision of this assessment, see, for example, Goldie, 'The Ancient Constitution', 29.

¹⁸ On this narrower definition of Englishness, see Kidd, *British Identities*, 106–9 and Brackmann, *The Elizabethan Invention*, 116–7.

The past three decades have seen substantial research on Archbishop Matthew Parker's role in the Anglo-Saxon revival of the sixteenth century and his effort to demonstrate ancient precedent for Protestant liturgy and the pre-Conquest church's independence from Rome.¹⁹ However, Coke's research is best understood not as Allen Boyer has claimed, as a "late flowering of the school of Archbishop Parker",²⁰ but rather as a beneficiary of the manuscript-sharing network and broader conceptions of Englishness promoted and propagated by antiquarian scholars to support his own claims about the character and essence of the common law. By the time the Society of Antiquaries was founded in 1586 (an organisation with whose members Coke maintained professional and personal relationships),²¹ distinguished lawyers and other men of political influence had become interested in extant sources of the Anglo-Saxon period that revealed not only England's religious past, but also its linguistic, legal, ethnic, and cultural heritage. This latter, "secular", antiquarianism accompanied the common lawyers' interest in the prestige of English law, which remained a feature of Coke's legal scholarship amidst the increased politicisation of his writings on the origins of the common law throughout the reigns of James and Charles I. Whilst Garnett has argued that history books and chronicles had little influence on Coke's more doctrinal legal scholarship,²² this essay demonstrates that a more abstract interest in the law's Englishness accompanied Coke's concern with its indeterminate immemoriality and its resultant supremacy. This less "practical" interest complemented contemporary developments in the Society of Antiquaries, whose members had implicitly formulated legal, etymological, and cultural definitions of a Germanic Englishness rooted in the Anglo-Saxon past.

The Cokean scholarship examined here was compiled contemporaneously with and in the two decades following the Society of Antiquaries' most active period in the initial years of the

¹⁹ See, in particular, the collection of essays in *The Recovery of Old English: Anglo-Saxon Studies in the Sixteenth and Seventeenth Centuries*, ed. Graham.

²⁰ Boyer, *Sir Edward Coke*, 146.

²¹ *Ibid.*, 146–7. On the Society of Antiquaries more and its methodology more broadly, see Schoeck, 'The Elizabethan Society', 421.

²² For example, Garnett, "'The ould fields'", 258.

seventeenth century.²³ Coke's *Reports* were published in thirteen parts, the first eleven of which appeared in Coke's lifetime, between 1600 and 1615. Parts twelve and thirteen were published in 1656 and 1659, respectively. The *Reports* were written in Law French, and were comprised of judgements and Coke's own notes on cases he had tried, adjudicated, attended, or heard about since the 1570s.²⁴ For the present essay, the prose prefaces, written in English but also translated into Latin,²⁵ Coke attached to each of the *Reports* are of greater significance than the cases reported, as the prefaces over time, according to Garnett, "took on the character of a series of reflections on the nature of English law, without any obvious connection to the disparate reports which followed".²⁶ In this sense, the prose prefaces to the *Reports* and the four-volume *Institutes of the Lawes of England* (published between 1628 and 1644) form a cohesive corpus of source material from which Coke's less doctrinal, more generalised views on the character and essence of English legal traditions can be ascertained. Whilst the precise dates of Coke's preparatory work for the *Institutes* are not known and Coke's professional standing and political favour changed drastically after 1616,²⁷ the treatises espoused attitudes regarding the Englishness of the common law and the Germanic source of that Englishness similar to those articulated in some of the earlier *Reports*, especially those published after 1610.

The *Reports* and *Institutes* were the fruits of meticulous research and a rigorous consultation of myriad sources. Yet in his efforts to substantiate his claims, Coke subsequently acquired a reputation for historical anachronism, and has been criticised for an ostensibly credulous faith that assumed all medieval evidence was what it purported to be.²⁸ Accordingly, his methodology has been criticised for its historical inaccuracies rather than mined for what it might reveal about the relationship of early modern contemporaries with the medieval English past, both within and

²³ See van Norden, 'The Elizabethan College', 97.

²⁴ See Baker, 'Coke's Note-Books', 59–86. See also Baker's new editions of the *Reports from the Notebooks of Edward Coke*.

²⁵ Garnett, "'The ould fields'", 247.

²⁶ *Ibid.*

²⁷ See Baker, 'Coke's Note-Books', 77–80.

²⁸ Musson, 'Myth, Mistake', 69. Musson has also observed that 'no other lawyer of his time probably had so much historical material at his fingertips'; see Musson, 'Sir Edward Coke', 96, 101.

outside of the legal profession. Indeed, notwithstanding the evolution of some of Coke's ideas about legal development and, for example, the application of the common law abroad,²⁹ the implication that the common law's Englishness – a characteristic separate from its immemoriality – originated with the first English people, the Anglo-Saxons, is found in the *Reports* and *Institutes* alike. Whilst Coke's familiarity with Anglo-Saxon legal sources – clearly informed by earlier and contemporary antiquarianism – became more sophisticated over time, what follows demonstrates that from the first years of the seventeenth century at the latest, Coke's interest in Anglo-Saxon evidence emerged out of a desire shared by his antiquarian contemporaries to Anglicise the pre-Conquest past, its law, and as will be shown, its vernacular language.³⁰

In modern scholarship, little effort has been made to contextualise Coke's researches within the nascent discipline of Anglo-Saxon studies. What follows re-assesses Coke's receptiveness — both conscious and unconscious — to perceptions of Germanic Englishness which had solidified in the scholarship of Lambarde and his mentor, Laurence Nowell, and later, in the Society of Antiquaries. As will be shown, this receptiveness extended beyond the sharing of medieval manuscripts, and transcended philosophical differences amongst legal scholars on the origins of the common law. Coke's writings featured an ostensibly paradoxical commitment to the native immemoriality of the common law, given his interest in and celebration of, the common law as a vital element of what it meant to be English. Assessment of Coke's legal history over the course of his long career facilitates a novel analysis not only of how early modern juridical scholars understood the origins of the common law, but also of how they resolved the perceived dichotomy between an inclusive Britishness and an exclusive Englishness.

Throughout the legal scholarship which formed the *Institutes*, the prose prefaces to the *Reports*, and his speeches as a member of Parliament in the late sixteenth century, Coke deployed Anglo-Saxon evidence as precedent for specific practices in English common law. Of equal

²⁹ See Hulsebosch, 'The Ancient Constitution', 439–44.

³⁰ This process began in earnest in the late 1550s. In addition to Brackmann, see Larkin, *The Making of Englishmen*, 131–3.

importance to the following discussion are Coke's invocations of the Anglo-Saxon past to prove two, more theoretical, points that were integral to his understanding of the common law: first, that extant Anglo-Saxon law codes and sources of legal administration supplied evidence that the Norman Conquest did not alter the quintessential features and characteristics of the ancient common law and, secondly, that the Anglo-Saxons were responsible for developing a native common law system of pre-Roman antiquity into a fixture of Englishness and English identity, as understood among early modern contemporaries. Coke did not believe that the common law was a Germanic import as Lambarde is thought to have done.³¹ However, the large corpus of Coke's treatises and other expositions of his thought reveals that, by the early seventeenth century, he considered allusions to the Anglo-Saxon past especially effective in presenting the common law as a quintessential feature of English cultural identity. This was accomplished through citation of examples of both specific jurisprudential customs and more opaque philosophical axioms which were seen to distinguish the English common law from distinct legal systems in Scotland and Continental Europe.

Despite his principal interest in sources of English law, Coke was trained in the humanist disciplines of logic and rhetoric. His well-stocked library in Norfolk included a substantial collection of classical literature,³² and he repeatedly drew on Cicero, Virgil, Seneca, and Tacitus throughout his *Institutes* in seeking to achieve the ideal balance between legal scholarship and rhetoric.³³ This habit was not unique to Coke; Mark Walters has observed that many of Coke's legal colleagues found "guidance within the general developments in intellectual inquiry associated with Renaissance humanism, especially developments in logic and rhetoric, and a 'humanist spirit' soon became apparent in common law writing".³⁴ As Daniel Woolf has argued, history therefore represented "a tool for casting light on the present, through precedent, custom, and explanation",³⁵

³¹ Brackmann, *The Elizabethan Invention*, 201.

³² See Hassall, *A Catalogue of the Library of Sir Edward Coke*.

³³ See Musson, 'Sir Edward Coke', 98.

³⁴ Walters, 'Legal Humanism', 358.

³⁵ Woolf, 'Afterword: Shadows of the Past', 640.

and although Garnett is undoubtedly correct that Coke preferred more verifiable legal records to dubious chronicle histories,³⁶ Coke was nevertheless a member of a scholarly intelligentsia whose historical interests reflected concurrent trends in antiquarian scholarship.

Coke was a keen participant in the manuscript-sharing network established by the “Parker school”,³⁷ and Coke benefitted from a corpus of Anglo-Saxon documentary evidence that had become considerably more accessible since the 1560s. Additionally, Coke’s legal interests were shared by members of the Society of Antiquaries — many of whom were his professional colleagues. Coke applied jurisprudential logic to questions of legal history that also interested his acquaintances in the Society, including the lawyers Francis Tate, Joseph Holland, and Arthur Agarde.³⁸ As Williams argues, Coke’s scholarship was bolstered, though not inspired, by what Coke considered challenges to the common law’s supremacy by the first two Stuart Kings of England.³⁹ Rather, the following posits that Coke’s Anglo-Saxon interests were products of contemporary conventions of historically-grounded argument, his desire in the early 1600s to substantiate his long-held theory of immemorial supremacy, and his engagement with antiquarian discourses — rooted in legal etymology — which contributed to an emerging historical consciousness defined by English institutions.

In the preface to the third part of his *Reports* (1602), which was published before James’s accession as king of England, Coke made explicit his theory of legal continuity, which critically did not presume that the common law was unchanging or immune to interference. Instead, he conceded that “sometime by actes of Parliament, and sometime by invention and wit of man, some points of the auncient Common Law have been altered or diverted from his due course”.⁴⁰ Thus, the ancient constitution was, as argued by Williams, a “mentalité ... not simply a series of moves in political

³⁶ Garnett, “The ould fields”, 258.

³⁷ A number of books and manuscripts in Coke’s library catalogue contain inscriptions indicating Parkerian provenance, including a copy of Bartholomaeus Anglicus’ *De proprietatibus rerum*, which is inscribed in Matthew Parker’s famous red crayon. See HH no. 581, 49.

³⁸ See Boyer, *Sir Edward Coke*, 146–7. See also Schoeck, ‘The Elizabethan Society’, 421.

³⁹ Williams, ‘The Tudor Genesis’, 104, 123. See also Smith, *Sir Edward Coke*, 44.

⁴⁰ Pref. 3 *Rep.*, 73.

discourse”;⁴¹ its structure and governing principles remained unchanged despite alterations to the precise form it assumed at any historical juncture. It was integral to Coke’s legal history that the defining qualities of the law had existed in England since a primordial antiquity, which he argued had replaced the Norman legal tradition once William I was made aware of English law’s superiority:

William the Conquerour finding the excellencie and equitie of the Lawes of England, did transport some of them into Normandy, and taught the former Lawes written as they say in Greeke, Latine, British, and Saxon tongues ... in the Normane language, and the which are at this day (though in processe of time much altered) called the Customes of Normandie ... most of the Customes of Normandie were derived out of the Lawes of England, in or before the time of the said King Edward the Confessor, from whom William Duke of Normandie did derive the title, by colour whereof he first entred into the crowne of England.⁴²

This argument was, in effect, a modified, legalised exposition of the *tempus regis Edwardi* interpretation of the Conquest, wherein William’s claim to England was legitimate and Edward the Confessor had named the Duke of Normandy as his successor prior to Harold Godwinson’s usurpation of the crown.⁴³ Coke’s reference to *Domesday Book* in the same preface erroneously attributed William’s famous survey to the reign of Edward the Confessor, “as it appeareth” in Anthony Fitzherbert’s *Novelle Natura Brevium* (1534).⁴⁴ Coke therefore viewed *Domesday Book* through later legal treatises in an effort to demonstrate through systematic citation of authoritative texts in reverse chronology that, in this case, certain elements of English real property law that used French terminologies (or appeared to have been Norman imports) were fixtures of the pre-Conquest English legal system.⁴⁵

Coke initially understood *Domesday Book* as a legal text of Edward the Confessor’s reign, whose authority was contingent upon its consistency with his view that the laws of Anglo-Saxon England had been exported to Normandy upon William’s realisation of their superiority to Norman

⁴¹ Williams, ‘The Tudor Genesis’, 261–2.

⁴² Pref. 3 *Rep.*, 76–7.

⁴³ See Vincent, ‘The Use and Abuse’, 208–9.

⁴⁴ Pref. 3 *Rep.*, 63.

⁴⁵ The terminology in this case was ‘ancient demesne’, a feudal concept which afforded certain privileges to tenants. ‘Ancient demesne’ refers in particular to royal land at the time of the Conquest. See also Garnett, “‘The ould fields’”, 278. On backward legal reading, see Williams, ‘The Tudor Genesis’, 117.

custom. This conclusion appears to have been drawn from Coke's reading of the thirteenth-century treatise known as the *Grand Custumier de Normandy*, his own copy of which he annotated heavily.⁴⁶ Coke's commitment to this interpretation of the Conquest led to him to observe in his second *Institute* that "in Domesday Haroldus, who usurped the Crown of England, after the decease of King Edward the Confessor, is never named per nomen Regis, sed per nomen Comitis Haroldi, seu Heraldi; And therefore we have omitted him".⁴⁷ Even upon his subsequent realisation of Domesday's post-Conquest provenance,⁴⁸ Coke did not revisit the question of how Domesday Book's disregard of Harold might have rendered it an ideal source for demonstrating legal continuity in the *tempus regis Edwardi*.⁴⁹

Garnett has argued that Coke was "so fettered by ... lawyerly logic that he had no inkling of how germane Domesday might have been to his case for continuity".⁵⁰ Certainly, Coke sought out legal, documentary material that facilitated the application of legal reason and methodology to his studies of the origins of English law. However, there was considerable overlap in the activities of different legal, parliamentary, and antiquarian communities in early modern England, and historical precedent was seen to be as powerful a rhetorical tool in these environments as it was a sound basis for historico-legal argument within and outside the law.⁵¹

Thus, Coke's "lawyerly logic" reflected tendencies inherent in early modern jurisprudence and the theoretical ideals which underpinned lawyers' and legal-antiquaries' engagement with the past. As such, the rest of this essay argues that various other factors contributed to Coke's conception of Englishness and English history — not least the scholarship of the Society of Antiquaries, whose final years of activity were contemporaneous with the publication of the first volumes of Coke's *Reports*. Indeed, whilst Linda van Norden argued that an anonymous Society of Antiquaries tract on "the antiquity of the laws of England" had cited a law report of the Society

⁴⁶ HH MSS 434 and 443, the former of which is inscribed 'Edw: Coke'.

⁴⁷ '... king by name, but by the name of Earl Harold, or Herald'. 2 *Inst.*, 753.

⁴⁸ See Williams, 'The Tudor Genesis', 123, n. 103.

⁴⁹ i.e., 'the time of Edward the Confessor'.

⁵⁰ Garnett, "'The ould fields'", 280.

⁵¹ Archer, 'Elizabethan chroniclers', 135. See also Lobban, 'The Common Law Mind', 18–21.

member John Davies, Attorney General for Ireland, the reference was actually to Coke's third *Report* (1602) "wherein [Mr Attorney General] maketh mention of British laws" — published when Coke held the office for England and Wales.⁵² Although Coke was certainly not a member of the antiquarian "establishment", if such a thing existed, he nevertheless benefited from and influenced the researches of legal-antiquaries within and outside of the Society.

Principles of Coke's Legal History and Anglo-Saxon Evidence

On 10 April, 1593, Coke, then Speaker of the Commons, addressed Queen Elizabeth in the House of Lords, remarking: "The high court of [Parliament] most high and mighty prince, is the greatest and most ancient court within this your realm. For before the Conquest in the high places of the West-Saxons, we read of a parl. holden; and since the Conquest they have been holden by all your noble predecessors kings of England".⁵³ Coke continued:

In the time of the West-Saxons a parl. was holden by the noble king Ina, by these words: 'I, Ina, king of the West-Saxons, have caused all my Fatherhood, Aldermen and wisest Commons, with the godly men of my kingdom, to consult of weighty matters, &c.' Which words do plainly shew all the parts of this high court still observed to this day. For by king Ina is your maj.'s most royal person represented. The Fatherhood, in ancient time, were these which we call bps. and still we call them rev. Fathers, an ancient and chief part of our state. — By Aldermen were meant your noblemen. For so honourable was the word Alderman in ancient time, that the nobility only were called Aldermen. — By Wisest Commons is meant and signified knights and burgesses.⁵⁴

Coke owned a copy of the twelfth-century Latin collection of Old English laws *Quadripartitus*,⁵⁵ and it is possible that Coke's interpretation of Ine's alleged Parliament was derived from this manuscript. Williams has noted a similar analysis of Saxon gatherings in Lambarde's *Archeion* (c. 1591),⁵⁶ although Lambarde had accurately translated the original preface to the Old English laws

⁵² van Norden, 'The Elizabethan College', 194. Coke was Attorney General for England and Wales from 1594–1606. See *CCD*, vol. I, 8.

⁵³ 10 April, 1593, CPH, vol. I, 889.

⁵⁴ *Ibid*, 889–91.

⁵⁵ London, BL, Additional MS 49366 [HK], formerly HH MS 337; 'late the booke of Parker ArchB: of Canterbury'. See Hassall, *A Catalogue*, 27.

⁵⁶ Williams, 'The Tudor Genesis', 113. This is noted in Lambarde, *Archeion*, 249. Though not printed until 1635, *Archeion* was circulating in manuscript throughout the antiquarian community from the early 1590s.

of Ine into modern English as “with the advice & teaching of Cenred my father”, as opposed to the erroneous “fatherhood”. Similarly, in the earlier *Archaionomia*, Lambarde had translated the original Old English, “mid lære Cenredes mines fæder”, as “suasu & instituto Cenredi patris mei”.⁵⁷ It is therefore unlikely that *Archeion* was Coke’s source, and it is more probable that Coke had erroneously translated the passage in *Archaionomia* in attempting to show that Ine had held a Parliament with the estates of the “fatherhood”, noble Aldermen, and “wisest Commons”.

What is interesting is that in his Society paper on Parliament over a decade later, the lawyer-antiquary and future Justice of the King’s Bench, John Dodderidge, had transcribed Ine’s laws nearly verbatim to Coke’s House of Lords speech in 1593, also mistranslating “my father” as “all my fatherhood”, which “in those ancient dayes were those whom we call Bishops, and therefore were termed reverend fathers”.⁵⁸ Although Williams suggests that “both Dodderidge and Coke shared Lambarde as a source”,⁵⁹ it is more plausible that Coke had drawn on Dodderidge, or that Dodderidge had drawn on Coke, in examining Anglo-Saxon parliaments, as Dodderidge and Coke were both MPs in the Parliament of 1589.⁶⁰

Dodderidge and Coke shared a legal worldview, particularly regarding the rationality and logic which the common lawyers held defined common law principles.⁶¹ Both scholars argued that the origins of the common law were lost, as articulated by Pocock, in the “mists of antiquity”,⁶² and in Coke’s words, in “time out of mind of man”.⁶³ Coke and Dodderidge’s insistence that Ine had held a Parliament — though based in this case on slightly erroneous readings of Lambarde — was equally rooted in evidence drawn from two fourteenth-century treatises: the *Mirror of Justices*, about which Coke claimed “most of it was written long before the Conquest”,⁶⁴ and the so-called

⁵⁷ ‘with the advice and instruction of Cenred, my father’. Lambarde, *Archaionomia*, C. 1v.–fol. 1r.

⁵⁸ *CCD*, vol. 1, 285.

⁵⁹ Williams, ‘The Tudor Genesis’, 113, n. 57.

⁶⁰ Ibbetson, ‘Dodderidge, Sir John’.

⁶¹ See Walters, ‘Legal Humanism’, 358.

⁶² Pocock, *The Ancient Constitution*, 261.

⁶³ *Pref. 3 Rep.*, 62.

⁶⁴ *Pref. 10 Rep.*, 338.

“ancient Treatise”, *Modus tenendi parliamentum*,⁶⁵ “wherein the Assembly of the Kings, the Lords and Commons, according to the manner continued to this day, is set down, which I have in a fair and very ancient written hand, whereby it is manifest that Conventus Nobilium & Sapientum, &c. included both the Lords and the Commons of the Parliament”.⁶⁶

These texts inspired some of Coke’s most anachronistic claims, particularly surrounding the purported laws of King Arthur and Coke’s repetitious insistence that every reference to a pre-Conquest meeting or assembly in his books referred to a parliament.⁶⁷ That is, the French etymology of the word “parliament” did not reflect its origins or its significance as “part of the frame of the Common Laws”.⁶⁸ The axiomatic contraction of “Parler le Ment” was noted by Coke, prior to his assertion that “the Saxons called this Court micel gemott” and “that W. the Conqueror changed the name of this Court, and first called it by the name of a Parliament, yet manifest it is by that which hath been said, that he changed not the frame or jurisdiction of this Court in any point”.⁶⁹ Notwithstanding these anachronisms, for Coke, evidence of an Anglo-Saxon parliament in Ine’s laws, refined through Lambarde’s editions of Old English law codes, proved the institution’s antiquity.

By 1613, Coke had examined Ine’s law code more thoroughly, quoting from *Archaionomia* (“as hath been anciently translated into Latin [which Translation I have]”) in the preface to the ninth volume of his *Reports*: “Ego Ina Dei gratia West Saxonum Rex, exhortatione & doctrina Cenredes patris mei”.⁷⁰ His accurate transcription of Ine’s laws reflects a subsequent, more informed consultation of the same sources twenty years later, yet even prior to James’s accession in 1603,

⁶⁵ Hassall, *A Catalogue*, 26–8, nos. 333, 335, 345, and as Garnett has shown, possibly 350. See Garnett, *The Norman Conquest*, C9, 40, n. 173.

⁶⁶ ‘a meeting of noble and wise men’, trans. Sheppard, pref. 9 *Rep.*, 297. See also Galbraith, ‘The Modus Tenendi Parliamentum’, 81–99 and Tucker, ‘The Mirror of Justices’, 99–109.

⁶⁷ On Arthur’s laws through the *Leges Edwardi*, see Calvin’s Case in 7 *Rep.*, 166–232. See also Pref. 9 *Rep.*, 288. On Coke’s marginalia relating to pre-Conquest parliaments, see Garnett, “‘The ould Fields’”, 277, n. 230.

⁶⁸ Pref. 9 *Rep.*, 292.

⁶⁹ *Ibid.*, 298–9. This notion, too, was likely refracted through Lambarde. See Kelley, ‘History, English Law and the Renaissance’, 35–6.

⁷⁰ ‘I, Ine, by the grace of God, king of the West Saxons, by the exhortation and teaching of Cenred, my father’. Pref. 9 *Rep.*, 292.

Coke was demonstrably aware that his claims regarding the Elizabethan parliament were strengthened through reference to what he considered reliable pre-Conquest material in the absence of evidence for the ancient common law. His discussion of the parliaments held by eight other Anglo-Saxon kings in the ninth volume of the *Reports* is representative of his later scholarly tendencies, predicated on the citation of as much evidence as possible.

Similar reasoning characterised much of Coke's study of the origins of English jurisprudence, believing it "sufficiently proved that the lawes of England are of much greater antiquity than they are reported to be".⁷¹ Coke filtered and substantiated his discussions of the laws of Alfred, Sigeberht of the East Saxons, and Edward the Confessor through Geoffrey of Monmouth, Polydore Vergil, and William of Malmesbury,⁷² copies of whose works he possessed in his library.⁷³ However, for Coke, legal sources were "of that authority that they need not the aide of any Historian", and though questions were raised by non-jurists as to "whether Historiographers do concurre" with his conclusions throughout the *Reports* published to 1611, he asserted that "the antiquitie and excellencie of our common lawes doe not only appeare by Historians of our owne persuasion in Religion, but by monasticall writers [also]".⁷⁴

Coke's interest in the Anglo-Saxon past, and use of its sources, was encouraged and facilitated by his relationships with prominent members of the Society of Antiquaries. The increased citation of pre-Conquest charters in Society proceedings provided Coke with access to a corpus of Anglo-Saxon chancery manuscripts in growing circulation.⁷⁵ He owned at least four single-sheet Anglo-Saxon charters himself,⁷⁶ and despite Julia Crick's postulation that he "may have found the texts of all of the charters cited [in his writings] in manuscripts in his own library",⁷⁷ Coke seems to have been a more proactive participant in manuscript sharing than hitherto

⁷¹ Pref. 3 *Rep.*, 66.

⁷² *Ibid.*

⁷³ HH MSS 499, 500, 503, and 516.

⁷⁴ Pref. 8 *Rep.*, 245.

⁷⁵ Keynes, 'The Cult of King Alfred', 243.

⁷⁶ HH MSS 1201-4; S 746 (or rather, a single-sheet version thereof, now lost), S 558, S 287, and S 1030, respectively. Only S 1030 remains at Holkham.

⁷⁷ Crick, 'The Art of the Unprinted', 129.

appreciated.⁷⁸ Furthermore, Coke's uses of Anglo-Saxon evidence demonstrate that he was sympathetic to what Brackmann has termed "cultural discourses" surrounding Englishness and ethnicity developing throughout contemporary antiquarian communities.⁷⁹ Coke's expressions of the antiquity and supremacy of the common law were reinforced by complementary antiquarian discourses which rendered Anglo-Saxon administrative material not only more accessible, but also increasingly appreciated for its legal reliability and association with a burgeoning ethnic definition of what it meant for institutions, language, and people to be English.

Coke's theoretical expositions of the history of the common law were imbued with his characteristic legal logic, filtered through a wide array of pre-Conquest evidence. In the preface to the sixth part of the *Reports*, Coke argued that "neither the Laws of any Nation of the World which worshippeth God, are of so old and ancient years; whereof the contrary is not to be said nor thought, but that the English Customs are very good, yea of all other the very best", asserting that if the original, ancient English legal system "had not excelled all others", the "Romans, Saxons, Danes or Normans; and especially the Romans, [who] do boast of their Civil Laws, would ... have altered or changed the same".⁸⁰ To demonstrate this, Coke identified "four particular cases" where the common law "was before the Conquest, as now it is", in response to the criticisms of the exiled Jesuit priest, Robert Persons.⁸¹ Persons's *Answere to the fifth part of Reportes lately set forth by Syr Edward Cooke knight* (1606) challenged Coke's implication that detachment from Roman influence was inherent in the native immemoriality of the common law. By contrast, Persons argued that English rulers had obstructed church governance and that the English themselves were responsible

⁷⁸ Schoeck's essay on law and Anglo-Saxon antiquarianism in early modern England omitted Coke entirely. See Schoeck, 'Early Anglo-Saxon Studies', 102–10. Coke's library catalogue included various volumes that illustrate his participation in, or at least knowledge of, the antiquarian scholarship discussed throughout this essay. See, for example, HH MS 377, "'de priscis Anglorum legibus", translated out of the Saxon tongue by Mr Lamberd' (*Archaionomia*), and HH MS 506, Parker's *De Antiquitate Britannicae ecclesiae*, inscribed 'Hunc cum aliis Johannes Paker miles, filius Mathaej Cantuar' Archiepiscopi, dono dedit. Edw. Coke ex dono Jo Parker militis' / 'John Parker, son of Matthew, Archbishop of Canterbury, gave this as a gift. Edward Coke from [John] Parker the knight'.

⁷⁹ Brackmann, *The Elizabethan Invention*, 5–6.

⁸⁰ Pref. 6 *Rep.*, 150.

⁸¹ *Ibid.*

for perceived abuses and corruption in the Church of Rome — the “true mother-Church of Christ, and Christian religion”.⁸²

In dispelling Persons’s criticisms, Coke demonstrated his command of histories whilst maintaining the legal authority he had established in the third volume of the *Reports*: “I pray thee beware of Chronicle Law reported in our Annales, for that will undoubtedly lead thee to error”.⁸³ Coke regarded legal sources as more reliable than medieval chronicles which purported to treat subjects of legal interest, sharing the common jurisprudential tendency in early modern England that has been summarised by Musson as a “natural faith in legal and governmental” material.⁸⁴ Whilst Garnett has argued that Coke “did not intend historical writing to be taken entirely seriously”,⁸⁵ Coke nevertheless referred to chronicles to supplement his refutation of Persons, who had criticised Coke’s interpretation of the immemorial common law as fundamentally outside of Roman influence.

Thus, Coke’s intention in the preface to the sixth part of the *Reports* was to demonstrate that the common law “was before the Conquest, as now it is”, and that the “ancient laws of England” did not permit “any Appeal to Rome in Causes Spiritual or Ecclesiastical”.⁸⁶ To support the latter argument, Coke cited the Constitutions of Clarendon (1164), by which Henry II had attempted to limit ecclesiastical privileges, and directed “every Man ... with an equal mind” to consult Coke’s report on *Caudrey’s Case* (1591) in the fifth volume of the *Reports*, where he had defined the narrow parameters of ecclesiastical jurisdiction and prerogative.⁸⁷

Thus, following Parker’s example (but for discrete legal purposes), Coke relied upon Anglo-Saxon charters to prove his first two points against Persons: that “the Queen, being Wife to a King Regnant, was a person sole by the Common Law to sue and be sued, to give and take, &c. solely

⁸² Persons, *An Answere to the fifth part of Reportes*, I. 3v. See also Houliston, *Catholic Resistance in Elizabethan England*.

⁸³ Pref. 3 *Rep.*, 61.

⁸⁴ Musson, ‘Myth, Mistake’, 70.

⁸⁵ Garnett, “‘The ould fields’”, 261.

⁸⁶ Pref. 6 *Rep.*, 151.

⁸⁷ See Waite, ‘The Struggle of Prerogative and Common Law’, 145.

without the King”, and secondly, that “a Man seised of Lands in Fee-simple, shall forfeit his Lands and Goods by Attainder of Felony by Outlawry, and that thereby his Heirs should be disinherited”.⁸⁹ Offering precedent for queens consort possessing the right to “give and take” as only permitted by the common law, Coke wrote: “I had no sooner seen these Questions, but instantly I found direct and demonstrative Answers to the same”.⁹⁰ To this end, he cited and translated into English a Latin charter for Æthelswith (AD 868), “queen of Mercia” to Cuthwulf, her “faithful servitor”, in which King Burgred’s wife granted “a piece of Land of fifteen Manses”; “part of [Æthelswith’s] peculiar power”.⁹¹ This was a question to which Coke returned in his commentary on Littleton in the first *Institute*, arguing there that “the Queene, the Consort of the King of England, is an exempt person from the King by the Common Law, and is of abilitie, and capacitie to purchase and grant without the King”.⁹²

Garnett has underscored Coke’s habit of ignoring “what was not germane to his case”,⁹³ which is here visible in Coke’s failure to acknowledge (or recognise) that both Æthelred, king of the West Saxons and Burgred, king of the Mercians (Æthelswith’s husband, the king regnant) attested the charter, both noting their “consent and subscription” to Æthelswith’s so-called independent action.⁹⁴ Coke’s omission may reflect the relative adolescence of Anglo-Saxon cartulary studies or Coke not yet having developed a sufficient familiarity with pre-Conquest charters, or perhaps, Coke had noticed the attestations, and regarded them as surplus to his argument. Coke had found an example of an English queen consort before the Conquest granting land of her own accord, which satisfied the conditions of his argument; the practice was therefore a feature of the ancient common law.

⁸⁹ Pref. 6 *Rep.*, 151.

⁹⁰ *Ibid.*

⁹¹ S 1201; Pref. 6 *Rep.*, 152.

⁹² 1 *Inst.*, 600.

⁹³ On this practice, see Garnett, “The ould fields”, 263.

⁹⁴ See also S 1201: ‘Ego Æthelred rex occidentalium Saxonum consensi et subscripsi’, ‘Ego Burgred rex Merciorum consensi et subscripsi’; ‘I, Æthelred, king of the West Saxons, consented and subscribed’, ‘I, Burgred, king of the Mercians, consented and subscribed’.

In further refuting Persons's claims, Coke continued to his second point, showing "ancient" precedent for real property held in fee simple being revoked under certain criminal circumstances. He deployed a charter for Æthelred the Unready as evidence, whereby the king had granted two and a half hides to an individual called Wulfric, as "the said Land came to the disposition of [Æthelred's] right, by the crime of a certain Mans unspeakable Presumption, wherewith boldly and feloniously he hath not abhorred to incumber himself, which Man his Parents named Ethelsig, albeit he hath discredited his Name by a foul fault".⁹⁵ As noted by Williams, Coke's need to "move beyond the Elizabethan material and understandings he had relied upon for several decades" evidently stimulated his interest in the potential value of Anglo-Saxon charters, in increased circulation, as supplemental evidence.⁹⁶ For Coke, however, these charters represented "the very Voice of the ancient Laws of this Realm proved and approved in all successions of Ages";⁹⁷ not only did the documents provide a window into the administrative apparatus of the pre-Conquest English and the Anglo-Saxon adherence to the immemorial common law, but they also supplied primary evidence for the period in which the ancient common law became "English".

The particular charters that Coke cited in addressing Persons's arguments can be traced with fair certainty to a manuscript roll acquired by the antiquary Robert Cotton in or around 1617,⁹⁸ as S 886 and the very rare S 1201 both appear in the cartulary. Although Crick has posited that these charters were probably taken from the same Abingdon roll in Cotton's library,⁹⁹ the roll was probably in the possession of the MP and subsequent ambassador to France, Sir Thomas Parry, when Coke transcribed the charters prior to compiling the sixth volume of his *Reports* — ten years before Cotton's acquisition of the manuscripts. Coke must have seen the Abingdon cartulary now catalogued by the British Library as Cotton MS Claudius B VI whilst Parry still owned the original

⁹⁵ S 886, trans. Sheppard, Pref. 6 *Rep.*, 153.

⁹⁶ Williams, 'The Tudor Genesis', 123.

⁹⁷ Pref. 6 *Rep.*, 155.

⁹⁸ Only one cartulary roll contains both of these charters: London, BL, Cotton MS Claudius B VI. See provenance notes for this manuscript in the *Electronic Sawyer* [<https://esawyer.lib.cam.ac.uk/manuscript/291.html>].

⁹⁹ Crick, 'The Art of the Unprinted', 129.

manuscript. Despite compelling evidence that Coke drew extensively upon a collection of transcripts he kept in his library,¹⁰⁰ it is not known how or when Coke transcribed the originals.¹⁰¹ There are thus grounds to lend at least some credence to Coke's assertion that he worked "tam laboris quam ingenii",¹⁰² despite Crick's scepticism regarding Coke's claims of "antiquarian toil".¹⁰³

While Coke turned to Anglo-Saxon evidence in defence of his ancient constitutionalism against Persons, several passages in the *Institutes* reveal his increasing appreciation for these sources over time, and ought be considered alongside contemporary trends in antiquarian discourses. The *Institutes of the Laws of England*, a treatise in four volumes intended as a guide to "the knowledge of the nationall Lawes of England" (published between 1628 and posthumously, 1644),¹⁰⁴ have been shown by Musson to have been a product of Coke's "wide reading and eclectic source material, both legal and historical", perhaps in response to James I's proposal to codify both English and Scottish law in accordance with the Roman model, a project Francis Bacon had supported consistently between the 1590s and the 1620s.¹⁰⁵ This proposition would have horrified Coke.

In a similar vein, the interest of antiquarian scholarship in generating firmer definitions of Englishness and English identity was reflected in Coke's assertions relating to the ancient common law, finding meaning in the Anglo-Saxon past, similarly to the ways in which members of the Society of Antiquaries engaged with the same evidence.¹⁰⁶ Coke's consultation of "many Records, never before published in print" therefore illustrates Coke's propensity to cite as much usable

¹⁰⁰ Ibid., 128–9.

¹⁰¹ Parry's ownership of this cartulary is noted in Sawyer. Perhaps Parry had acquired the cartulary out of genealogical interest and later permitted Coke to transcribe its contents. In the 1850s, Henry Godwin noted that the 'Parrys are one of the oldest families in this kingdom; and can trace their pedigree far back into Anglo-Saxon times'; Godwin, *The Worthies and Celebrities*, 36.

¹⁰² 'with both labour and talent'. Qu in Crick, 'The Art of the Unprinted', 127. See also Baker, 'Coke's Note-books', 67.

¹⁰³ Crick, 'The Art of the Unprinted', 127.

¹⁰⁴ 1 *Inst.*, 585.

¹⁰⁵ Musson, 'Sir Edward Coke', 96. See also Shapiro, 'Francis Bacon', 350–6.

¹⁰⁶ See Boyer, *Sir Edward Coke*, 146–8.

Anglo-Saxon evidence as he could find, “to the end the prudent Reader may discern what the Common Law was before the making of every of those Statutes, which we handle in this work, and thereby know whether the Statute be introductory of a new Law, or declaratory of the old”.¹⁰⁷

Coke’s conclusions were influenced not only by Anglo-Saxon source material to which he now had access, but also, more broadly, by a general interpretation of English legal history that he had espoused in 1605 in the preface to the fifth part of the *Reports*: that the “auntient & excellent Lawes of England are the birth-right and the most auntient and best inheritance that the subjects of this realm have, for by them hee injoyeth not onely his inheritance and goods in peace & quietnes, but his lyfe and his most deare Countrey in safety”.¹⁰⁸ Coke contrasted the idea that all English subjects inherited and shared in the “excellent Lawes of England” with his criticism of administrative and monarchical abuses — namely, rampant judicial corruption and perceptions that James VI & I (and later, Charles I) were failing to respect the supremacy of the common law in the way that Elizabeth had. The *Institutes* therefore reiterated many of Coke’s earlier views on the origins of the common law, but increasingly based on a wider range of sources. Where the *Reports* “related the opinions and judgements of others”, Coke explained that “herein [in the *Institutes*] we have set downe our owne”.¹⁰⁹ As demonstrated below, setting out his own judgments necessarily involved gathering his own evidence, especially evidence that would bolster both the supremacy of the common law and perceptions of the law as a unique feature of English culture and society.

Coke’s analysis of the history of the common law depended on his ability to cite what he considered reliable evidence for this “auntient and excellent” inheritance, designed to protect the property and interests of the subjects of the realm. For example, he explained in the first *Institute* that “if a man by Deed give lands to another, and to his heires without more saying, this is good, if he put his Seale to the Deed, deliver it, and make liverie accordingly”, prior to justifying the

¹⁰⁷ 2 *Inst.*, 752.

¹⁰⁸ 5 *Rep.*, 127.

¹⁰⁹ 1 *Inst.*, 587.

antiquity of this practice: that “the sealing of Charters and Deeds is much more ancient than some, out of error, have imagined”.¹¹⁰

To support this claim, Coke employed a charter for King Eadwig (whom he erroneously called “Edwyn”), “bearing Date Anno Domini 956, made of the land called Jecklea [Yaxley] in the Isle of Ely, [which] was not onely sealed with his owne Seale (which appeareth by these words, Ego Edwinus gratia Dei totius Britannicae telluris Rex meum donum proprio sigillo confirmavi) but also the Bishop of Winchester put to his Seale, Ego Aelfwinus Winton Ecclesiae divinus speculator proprium sigillum impressi”.¹¹² Though Coke seems also to have mistaken Ælfwine for Ælfsige, (Bishop of Winchester until 959), his citation of this charter, almost certainly through the Red Book of Thorney,¹¹³ represented an attempt to offer pre-Conquest precedent for the process by which charters and deeds were proven authentic; a central tenet of the customs associated with the handling of deeds and charters by early modern English common law courts.

Coke’s subsequent reference to “the Charter of King Offa, whereby he gave the Peterpence” which “doth yet remaine under Seale” offered an intriguing addition to this evidence,¹¹⁴ reflecting Coke’s method of reading and citing legal material chronologically backward in accordance with the conventions of his profession.¹¹⁵ That is, Coke employed the tenth-century charter from the Red Book in his argument prior to drawing attention to the seventh-century document, as he would have deployed legal precedent of his own day. In the later seventeenth century, Sir Matthew Hale was unable to trace Coke’s source for the Offa charter, noting that “if Coke had informed us where it might be seen, it would perhaps, appear to be either a great rarity, or a great counterfeit”.¹¹⁶ Perhaps

¹¹⁰ 1 *Inst.*, 624.

¹¹² ‘I, Edward, by the grace of God king of all the land of Britain, have confirmed my gift with my own seal’; ‘I, Ælfwin, God’s overseer of the church of Winchester, have stamped my own seal’, trans. Sheppard. 1 *Inst.*, 624. Sheppard’s translation of ‘Edwinus’ and ‘Aelfwinus’ as ‘Edward’ and ‘Ælfwin’, respectively, should be ‘Eadwig’ and ‘Ælfsige’.

¹¹³ S 595, in CUL, Additional MSS 3020–1.

¹¹⁴ 1 *Inst.*, 624.

¹¹⁵ Williams, ‘The Tudor Genesis’, 117.

¹¹⁶ Hale, *The History of the Common Law*, 343.

Coke had read of the alms Offa paid to Rome, as described by Polydore Vergil,¹¹⁷ and included a brief note to this effect.¹¹⁸

Nevertheless, Coke's discussion of this particular tenet of English law was based on especially rare Anglo-Saxon charters, despite Hale's subsequent explanation that the word "sigillum", which "occurs in many Latin charters before the Conquest", "did not always signify a seal of wax".¹¹⁹ Coke's seemingly-superficial uses of Anglo-Saxon sources to support claims of legal immemoriality have provoked censure from later historians, yet for the purposes of this study, his corroborative diligence is more significant than his failure to assess pre-Conquest evidence accurately in each instance. His repeated references to medieval sources, which Musson has observed often seem "ornamental garnishes rather than penetrating and necessary", reflected Coke's desire to contextualise the evolution of English law as fully as possible.¹²⁰

Though legally motivated, such attempts at historical contextualisation and corroboration rendered Coke sympathetic to the objectives and methodologies of his antiquarian contemporaries, an increasing number of whom attributed the foundations of the English legal system to the Anglo-Saxons. Whilst Coke's theory of English legal immemoriality was not intrinsically reconcilable with legal historicism predicated on the migration of common law principles with the Anglo-Saxons in the fifth century, his use of the Anglo-Saxon laws via Lambard's editions is a reminder that Coke participated in the legal-antiquarian discourses discussed above.

Coke's interests in tenure and land law coincided with the increased currency of Anglo-Saxon charters in antiquarian scholarship, especially in relation to the prevalence of contemporaneous etymological and toponymic research. Indeed, Coke's acquaintance Arthur Agarde had addressed the Society of Antiquaries on the antiquity of seals in 1591,¹²¹ similarly

¹¹⁷ i.e., in HH MS 503, *Polidor Virgills historie of England*. See Vergil, *Anglica Historia*, IV, cap. 32.

¹¹⁸ His brevity might have been so as not to appear to contradict the Protestant polemical scholarship of Parker.

¹¹⁹ Hale, *The History of the Common Law*, 342–3.

¹²⁰ Musson, 'Sir Edward Coke', 106.

¹²¹ Boyer has shown that Coke was 'in regular working contact' with members of the Society, especially Agarde, Tate, and Holland. See Boyer, *Sir Edward Coke*, 147.

citing charters for Edgar and Edward the Confessor to equate “sigillari” and “sigillo” with modern wax seals.¹²² That is, the influence and legacy of Nowell, Parker, and Lambarde on the subsequent generation of antiquaries was particularly evident in the etymological commentaries which occupied the Society when Coke started publishing his *Reports*, and it is not coincidental that Coke was interested in what Anglo-Saxon sources, and the antiquarian research of his colleagues might offer.

Despite Coke’s primary concern with narrow questions of law, particularly from the ninth part of the *Reports* and the later *Institutes*, he engaged seriously with antiquarian linguistic and cultural discourses in examining the “nationall [law] of England” and in discussing its history.¹²³ That “Divisos ab orbe Britannos” seems to have assumed particular significance for Coke is apparent by the time of Charles I’s accession,¹²⁴ when Coke argued to a Committee of the whole House in 1628: “We have a national law appropriate to this kingdom. If you tell me of other laws, you are gone. I will only speak of the laws of England”.¹²⁵ Coke’s demonstrable interest in Anglo-Saxon charters therefore reflects his efforts to expand the corpus which comprised “the auncient Law of England” and his conceptions of the English legal past. Whilst Coke’s legal history was not necessarily “insular”,¹²⁶ as Richard Helgerson has shown, “ideological necessity” restricted Coke’s arsenal to legal evidence he could claim was authoritative in matters of English law.¹²⁷ However, especially from the 1610s, the continual refinement of Coke’s legal ideology in the *Reports* and *Institutes* required a corresponding refinement of the conceptual frameworks and methodologies necessary in order to use this material effectively. These frameworks, it will be shown, increasingly

¹²² *CCD*, vol. II, 314–5.

¹²³ 1 *Inst.*, 585.

¹²⁴ ‘The Britons are divided from the world’.

¹²⁵ 25 March, 1628, in Sheppard, *The Selected Writings and Speeches of Sir Edward Coke*, vol. III, 1232.

¹²⁶ On the insular — or cosmopolitan — nature of the seventeenth-century legal profession, see Goldie, ‘The Ancient Constitution’, 29.

¹²⁷ Helgerson, *Forms of Nationhood*, 71.

included etymological methodology that had supported scholarship presented in the Society of Antiquaries between the late 1580s and the Society's dissolution in 1607.¹²⁸

Coke, Antiquarian Methodologies, and Ethno-cultural Pride

Coke's acquaintances in the Society of Antiquaries spoke at length on the origins of certain words pertaining to the structure of the English legal system, and were especially conscious of hybrid philologies in the language of the common law.¹²⁹ The use of French terminologies and words of evident French derivation in English legal parlance and titles prompted identification of Anglo-Saxon words that reflected the concepts' senses of original Englishness. On "the antiquity of Barons", for example, Agarde had taken the opposite line to Coke on the Conquest's effects on English law, observing that "although king Edward the Confessor brought into this land sundry of the Norman laws ... I cannot find the name of Baron in any of his charters, of which I have three in Latin made to Westminster-Abbey, and many others written in the Saxon tongue; but in none of them doth the name Baron occur; but instead thereof, all my Theignes".¹³⁰

Coke would not have conceded that any Norman laws were imported to England, but there are striking similarities between the antiquaries' methodology and Coke's examinations of English legal etymology in the later *Reports* and *Institutes*. Indeed, in the ninth part of the *Reports*, published in 1613, Coke quoted Ine's laws in the original Old English and provided Latin translations in analysing the origins of the office of sheriff, which he noted "is derived of two Saxon words, viz. of Scyre, that is, the Shire or County, and Reve".¹³¹ Such a claim closely echoed — in subject and in methodology — the focus of a paper on shires delivered by Francis Thynne to the

¹²⁸ On etymology as the most important antiquarian methodology of the period and its association with ethnic genealogy, see Vine, *In Defiance of Time*, 51.

¹²⁹ On Coke's connections to Agarde, Tate, and Holland, see Boyer, *Sir Edward Coke*, 146–8. On Coke's friendships with Society members and the frequency of Tate and Agarde's contributions to Society discourses, see van Norden, 'The Elizabethan College', 134–50 and 227–8. Coke owned, and annotated, two manuscripts called 'liber Agard', on 'records and Judgments in the raignes of E: I. E: 2. E: 3. R: 2. E: 4. H: 5. cont' 145 leaves', HH MSS 316–7.

¹³⁰ *CCD*, vol. I, 309. Coke seems to have shared this interest, owning many volumes on heraldry and peerage.

¹³¹ Pref. 9 *Rep.*, 303. Coke probably found these laws, and their translations, in his copy of Lambarde's *Archaionomia*.

Society in 1591. Thynne subscribed to the conventional interpretation that King Alfred had been the first to divide England into shires, and set out to discern the precise Old English etymology of the word after positing (from Camden) that Alfred had “imitated” the “German” practice of administrative organisation.¹³² Thynne concluded that the word shire was “mere Saxon”, and was “to this day retained with us ... as a certain proportion or part of the land; that being deduced of the Saxon word [scyren], which signifieth to cut or divide”.¹³³

Coke shared with the antiquaries a degree of etymological anxiety surrounding the French influence in English terms of law and administration. Although he remained committed to his established interpretations of the Conquest and immemorial common law, Coke’s later writings reflected an increased appreciation for the utility of Anglo-Saxon sources in demonstrating Anglo-Saxon precursors to post-Conquest legal customs — imbuing them with a stronger quality of original Englishness. In the first *Institute* (1628), Coke conceded that “our Books of Reports and Statutes, in ancient times were written in such French as in those times was commonly spoken and written by the French themselves”,¹³⁴ before turning to the equivalent Old English words by which the Normans referred to preexisting English terminologies. Coke’s exposition of Thomas de Littleton’s fifteenth-century *Treatise on Tenures* in the first *Institute* included various discussions of Anglo-Saxon antecedents to French titles and feudal concepts in order to show that the Normans had merely renamed ancient common law terminologies without amending them in character or in practice. On “scutage” (i.e. shield money, or in Old French, “escuage”), feudal payments of fees by tenant-vassals in place of military service, Coke assessed the conditions in which knights or soldiers could find substitutes, “conveniently arrayed for the warre”, to perform the requisite service in their places. Deploying the exegetical methodology that featured in most of his legal scholarship, Coke deconstructed and parsed each component of Littleton’s definitions, laying out the “four things to be observed” on how military substitutes for knights owing shield money could be considered

¹³² *CCD*, vol. I, 22.

¹³³ *Ibid.*, 23.

¹³⁴ 1 *Inst.*, 586.

“conveniently arrayed” under the law: there must be another individual to act as substitute, that person must be able, he must be “armed at the costs and charge of the Tennant”, and he “must have such Armour, as shall be necessarie, and so appointed in readinesse”.¹³⁵

This methodical deconstruction of Littleton was characteristic of most contemporary legal scholarship; however, Coke also included a number of what Musson has called “ornamental garnish[es]” — references to classical authors or, with increasing frequency, Anglo-Saxon words that illustrated the existence of feudal concepts in England before the Conquest.¹³⁶ Some “garnishes” were more germane to legal arguments than others, and whilst Coke’s quotation of Livy on the duty of knights to God, for example, was more stylistic than substantive, Coke also cited the thirteenth-century legal treatise known as *Fleta* to note two relevant Old English words with no introductory explanation of their inclusion: “Ferdwit is a Saxon word, & significat quietanciam murdri in exercitu. Worscot is an old English word and signifeth Liberum esse de oneribus armorum”.¹³⁷

Although Garnett has argued that Coke’s habit of “historical decoration” was intended to render the law “more accessible to a general readership”,¹³⁸ it can be contended that his references to Anglo-Saxon sources and Old English terminologies served the different purpose of strengthening his argument for legal continuity and also thereby making the common law seem more English. These Old English etymological references, distilled through *Fleta*, were intended to solidify connections between the French *escuage* and the ancient common law before the Norman Conquest, imbuing the terminology with a sense of original Englishness. References to the Saxon words “Ferdwit” and “Worscot” were therefore an outgrowth of the contemporary antiquarian scholarship in which Coke did not necessarily participate via the Society, but whose researches clearly influenced his determination of which medieval evidence would support his arguments

¹³⁵ 1 *Inst.*, 689.

¹³⁶ Musson, ‘Sir Edward Coke’, 106.

¹³⁷ ‘...and it signifies an acquittal of murder in an army’; ‘To be free of the burdens of arms’, respectively. 1 *Inst.*, 689.

¹³⁸ Garnett, “‘The ould fields’”, 282.

surrounding the supreme antiquity — and innate Englishness — of the common law. The “more sophisticated approach to ascertaining the national past” noted by Williams in Coke’s later works might therefore be observed not only in his use of a wider range of sources,¹³⁹ but also in his engagement with a wider range of scholarly discourses.

The aforementioned citation of Livy — though surplus to the legal points being advanced in the passage — is indicative of the under-appreciated connection between distinct, yet complementary, disciplines of antiquarian and legal scholarship in early modern England. In light of Society members’ legal sensibilities and demonstrated interest in Anglo-Saxon administrative evidence, it is evident, as noted by Stuckey, that etymological studies were seen as “consonant with accepted practices of common law learning”.¹⁴⁰ The more empirical methodology in Society discourses made available to Coke a broader corpus of medieval evidence and enabled him to engage with strands of antiquarian scholarship that were beginning to affect wider perceptions of English ethnic identity and heritage. It was in this spirit that Coke described Joseph Holland as “a good Antiquary and a lover of learning”, following a notation of Holland’s membership of the Inner Temple.¹⁴¹

Coke’s preference for the “legal” over the “historical” has been well documented. Additionally, the uniqueness of the common law to the jurisdiction of England and Wales was identified by Pocock as a major source of national pride in early modern England, and for Coke and other jurists, the legal past was inextricably linked to perceptions of the national past.¹⁴² Furthermore, Coke’s belief in the immemoriality of the common law, dating from long before the arrival of the Saxons in Britain, did not diminish the law’s Englishness — despite the English identity having clear Saxon origins. These paradoxes were of secondary importance to matters of narrow legal interest in Coke’s mind, and the unwritten, uncodified nature of the common law supported Coke’s repeated insistence that use of French as the language of legal administration in

¹³⁹ Williams, ‘The Tudor Genesis’, 123.

¹⁴⁰ Stuckey, ‘Antiquarianism and Legal History’, 218.

¹⁴¹ Pref. 3 *Rep.*, 69.

¹⁴² See Williams, ‘The Tudor Genesis’, 123.

England in no way implied that the Normans had imported the common law to England. Whilst it was more likely for Coke that the Normans had replicated pre-existing English legal customs in Normandy prior to the Conquest, the language of the law was irrelevant. Its governing philosophies transcended the specific words that various groups had used to refer to the same common legal principles; English law was “divinely infused into the heart of man and builded upon the immovable rock of reason”.¹⁴³

Although Coke maintained that the unwritten law nullified the ostensible French influence in the English legal tradition, the common law’s supreme antiquity was distinct from the way in which Coke understood and celebrated its Englishness. The latter was illustrated through the implication that the ancient common law that had existed in England since a “much greater antiquity than ... any [of] the Constitutions or Lawes imperiall of Roman Emperors”, but that it had become English when Alfred and the other Anglo-Saxon kings chose the best of the Trojan, Greek, British, Saxon, and Danish laws and condensed them to form “the laws of England”.¹⁴⁴ The use of the English vernacular was integral to Coke’s estimation of when the ancient common law had become the English common law, visible in the contrasting language Coke used to describe the “Lawes of the Britons” of the fifth-century Welsh king Dyfnwal Moelmud (referred to as “Dunvallo M.” by Coke).¹⁴⁵ Coke accessed Dyfnwal’s purported law code via the Welsh historian John Lewis’s edition of the “laws of the ancient Britons”, of which Coke owned a manuscript copy with an autograph dedication.¹⁴⁶ Coke identified with the ancient Britons using similar language to the way in which antiquaries such as William Camden and Henry Spelman claimed Saxon heritage: “our British Druides”.¹⁴⁷ Nevertheless, although he neither believed nor claimed that the Saxons were the authors of the common law, Coke deliberately distinguished the ancient Druidic law from

¹⁴³ London, BL, Harley MS 244, fol. 57v., qu in Baker, *Reports from the Notebooks of Edward Coke*, vol. I, cxxxvi, n. 8.

¹⁴⁴ Pref. 3 *Rep.*, 66–7.

¹⁴⁵ *Ibid.*

¹⁴⁶ This manuscript was omitted in Coke’s own catalogue. See de Ricci, *A Handlist of Manuscripts*, MS 227, 19 fols.

¹⁴⁷ Pref. 3 *Rep.*, 65. William Camden, for example, made reference to ‘the Saxons our progenitors’. See *Rem.*, 15.

a legal tradition whose Englishness was contingent upon its development and solidification under the Anglo-Saxon kings.

It is therefore evident that Coke had adopted the antiquarian attitude discussed above, whereby the Anglo-Saxons were the first English and the “Saxon” language represented original English titles and terminologies — some of which remained “used to this day”, despite pervasive French influence.¹⁴⁸ A growing interest in the etymological and linguistic elements of Anglo-Saxon legal scholarship, then, is visible in the *Reports* and the *Institutes*, leading Coke to quote at length from law codes and charters such as the laws of King Ine, which Coke accessed via Lambarde’s *Archaionomia* and *Archeion*. Thus, in the preface to the ninth part of the *Reports*, the laws of Ine confirmed the arguments of both the fifteenth-century jurist Sir John Fortescue and Camden, the “chief Antiquary of his time”, and demonstrated precedent before the Conquest for specific legal institutions and customs such as Parliament,¹⁴⁹ and indeed of vernacular lawmaking, which Coke quoted with increasing frequency in the original Old English. For example, in the preface to the ninth part of the *Reports*, Coke quoted Ine’s law from Lambarde’s *Archaionomia*, providing the Old English prior to the Latin translation: “Gif hwa hun righter bidde beforan scirman oth the othrun deman”.¹⁵⁰

Relatedly, the *Institutes* were written in English rather than Latin or Law French. As Williams has noted Coke’s earlier expression of the irrelevance of pre-Conquest codes to early modern litigation,¹⁵¹ Coke’s interest in Anglo-Saxon sources therefore reflected his concern with both legal continuity across the Conquest and the Englishness of the common law implied by its survival of the Conquest – the latter demonstrable in Old English vernacular lawmaking. Indeed, Helgerson has observed that from the publication of the second *Reports* in 1602, “the vigorous

¹⁴⁸ Pref. 9, *Rep.*, 303.

¹⁴⁹ *Ibid.*, 301.

¹⁵⁰ ‘If anyone leaves his lord without licence, or steals into another county, and then returns, he shall go back to the place where he was before and make amends of sixty shillings to his lord’, trans. Sheppard, pref. 9 *Rep.*, 302.

¹⁵¹ Williams, ‘The Saxon Constitution’, 18.

defense of English law against all rivals became [Coke's] constant theme".¹⁵² This defense increasingly involved citation of Old English laws and terminologies, tracing the survival of "vulgar name[s] used to this day" in strikingly similar fashion to antiquarian tendencies of the preceding decade.¹⁵³ Thus, in addition to both practical and normative reasons for providing the prose prefaces to the *Reports* in English as well as Latin (including Law French's perceived lack of utility),¹⁵⁴ by 1602, Coke already considered "Saxon" to be synonymous with "English" and provided a linguistic analogy to explain why reporting cases in Law French did not detract from the Englishness of the common law: William the Conqueror taught "Englishmen the Norman tearmes of hunting, hawking, and in effect of all other playes and pastimes, which continue to this day: And yet no man maketh question but these recreations and disports were used with in this Realme before the Conquerours time".¹⁵⁵

The *Institutes* had no corresponding Latin translation and were intended, in Musson's words, to "reach beyond a professional audience to English subjects at large".¹⁵⁶ In explaining his reasoning for writing in English in the third *Institute*, Coke returned to a linguistic theme established in some of his earlier writings: that French terminologies in English law meant that the Normans had based their legal system on the English model before the Conquest, or that the Normans had introduced French equivalents to preexisting English terms but had not altered the common law in character or practice. This feature of Coke's thought was illustrated in an analogy in his 1592 Reading on Uses, best paraphrased by Baker: "One might as well maintain that hunting was invented by the Normans because its terms of art were French".¹⁵⁷ Thus, in the third *Institute*, Coke drew on the fourteenth-century theologian Robert Holcot, quoting at length from Holcot's commentary on the *Book of Wisdom* with regard to William the Conqueror's plans to "do away with

¹⁵² Helgerson, *Forms of Nationhood*, 81.

¹⁵³ Pref. 9 *Rep.*, 303.

¹⁵⁴ See Williams, 'Law, Language', especially 346–57 and Ross, 'The Commoning', especially 365–79.

¹⁵⁵ Pref. 3 *Rep.*, 76.

¹⁵⁶ Musson, 'Sir Edward Coke', 107.

¹⁵⁷ See Coke's Reading on Uses (1592), London, BL, Hargrave MS 33, fol. 136v., qu and paraphrased in Baker, *Reports from Coke's Notebooks*, cxxvi–ii.

the Saxon tongue and make England and Normandy agree in language".¹⁵⁸ Coke juxtaposed Holcot with the fourteenth-century statute 35 Edw. 3., which

hath taken these edicts of a Conqueror away, and given due honour to our English language, which is as copious and significant, and as able to expresse any thing in as few and apt words, as any other native language, that is spoken at this day. And (to speake what we think) we would derive from the Conqueror as little as we could.¹⁵⁹

In addition to the increased accessibility of Coke's vernacular prose, by the time he finished his third *Institute* toward the end of his life, Coke had developed a proficiency in the school of etymological enquiry that had once been central to the scholarship in the defunct Society of Antiquaries. There was a pronounced sense in Coke's later work that he felt his analysis of defining principles of England's "nationall laws" (i.e. high treason, the subject of the third *Institute*) ought to be articulated in English. To this end, Coke offered the following "ornamental garnish" from the *Aeneid* (perhaps slightly ironically in Latin),¹⁶⁰ which, by implication, applied both to the law and to the language of legal administration: "Aut haec in nostros fabricata est machina muros / Aut aliquis latet error, equo ne credite Teucris".¹⁶¹

The third *Institute* included other features of late Tudor and early Stuart antiquarian scholarship — not least the efforts by antiquaries such as Robert Cotton to trace royal ancestries to Anglo-Saxon kings.¹⁶² Thus, alleging that the unfortunate period of English kingship dominated by the line of William the Conqueror had ended in the twelfth century with the death of Henry I, Coke provided the genealogy for Henry's wife, Maud, in similar fashion to Cotton's Saxon genealogy of James:

Mawde, daughter of Malcolme King of Scotland surnamed Canmor, and of Margaret his wife, who was the [grandchild] of Edmond Ironside King of England. viz. The said King Edmond had issue Edward surnamed the Outlaw, because he lived a long time beyond sea with Salamon King of Hungary out of the extent of the lawes of this Realme. Edward had issue the said Margaret his eldest daughter, famous for her piety and vertue; she had issue

¹⁵⁸ 3 *Inst.*, 951, trans. Sheppard.

¹⁵⁹ *Ibid.*

¹⁶⁰ Musson, 'Sir Edward Coke', 106.

¹⁶¹ 'Either this machine has been made within our walls, or there is some mistake: do not trust the horse of Teucus' (i.e. the Trojan horse). Pref. 3 *Rep.*, 68, trans. Shepherd.

¹⁶² See Robert Cotton's *Discourse on the Descent of the King's Majesty from the Saxons*, Kew, TNA, MS SP 14/1/3.

Mawde wife of King H. 1. who by her had issue Mawde, of whose English blood by Geffery Plantagenet Earle of Anjou all the Kings of England are lineally descended.¹⁶³

Maud's "English blood" was the consequence of her descent from Edmund Ironside and Edward Ætheling, further illustrating Coke's reception of antiquarian ideas of ethnic Englishness that had originated with Nowell and Lambarde and provided the bases for much of the scholarship in the Society. Indeed, when Coke provided a brief survey of the history of the common law in the third part of the *Reports*, he distinguished the "Lawes of the Britons" in the "British tongue" from the "Lawes of England" — many of which were in Old English.¹⁶⁴ Despite holding that the common law had remained unchanged in character since long before the Saxon migration to Britain, Coke's understanding of the law's Englishness reflected the same ethno-cultural and etymological attitudes that had characterised Society scholarship. Whilst Coke's immemorial legal history undoubtedly imbued the common law with a pronounced sense of native "Britishness", he nevertheless embraced, for example, Cotton's personal identification with the Saxons as the source of his own ethnic identity (e.g. "the office of steward ... came from the Normans to us, and from the French to them").¹⁶⁵

Therefore, Coke's later tendency to cite etymological precedent in Old English reflected not only his increased appreciation for the utility of Anglo-Saxon sources, but also a willingness to apply antiquarian frameworks to his legal researches. For example, Coke introduced his discussion of treason in the third *Institute* by way of the statute 25 Edw. 3., first parsing the Latin "de proditionibus" in defining the offence.¹⁶⁷ He then provided the etymology of the English word: "[Treason] is derived from [trahir] which is treacherously to betray. Trahue, betrayed, and trahison, per contractionen, treason, is the betraying it self".¹⁶⁸ Coke followed this etymology with reference to treason as defined in the laws of Cnut, taken verbatim from the Latin in Lambarde's

¹⁶³ 3 *Inst.*, 951.

¹⁶⁴ Pref. 3 *Rep.*, 67.

¹⁶⁵ *CCD*, vol. II, 3.

¹⁶⁷ 3 *Inst.*, 952.

¹⁶⁸ *Ibid.*, 956.

Archaionomia with an Old English interjection from the corresponding transcription on the facing page: “Proditiones (hlaford swice) numerabantur inter scelera jure humano inexpiable.”¹⁶⁹

Coke explained that the “Latin word used in law is proditio (à prodere) and thereof cometh proditionè, which of necessity must be used in every indictment of treason, and cannot be expressed by any other word, peripharsis [*sic*], or circumlocution”.¹⁷⁰ The parenthetical inclusion of the Old English compound “hlaford swice” (“lord-deceit” or “lord-treachery”) facilitated, however, an implicit suggestion that the modern definition of treason — which necessarily required the Latin “proditio” — had a pre-Conquest equivalent in Old English. Cross-reference of the Old English original from Cnut’s reign and Lambarde’s Latin translation rendered an apparent linguistic discrepancy an opportunity to reinforce Coke’s theory of legal continuity whilst contrasting words of Anglo-Saxon origin with terminologies in contemporary usage derived from Latin and French.¹⁷¹

***Lex terrae* and English Identity**

For Coke, the superiority of the common law contrasted with the inferiority of the ecclesiastical courts on the grounds of their “foreignness”.¹⁷² The implication that the common law was native to England, of supreme antiquity, and thus, superior to canon law (and the civil law more broadly) therefore explains Coke’s efforts to demonstrate dynastic continuity across the Conquest. Thus, Coke attempted to link the English monarchy to the unbroken royal line of the West-Saxon house of Cerdic. This is a theme to which Coke returned consistently; for example, in the proem to the second *Institute*, Coke described the medieval law book known as the *Grand Custumier de Normandy* as

¹⁶⁹ ‘Treasons [lord-deceit] are accounted among those offences which are not emendable by the law of man’. 3 *Inst.*, 956, trans. Sheppard. cf. Lambarde, *Archaionomia*, fols 117v.–8r.

¹⁷⁰ 3 *Inst.*, 956.

¹⁷¹ Agarde expressed similar views on linguistic identity in his discourse on stewards: ‘I suppose the same word steward to stand upon the Saxon language rather than upon the Latine or French’, *CCD*, vol. II, 41.

¹⁷² See Smith, *Sir Edward Coke*, 138.

being a Book compounded as well of the Laws of England, which King Edward the Confessor gave them, as he that Commenteth upon that Book testifieth (as elsewhere we have noted) as of divers Customes of the Duchie of Normandie, which book was composed in the reign of King Henry the third viz. about 40. yeares after the Coronation of King Richard the first, 3. Septembris, Anno 1. of his reign, Anno Dom. 1189. about 138. yeares after the Conquest.¹⁷³

Coke distinguished thirteenth-century Norman custom from modern English law on the grounds that “a great number of the Courts of Justice, of the originall Writs, and of many other of the titles of the Laws of England, are not so much as named or mentioned”.¹⁷⁴ The absence in his Norman law books of legal terminologies with which he was familiar through the twelfth-and-thirteenth-century legal treatises *Glanvill* and *Bracton* enabled Coke to argue conclusively that the common law was not a Norman import, but had long existed in something like its seventeenth-century form. Thus, Coke immediately shifted his attention to the Anglo-Saxons, providing “for the ease of the Reader” the regnal dates of each pre-Conquest king whose law codes survived, to ensure his readers would understand his references to early medieval English monarchs.¹⁷⁵ He excerpted part of John Caius’s *De antiquitate Cantebriensis Academiae* after noting Alfred the Great’s regnal dates, a copy of which he owned in his library:

Aluredus acerrimi ingenii princeps per Grimbaldum & Johannem doctissimos Monachos tantum instructus est, ut in brevi librorum omnium notitiam haberet, totumque novum & vetus Testamentum in eulogiam Anglicae gentis transmutaret (cujus translationis pars nobis feliciter accidit).¹⁷⁶

That Coke included Caius’s description of Alfred’s learnedness, based on Asser’s *Vita Ælfredi* (the definitive edition of which was published by Archbishop Parker in 1574), in the proem to the second *Institute* is reflective of the multiplicity of influences in his legal scholarship. Indeed, the assumption that Coke was uninterested in sources not directly relevant to his survey of the common law impedes analysis of him as a scholar with broader interests in English history. Coke was willing

¹⁷³ 2 *Inst.*, 752.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*, 752–3.

¹⁷⁶ ‘Alfred, a ruler of the sharpest ingenuity, was so educated by the two most learned monks Grimbald and John that he had brief notes of all books, and translated the whole of the Old and New Testament into English speech (part of which translation happily remains to us)’. 2 *Inst.*, 753., trans. Shepherd. HH MS 1043.

to draw from so-called “approved histories” when they were consistent with his legal logic,¹⁷⁷ especially relating to questions of English etymology and the earliest English vernacular.

Alfred’s Old English translation of the Ten Commandments, appended to his *Domboc*, survives in a number of manuscripts, including the Parker Chronicle,¹⁷⁸ Nowell’s transcript of Cotton Otho B XI, and the *Textus Roffensis* — transcribed by the Society member Francis Tate in 1589.¹⁷⁹ Alfred’s preface to his law codes had been faithfully transcribed and translated into Latin by Lambarde in *Archaionomia*,¹⁸⁰ and Coke seems to have been intrigued by Alfred’s efforts to increase the accessibility of important texts through vernacular translation. The association of Alfred’s famous educational programmes with his Old English law codes is likely to have deepened Coke’s appreciation for such sources. Despite Coke’s use of the common contemporary terminology “the Saxon tongue” in reference to the Old English language, his interest in Alfred’s translations “in eulogiam Anglicae gentis” reflected the blurring of linguistic distinctions between “Saxon” and “English” in exactly the same fashion antiquaries like Lambarde and Camden referred to the Anglo-Saxon vernacular.¹⁸¹ Consequently, Coke’s distillation of Asser through Caius is evidence of his engagement with antiquarian discourses which explored what Brackmann has termed the “historical development and heritage” of the English language.¹⁸²

In his recent examination of the resurgence of legal interest in Magna Carta from the 1580s, Baker has underscored the widespread appeal of chapter 29 and its reference to *lex terrae*.¹⁸³ Though it was a matter of considerable debate during Coke’s lifetime, Coke’s interpretation of the so-called “law of the land” had remained unchanged by 1628, when he addressed the Committee of the whole House on the Petition of Right: “The question is what is *lex terrae*? Therein some differ.

¹⁷⁷ See Hassall, *A Catalogue*, 42.

¹⁷⁸ CCCC MS 173.

¹⁷⁹ See Grant, ‘Laurence Nowell’s Transcript’, and Garnett, “‘The ould fields’”, 280.

¹⁸⁰ Lambarde, *Archaionomia*, fols 19r.–27v.

¹⁸¹ *2 Inst.*, 753.

¹⁸² Brackmann, *The Elizabethan Invention*, 71.

¹⁸³ i.e., ‘law of the land’. See Baker, *The Reinvention of Magna Carta*, especially 249–75.

If I have any law, *lex terrae* is the common law”.¹⁸⁴ The definition of *lex terrae* was subject to manifold interpretations in the sixteenth and seventeenth centuries;¹⁸⁵ however, it is clear that the common law’s innate link to England — to the *terra* itself — was integral to Coke’s ancient constitutionalism. Nevertheless, Coke’s uses of Anglo-Saxon sources underscore the complexities inherent in his shared interests with contemporary antiquaries and in the evolution of his views on Englishness and English identity.

Coke deployed a wide range of Anglo-Saxon evidence in proving the common law’s antiquity. He did not believe that the law had Germanic origins, but he drew extensively upon sources printed or circulated as evidence of the common law’s alleged Teutonic roots or of the native antiquity of Protestant liturgical practices. His use of Anglo-Saxon sources was clearly influenced by the scholarship current among his contacts in the Society of Antiquaries. These antiquarian discourses made the Anglo-Saxon period seem the most “English” of any of the historical periods according to which the English past was increasingly understood.¹⁸⁶ Whilst Coke’s principal legal interests led him down different scholarly paths to those of the members of the Society, Coke’s writings nevertheless reflected his reception of and (perhaps inadvertent) participation in scholarly discourses that had had significant effects on the English conception of ethnic identity and heritage. Despite the patent French influence in the language of the common law, Coke’s researches reflect, at least to some degree, an embrace of Cotton’s and other antiquaries’ conceptions of the pre-Conquest English past. Indeed, Coke juxtaposed William the Conqueror’s replacement of Old English (or rather, “Saxon”) with Norman French as the language of administration in England with a statute of Edward III which “hath taken these edicts of a Conqueror away, and given due honour to our English language”.¹⁸⁷

¹⁸⁴ 26 April, 1628, in Sheppard, *Selected Writings and Speeches*, vol. III, 1267. On the political and legal circumstances surrounding the petition of right, beyond the scope of this essay, see Guy, ‘The Origins of the Petition of Right Reconsidered’, 289–312.

¹⁸⁵ See Hulsebosch, ‘The Ancient Constitution’, 451.

¹⁸⁶ Brackmann, *The Elizabethan Invention*, 3.

¹⁸⁷ 3 *Inst.*, 951.

Coke held that the *lex terrae* was paradoxically traceable to an untraceable antiquity.

However, despite his limited grasp of Old English, his demonstrated interest in the Old English language and its derivations lent a stronger sense of Englishness to the common law and its institutions. The fourteenth-century statute he cited in the third *Institute* had restored the “honour” of the English language, which, despite the use of Law French and Latin in early modern jurisprudence, Coke ultimately implied was the principal *lingua terrae*.¹⁸⁸ The ethno-linguistic institutional histories which occupied contemporary antiquaries thus offered Coke a novel and stimulating lens through which to examine the English legal past, and provided a substantial corpus of trustworthy evidence through which he configured his ethno-historical English identity. Indeed, amidst the debate on the union in 1604, Coke asserted that “if Great Britain should be newly erected a kingdom, this new kingdom should have no law”, as “all our judicial proceedings are ‘according to the law and custom of England’ and cannot be ‘according to the law of Britain’”.¹⁸⁹ It was in defence of this view of English legal supremacy and historical hegemony that Coke later cited a charter for Edgar in the seventh part of his *Reports* (1608), in which the tenth-century Saxon king had declared himself lord and emperor over “insularum oceani, quae Britanniam circumjacent ... usque Norvegiam, maximamque partem [Hibernia], cum sua noblissima civitate de Dublina, Anglorum regno subjugare”.¹⁹⁰

In Coke’s view, the Anglo-Saxons had subjugated “all the islands” in the vicinity of the isle of Britain and had established an English empire whose immemorial customs James’s united Britain would necessarily have invalidated. In other words, it was inconceivable that the medieval English conquerors — his ancestors and the source of his ethno-cultural identity — could be conquered retroactively. Whilst Coke drew upon an increasing amount of Anglo-Saxon legal and linguistic evidence in his researches over time (especially following the publication of the ninth part of the

¹⁸⁸ ‘language of the land’.

¹⁸⁹ Autograph marginal note in Coke’s hand in New Haven, CT, Beinecke Library, MS G R24.1, fol. 149v. I am grateful to Professor Sir John Baker for sharing with me his transcription of the manuscript.

¹⁹⁰ ‘...of all the islands of the ocean which surround Britain ... as far away as Norway and the greater part of Ireland (with its most noble city of Dublin), under the subjugation of the English kingdom’, *7 Rep.*, 281.

Reports), it is nevertheless evident that Coke benefited from a robust legal-antiquarian tradition that had emerged in the mid-sixteenth century, with Parker, Nowell, and Lambarde, that reached its zenith in the early years of the seventeenth century. It is further evident that Coke was more receptive to ideas and historical attitudes promoted by antiquarian scholars than has been hitherto appreciated, albeit mostly with regard to matters of legal interest that supported his own arguments. As a result, by the time the late *Reports* and the *Institutes* were completed, Coke was able to show that ancient British immemoriality and Saxon, Germanic Englishness were not mutually exclusive; together, they reflected a novel way of understanding the English legal, linguistic, cultural, and by extension, ethnic past.

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