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*An Examination of the Accidental History of English Common Law*

An examination of key moments in the development of English Common law, including the Magna Carta, the *Entick v Carrington* case and decision, the Bill of Rights of 1688, and the Human Rights Act of 1998, suggest that the ability of the common law to expand on the protections of civil rights and liberties is due to historical accident rather than deliberate design. In this examination, historical accident does not refer to something that was not intentional, but rather to the uncontrolled circumstances that have influenced such growth in an organic manner. The common law system has evolved through its reliance on the precedent established in previous cases as well as its responsibility to establish legally sound precedent for the future when facing new considerations. The structure of the common law system lends itself to a protection of the civil rights and liberties issues that arise as a result of present circumstances. Furthermore, the common law system has the potential to influence future civil rights and liberties protections as the possibilities for interpretation and application of rulings expands. Alongside the development of the common law, legislation has been introduced over time that explicitly focuses on the protection of certain civil rights and liberties. The complementary relationship between these two aspects of the law allows for both sides to further influence the increased protection of civil rights and liberties. The nature of the common law system necessitates that its protections of civil rights and liberties have been accidents of history, however, interactions between the common law and statutory law can naturally influence moments of more deliberate focus on these protections.

Leading up to the *Entick v. Carrington* case, there were several instances of search and seizure of individuals accused of publishing seditious libel. In one such case, an author, John Wilkes MP, wrote a response to the King's Speech in Parliament saying that "the 'spirit of concord,'" which the King had called for, "was not to be expected of people who were being made subject to arbitrary searches and seizures, rather the 'spirit of liberty' should rise up in proportion to the grievance they felt—'freedom is the English subject's Prerogative'".<sup>1</sup> Wilkes and other authors under similar accusations were subject to search and seizure based on a general warrant issued by Lord Halifax, the Secretary of State. Although Chief Justice Pratt and Lord Mansfield recognized "the issue of the legality of such warrants" should be addressed, at the time it was not "clearly raised and decided."<sup>2</sup> General warrants stopped being used, which allowed the specific warrant issue to be addressed more clearly in *Entick v. Carrington*. At this time, the question of legality concerning the "search and seizure in pursuance of the warrant" could not be avoided.<sup>3</sup>

*Entick v Carrington* provided a narrow window through which the court could more specifically address two issues. First, the court had to recognize the ability of government officials in certain positions to issue specific warrants for high treason and seditious libel. Second, Chief Justice Pratt illustrated that further searches and seizures were unlawful, that "no such law ever existed in this country; our law holds the property of every man so sacred that no man can set his foot upon his neighbor's close without his leave."<sup>4</sup> Directly addressing this issue, in a way that had not been possible in the earlier cases, allowed the court to take a firm stance on

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<sup>1</sup> Lady Hale 5

<sup>2</sup> Lady Hale 6

<sup>3</sup> Lady Hale 7

<sup>4</sup> Entick 10

protecting the right to property in the common law system. *Entick v. Carrington* represented an opportunity for the courts to take advantage of the circumstances present in the case—concerning the misuse of specific warrants to illegally search and seize—to enhance the protection of civil rights and liberties, something they had not been able to address directly in the earlier cases examined under general warrants.

Interpretations of past holdings in the law allow the opportunity to interpret those contributions to law in the context of a new period of time and society. Sections thirty-nine and forty of the Magna Carta state that “no free man shall be taken or imprisoned, or be disseised of his freehold or liberties or free customs...nor will we not pass upon him, nor condemn him, but by the lawful judgment of his peers or by the law of the land...we will not deny or defer to any man right or justice.” (MAGNA CARTA). As Tom Bingham writes, “the significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said” (Bingham, 12). In 1215, this document would have been referring to a very specific subset of the population—the wealthy and powerful barons, and all other groups would have been excluded. However, this section has come to carry great weight for the long-held ideals in the English Common Law concerning the right to “life, liberty, and property, not to be arbitrarily infringed by the rulers, but only in accordance with the law” for all citizens (Lady Hale). Consider this section in the context of *Entick v. Carrington*. It begins to hold a much greater importance when considering its reinforcement of this key tenant of the Magna Carta, while also further expanding the application of that section.

The holding of *Entick v Carrington* has been influential on the development of the law, particularly concerning protections of civil rights and liberties. The case first further established

protection of the right to property, particularly concerning who is allowed to maintain that right and limiting who would have the authority to violate it, and on what grounds. The plaintiff's counsel invited the question of the right to privacy into his argument when he stated that even if Entick had been guilty of libel, "it is the publishing of libel which is the crime, and not the having it locked up in a private drawer in a man's study; but if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him" (ENTICK pg. 6). The connection of these two ideas—the right to property and the right to privacy, through one's property, establishes opportunities for future expansions of the protection of these rights as they become more defined. *Entick v. Carrington* served as a catalyst towards future understandings leading to an expansion of the right to privacy. The further protection of these civil rights and liberties was only possible through the circumstances that led to the case as well as the interpretation of precedent by the judges. Because of this, the enhanced protections introduced were due to the historical 'accidents' contributing to the facts of the case as they were.

As the common law develops, it serves as an indication of the issues facing a society and can inform the development of future explicit protections of certain civil rights and liberties. On the other hand, as statutory law establishes a more explicit standard of civil rights and liberties protections, the development of the common law is pushed more directly towards protecting those rights, when questions concerning them arise. *Entick v. Carrington* is often cited as one of the early instances of common law upholding the right to property. In this way it is incredibly influential on the statutory and common law today. Article Eight of the European Convention on Human Rights guarantees the "Right to respect for private and family life." This includes the

right to respect of one's home and property, as well as the stipulation that "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society..." (UN DHR). The Human Rights Act 1998 made legal system of England and Wales subject to many aspects of the European Convention on Human Rights, including Article Eight. The Act provided a standard for civil rights and liberties which the law should uphold, through the courts and Parliament. The dual influence of the implications of this act demonstrate the complementary relationship between common and statutory law. As the statutory law attempts to deliberately expand the protections of civil rights and liberties, the common law will institute similar expansions in response to the prevalence of such a document. By deliberately highlighting certain civil rights and liberties, the Act certainly influences the possibilities for how the common law can expand those rights. Furthermore, as the courts rule on the application of this act, in response to the 'accidental history' of the introduction of such requirements, the ways in which to properly do so will become more laid out as the courts navigate the initial issues.

As established in the Magna Carta, the authority of the state is supposed to be subject to the law, as are all other leaders. At the time of the Glorious Revolution this principle was put to the test when William of Orange would only be accepted as king if he agreed to the standards outlined in The Bill of Rights 1688. These included the protection of "personal liberty and security" which were preserved by "prohibiting the requirement of excessive fines, the imposition of excessive bail, and the infliction of 'cruel and unusual punishments.'" (Bingham, 24). The dedication to preserve such civil rights and liberties as they came through the courts was evident when Lord Camden upheld in *Entick v. Carrington* that if the "usage of these warrants since the

Revolution...is too modern to be law; the common law did not begin with the Revolution; the ancient constitution which had been almost overthrown and destroyed, was then repaired and revived; the Revolution added a new buttress to the ancient vulnerable edifice” (ENTICK, 11).

The common law has developed over hundreds of years—just as it is not subject to the whims of one ruler, it is not necessarily subject to the whims of the people in one period of time, but instead has developed with the history of England in response to the lessons learned in the past and the potential of the future.