

Articles

The Origins of Historical Jurisprudence: Coke, Selden, Hale

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CONTENTS

INTRODUCTION	1652
I. THE HISTORICAL BACKGROUND OF ENGLISH LEGAL PHILOSOPHY, TWELFTH TO SEVENTEENTH CENTURIES	1656
A. <i>Scholastic Jurisprudence and Its Sixteenth-Century Rivals</i>	1656
B. <i>Richard Hooker's "Comprehensive" Legal Philosophy</i>	1664
C. <i>The Legal Theory of Absolute Monarchy: James I and Bodin</i>	1667
II. SIR EDWARD COKE: HIS MAJESTY'S LOYAL OPPONENT	1673
A. <i>Coke's Acceptance of James' Premises and the Sources of His Opposition to James' Conclusions</i>	1673
B. <i>Coke's Philosophy of English Law</i>	1678
C. <i>Coke's Historicism</i>	1687
D. <i>Coke's Concept of the English Common Law as Artificial Reason</i>	1689
III. JOHN SELDEN'S LEGAL PHILOSOPHY	1694

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A.	<i>Coke to Selden to Hale</i>	1694
B.	<i>Selden's Historicity Versus Coke's Historicism</i>	1695
C.	<i>The Consensual Character of Moral Obligations</i>	1698
D.	<i>The Origins of Positive Law in Customary Law</i>	1699
E.	<i>Magna Carta and the Five Knights' Case</i>	1700
IV.	SIR MATTHEW HALE'S LIFE AND WORKS	1702
A.	<i>Hale's Personal Integrity in a Revolutionary Age</i>	1702
B.	<i>Hale's Integrative Jurisprudence</i>	1708
V.	THE RELATIONSHIP OF ENGLISH HISTORICAL JURISPRUDENCE TO SEVENTEENTH-CENTURY RELIGIOUS AND SCIENTIFIC THOUGHT	1721
A.	<i>Jurisprudential Counterparts of Basic Calvinist and Neo-Calvinist Religious Beliefs</i>	1722
B.	<i>Contrasts and Parallels Between the New Jurisprudence and the Revolution in the Natural Sciences</i>	1724
VI.	EPILOGUE: FROM HALE TO BLACKSTONE, BURKE, AND SAVIGNY	1731
A.	<i>The Embodiment of Historical Jurisprudence in the Doctrine of Precedent and the Normative Character of Custom</i>	1732
B.	<i>Blackstone and Burke: The Defense of Tradition Against the New Rationalism</i>	1733
C.	<i>Savigny and the Disintegration of Jurisprudence in the Nineteenth and Twentieth Centuries</i>	1736

In the seventeenth century, leading English jurists introduced into the Western legal tradition a new philosophy of law, which both competed with and complemented the two major schools of legal philosophy that had opposed each other in earlier centuries, namely, natural law theory and legal positivism. The new philosophy eventually came to be called historical jurisprudence, or the historical school. It predominated in some countries of Europe as well as in the United States in the late nineteenth and early twentieth centuries and has played an important role in the thinking of American judges and lawyers down to the present day, especially in constitutional law and in those areas of the

law in which the common law tradition is still taken seriously.¹ Indeed, it is the foundation of the English and American doctrines of precedent.

Each of these three major theories, or schools, has many variations, but each also has a distinctive core of meaning. Natural law theory treats law essentially as the embodiment in rules and concepts of moral principles that are derived ultimately from reason and conscience. Positivism treats law essentially as a body of rules laid down ("posited") and enforced by the supreme lawmaking authority, the sovereign. The former theory views law as rooted primarily in morality ("reason and conscience"); the latter views law as rooted primarily in politics ("the will of the lawmaker"). Most positivists do not deny that law ought to serve moral ends, the ends of justice, but argue that what law *is* is a political instrument, a body of rules manifesting the policies of the legitimately constituted political authorities. Only after it is established what law is may one ask what it ought to be. Naturalists, if I may so call them, believe, on the other hand, that one cannot know what the law is unless one considers at the same time what it ought to be, since, they argue, it is implicit in legal norms that they have moral (including political) purposes and are to be analyzed, interpreted, and applied in the light of such purposes. The naturalist will deny the validity, indeed, the legality, of a rule or action of the political authority that contradicts fundamental principles of justice.

1. See Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 788-97 (1988) [hereinafter Berman, *Integrative Jurisprudence*], reprinted in HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 289 (1993) [hereinafter FAITH AND ORDER]. On the role of historical jurisprudence in American legal thought in the nineteenth century, see generally ROSCOE POUND, 1 JURISPRUDENCE 63 (1959) ("The historical school . . . was dominant in Continental Europe and in America in the last half of the nineteenth century."); Stephen A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431. A major American exposition of historical jurisprudence is JAMES C. CARTER, *LAW: ITS ORIGIN, GROWTH, AND FUNCTION* (1907). In the twentieth century the historical school came to be largely discredited or, more frequently, ignored by American legal philosophers. Thus Alan Watson, in the course of examining positivist and natural law justifications of the validity of customary law, disdains to discuss historical jurisprudence at all, on the ground that "Savigny's . . . general theory of law . . . is today universally rejected . . ." ALAN WATSON, *THE EVOLUTION OF LAW* 48 (1985). Nevertheless, the historicity of law continues to be strongly reflected in judicial opinions and in the thinking of practicing lawyers. A recent example of its vitality in constitutional law is the majority opinion of the Supreme Court of the United States in *Planned Parenthood v. Casey*, which grounds the "very concept of the rule of law" on "continuity over time" and "respect for precedent." 112 S. Ct. 2791, 2808 (1992). A famous example in tort law is the majority opinion of the New York Court of Appeals in 1916 in *MacPherson v. Buick Motor Co.*, in which Judge Cardozo reinterpreted a century of precedents concerning manufacturers' liability to remote users of their products, showing that what was originally thought of as an exception to a rule had gradually swallowed up the rule. 217 N.Y. 382, 384-91 (1916). Among American legal theorists of the latter half of the twentieth century, Alexander Bickel was one of the rare exponents of the historical school of constitutional philosophy that goes back, through Edmund Burke, to Hale, Selden, and Coke. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975), especially ch. 1, at 11-30 (sections entitled "Edmund Burke and Political Reason" and "The Supreme Court and Evolving Principle"); cf. Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1600 (1985) ("The . . . 'Whig' tradition, to which Bickel himself claims allegiance, is 'usually called conservative' and is associated 'chiefly with Edmund Burke.'"). Kronman, however, identifies Bickel's legal philosophy as one of prudentialism, rather than historicity. See *infra* note 220.

In the four centuries preceding the Protestant Reformation, various natural law theories predominated, of which that of the thirteenth-century philosopher Thomas Aquinas (1225-1274) eventually became the best known.² In the fourteenth and fifteenth centuries, Thomist natural law theory was challenged by those who, like William of Ockham, believed in the priority of will over reason, both at the divine and human levels, as well as those who, like Marsilius of Padua, and later Machiavelli, believed in the quintessentially coercive character of all government and law.³ In the sixteenth century, Lutheran and Calvinist political and legal theory found support in such "voluntarist" doctrines, although both Lutherans and Calvinists combined positivist theories with natural law theories and lived with the tension between them.⁴

These philosophical issues concerning the nature of law had, however, an historical dimension, which remained largely unarticulated. Ever since the early formation of discrete modern Western legal systems in the twelfth century, it had been taken for granted that a legal system has an ongoing character, a capacity for growth over generations and centuries. This was a uniquely Western belief: that a body of law, a system of law, contains, and should contain, a built-in mechanism for organic change and that it survives, and should survive, by development, by growth. Thus the new profession of jurists, coming out of the universities that were founded from the late eleventh century on, developed the newly systematized canon law of the Roman Catholic Church progressively, each generation building on the work of its predecessors; likewise, although to a somewhat lesser extent, the various new systems of royal law, feudal law, urban law, manorial law, and mercantile law were also seen as evolving systems. The changes were thought to be part of a pattern of changes and, at least in hindsight, to reflect an inner logic, an inner necessity.

2. Brief analyses and evaluations of Thomist legal theory may be found in Anton-Hermann Chroust & Frederick A. Collins, Jr., *The Basic Ideas in the Philosophy of Law of St. Thomas Aquinas as Found in the "Summa Theologica,"* 26 MARQ. L. REV. 11 (1941), and in HEINRICH ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* 45-57 (Thomas R. Hanley trans., 1947). Twelfth- and thirteenth-century canon lawyers, such as Gratian, Rufinus, Huguccio, and Raymund of Peñafort, also developed distinctive approaches to natural law theory, as did contemporary Romanists such as Azo and Accursius. See generally GILLES COUVREUR, *LES PAUVRES ONT-ILS DES DROITS?* 119-55 (1961); RUDOLF WEIGAND, *DIE NATURRECHTSLEHRE DER LEGISTEN UND DEKRETISTEN VON IRNERIUS BIS ACCURSIVS UND VON GRATIAN BIS JOHANNES TEUTONICUS* (1967).

3. Ockham (c.1280-1349), though not himself a positivist, laid the foundation for the development of positivist theories of law by emphasizing the primacy of the divine will over the divine reason and thus the potentially irrational power of God. See Francis Oakley, *Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition*, 6 NAT. L.F. 65 (1961). This emphasis on will and power informed more explicit positivist theories such as those of Marsilius and Machiavelli. See ALAN GEWIRTH, *MARSILIUS OF PADUA* (1951); ISAIAH BERLIN, *The Originality of Machiavelli*, in *AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS* 25 (Henry Hardy ed., 1980); see also J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 171-72 (1992).

4. See generally Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 S. CAL. L. REV. 1575 (1989), *abridged in FAITH AND ORDER*, *supra* note 1, at 141.

The law was thought to be not merely ongoing; it had a history; it constituted a tradition.⁵

This historical dimension of Western systems of law, despite its crucial practical importance, did not attract the attention of Western philosophers sufficiently to affect their jurisprudence. Prior to the seventeenth century, they remained adherents either of natural law theory or of positivism or of an uneasy mixture of the two. There did emerge in the sixteenth century, most prominently in France, an historicist school of legal thought that held up the ancient Frankish customary law as a model to be opposed to “foreign” Romanist and canonist legal traditions.⁶ This nationalist historicism was invoked against royal innovations, although in England sixteenth-century supporters of absolute monarchy also invoked ancient English traditions and precedents to support their royalist position.⁷

Prior to the seventeenth century, however, it is hard to discover in Europe a legal philosopher who argued that the past history of a legal system embodies basic norms which not only do govern but also, because of their historicity, should govern subsequent developments and which bind the sovereign political authority itself. Only in the course of the seventeenth century did there emerge among the English common lawyers the strong conviction that the primary source of the validity of law—including both its moral validity and its political validity—is its historical character, its source in the customs and traditions of the community whose law it is. This conviction was forcefully expressed by Sir Edward Coke (1552-1634) in the first decades of the century. It was developed further by Coke’s protégé, John Selden (1584-1654). In the middle and later decades Sir Matthew Hale (1609-1676), who consciously built on the work both of Coke and of Selden, presented a systematic theory of the historical character of law and integrated that theory with both natural law theory and positivism.⁸

5. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 9, *passim* (1983).

6. See *infra* text accompanying notes 26-29.

7. Cf. Johann P. Sommerville, *History and Theory: The Norman Conquest in Early Stuart Political Thought*, 34 *POL. STUD.* 249, 255 (1986).

8. The significance for present-day American political and legal thought of the traditional division of legal philosophy into the three main schools is discussed in Berman, *Integrative Jurisprudence*, *supra* note 1. See also *infra* notes 168, 169, 220 and pp. 1736-38. It may be noted here that in recent American legal scholarship this division has largely given way to a multiplicity of particular approaches such as “law and economics,” “critical legal studies,” “right answer” theory, “contractarian” theory, “Republican” theory, and competing schools of feminist jurisprudence. See generally Gary Minda, *Jurisprudence at Century’s End*, 43 *J. LEGAL EDUC.* 27 (1993). Most of these approaches fall unconsciously into the positivist category, sometimes with an unconscious admixture of natural law theory. Most of them omit—or inveigh against—historical experience as a source of the legitimacy of existing legal institutions and as a key to the interpretation and application of particular legal rules and standards.

Perhaps Ronald Dworkin unconsciously approaches an historical jurisprudence when he compares the work of judges to the writing of a “chain novel” begun by collaborators at some point in the past. Dworkin states:

Each judge is . . . like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what these judges have said, or their state of

To elaborate this thesis it is necessary, first, to refute the conventional view that the English common lawyers were committed to historical jurisprudence from the start and that nothing fundamentally new happened in English legal philosophy in the seventeenth century except that the common lawyers finally triumphed over their opponents, the Romanists and canonists. The first section of this Article is devoted, therefore, to the historical background of English legal philosophy as it developed in the twelfth to the sixteenth and early seventeenth centuries. Succeeding sections are devoted to the legal philosophies of Coke, Selden, and Hale, respectively. A concluding section deals briefly with the relationship between the transformation of English legal philosophy in the seventeenth century and the contemporaneous revolutions in religion and science.⁹ An Epilogue notes briefly some of the connections between the historical jurisprudence of Hale and that of his eighteenth-, nineteenth-, and twentieth-century successors.

I. THE HISTORICAL BACKGROUND OF ENGLISH LEGAL PHILOSOPHY, TWELFTH TO SEVENTEENTH CENTURIES

Scholastic Jurisprudence and its Sixteenth-Century Rivals. It is conventional wisdom that distinctively English conceptions of the nature, sources, and purposes of law can be traced back to the early history of the English common law in the twelfth to fifteenth centuries.¹⁰ In fact, however,

mind when they said it, but to reach an opinion about what these judges have collectively *done*, in the way that each of our novelists formed an opinion about the collective novel so far written. Any judge forced to decide a law suit will find, if he looks in the appropriate books, records of many arguably similar cases decided over decades or even centuries past by many other judges of different styles and judicial and political philosophies, in periods of different orthodoxies of procedure and judicial convention. Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day.

Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 542-43 (1982). Dworkin does not, however, integrate this insight into his general theory of law.

9. Discussion of the political, economic, and social revolution of 1640-1689, which formed the context in which seventeenth-century English legal philosophy developed, is omitted here. It is to be discussed at some length in a forthcoming work of the author. It is discussed briefly in Harold J. Berman, *Law and Belief in Three Revolutions*, 18 VAL. U. L. REV. 569, 590-92 (1984), *reprinted in* FAITH AND ORDER, *supra* note 1, at 83.

10. This view, which originated in the seventeenth century, acquired even greater support in the heyday of English insularity in the nineteenth and early twentieth centuries. Thus Bishop William Stubbs, a leading English constitutional historian of the Victorian era, described English law as the purest surviving specimen of Germanic customary law, to which he attributed a strong stress on individual freedom and on constitutional limitations on the monarch, as opposed to Romanist theories of absolutism. From the time of Henry II, he wrote, the English common law reflected a wholly different philosophy from that of the canon or civil law, to which "there was in England the greatest antipathy." WILLIAM STUBBS, LECTURES ON EARLY ENGLISH HISTORY 257 (1906); *see also* WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 584-85 (Oxford, Clarendon Press 1891). The notion of an age-old conflict between a democratic, individualist, empirical, Anglo-Saxon or Germanic theory versus an autocratic, collectivist, dogmatic Romanist theory of law and government was widespread in late nineteenth-century America as well, and was taught at Harvard University, for example, by Henry Adams. *See* HENRY ADAMS, ESSAYS IN ANGLO-

there is little in the legal literature of those centuries that distinguishes English philosophy from that of other peoples of Western Christendom. It is, of course, not surprising that before the English Reformation books written by English canonists and English Romanists, or courses in canon law and Roman law taught in the English universities, reflected a legal philosophy hardly distinguishable from that of canonists and Romanists of other European countries; or that pre-Reformation English theological and philosophical writings on law were basically similar to those of French, German, Italian, or other European theologians and philosophers. The jurists and theologians and philosophers of all parts of Western Christendom in those centuries formed a single community, with a common language and a common religious faith. Everywhere the same controversies raged concerning the interrelations of divine, natural, customary, and positive law, of strict law and equity, of retribution and deterrence, of rights and responsibilities.

One might, indeed, expect to find some distinctive features of English legal philosophy reflected in early writings about the law applied in the royal

SAXON LAW (Boston, Little, Brown & Co. 1876) (containing his Harvard lectures).

Similar views recur even in recent scholarship. Thus Quentin Skinner states that English "nationalist hostility" to the Roman law and the canon lawyers "can be traced as far back as Bracton's defence of custom in the thirteenth century . . ." 2 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 54 (1978). In fact, Bracton, in his great treatise on English law, quoted Roman law favorably in hundreds of places. S.E. THORNE, *Henry de Bracton, 1268-1968*, in *ESSAYS IN ENGLISH LEGAL HISTORY* 75, 82-83 (1985) ("[Q]uotations from almost 500 different sections of the Digest and Code have now been identified in Bracton's book.") Moreover, Bishop Raleigh, the judge for whom Bracton clerked and whose cases he collected in his Notebook, was an ardent supporter of the papacy, who had to flee to France to escape the king's wrath, and was called at the time a second Thomas Becket. Skinner also wrongly attributes to the fourteenth-century English jurist Sir John Fortescue the view that "the whole of the Roman code is alien to the 'political' nature of the English constitution," and he misreads Fortescue as "xenophobic" toward Romanists and canonists. In fact, at the page cited by Skinner to support these conclusions, Fortescue merely states that English law is as "adapted to the utility of [England] as the civil law is to the good of the Empire." See SKINNER, *supra*, at 55 (quoting SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE (IN PRAISE OF THE LAWS OF ENGLAND)* 25, 37 (S.B. Chrimes ed. & trans., Cambridge Univ. Press 1942) (1471)). On Fortescue's general legal philosophy, see *infra* pp. 1658-59.

The prominent contemporary historian of medieval English law, R.C. van Caenegem, makes an argument similar to that of Stubbs and Skinner, and in addition contrasts the empirical, inductive character of the "Germanic and feudal customs and laws of England" in the twelfth century and thereafter with the dogmatic, deductive character of the Roman law of the contemporary continental European universities. R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 88 (2d ed. 1988). But of course the comparison should be between the Germanic and feudal customs of England and the Germanic and feudal customs of the other countries of Western Europe, and between the Roman law of the continental European universities and the Roman law of the English universities. See DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 165-74 (1990). Kelley rightly contrasts the "style" of the common lawyers and that of the civil and canon lawyers in sixteenth-century England, but greatly exaggerates the differences between their underlying philosophies. For the most part, they were, and were seen to be at the time, complementary to each other and shared common assumptions concerning the nature, sources, and purposes of law. That distinctive English political and legal institutions are rooted in a continuous English history dating from Magna Carta is also a principal theme of an important new book, *THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW* (Ellis Sandoz ed., 1993) [hereinafter *THE ROOTS OF LIBERTY*]. This otherwise valuable and sometimes brilliant collection of essays is marred by the failure to situate English developments within a larger European framework and also by a failure to appreciate the fundamental transformation of English legal thought in the seventeenth century.

courts of Common Pleas, King's Bench, and Exchequer, inasmuch as that law differed in many respects from the law applied in the secular courts of other European countries. No doubt the pride that was taken by various English writers in the law applied in the English royal courts—from Glanvill and Bracton in the twelfth and thirteenth to Sir John Fortescue and Christopher St. German in the late fifteenth and early sixteenth centuries—has some philosophical implications. Yet even books written “in praise of the laws of England” hardly differed in their underlying philosophy from books on German or French or Italian secular law written by German, French, and Italian jurists during those centuries.

Fortescue, to be sure, has been hailed as an important precursor of the distinctive historicism that came to dominate English legal thought in the seventeenth century.¹¹ Fortescue did, indeed, trace English law to immemorial custom, dating back to pre-Roman times. Nevertheless, the “laws of England,” which he “praised” in a fictitious dialogue between a young exiled English prince and his lord chancellor, were not conceived by him to be essentially different in their fundamental nature and sources and purposes from the customary laws of other countries, except that they were more ancient and hence superior. Moreover, the English laws which Fortescue lauded included not only specific English customs but also, in his words, “universals which those learned in the laws of England . . . call maxims, just as . . . civilians [speak] of rules of law.”¹² Indeed, Fortescue's principal work on legal philosophy did not reflect a theory that it is the historical character of law, its source in the customs and traditions of a people, that gives it its ultimate validity; on the contrary, Fortescue in that work remained strictly within the school of natural law represented by Thomas Aquinas, which emphasized the ultimate source of law in divine reason and its ultimate purpose as promotion of the common good.¹³ Other English jurists of the fifteenth and early

11. Cf. Ellis Sandoz, *Editor's Introduction: Fortescue, Coke, and Anglo-American Constitutionalism*, in *THE ROOTS OF LIBERTY*, *supra* note 10, at 1, 5-14.

12. FORTESCUE, *supra* note 10, at 21. This statement forms part of a larger debate between the chancellor and prince over whether the prince can acquire a knowledge of the laws. The prince has just said to the chancellor: “[W]hen I recollect how many years students in the curricula of the law devote to their study before they attain to an adequate expertness therein, I fear lest I myself spend the years of my youth in the same way.” *Id.* at 19-21. The chancellor's response is that knowledge of the law can be acquired in a short time through knowledge of the universal principles of law. *Id.* at 21.

13. See SIR JOHN FORTESCUE, *De Natura Legis Naturae*, in 1 SIR JOHN FORTESCUE, KNIGHT: HIS LIFE, WORKS, AND FAMILY HISTORY (Garland Publishing reprint ed. 1980) (Lord Clermont ed., 1869) [hereinafter *THE WORKS OF FORTESCUE*]. Fortescue submitted this book, written (as was his *IN PRAISE OF THE LAWS OF ENGLAND*, *supra* note 10) while he was in exile between 1461 and 1471, to the examination of the Pope, asking him, if he found it right and just, to impart it to all the sons of the Church, or otherwise “to annul it.” *Id.* at 332; see also George L. Mosse, *Sir John Fortescue and the Problem of Papal Power*, 7 *MEDIAEVALIA ET HUMANISTICA* 89, 90 (1952). Fortescue presented the orthodox view, then more or less universally shared in the West, that human law, including the statutes of Parliament, was derived from natural law, which was a reflection of divine law, and that statutes contrary to natural law were void; and further, that the Church was the final custodian of divine and human law and the Pope the final authority in its interpretation. Indeed, Fortescue goes so far as to say that the secular judge, in interpreting divine law, should “in doubtful matters . . . follow the decree of the supreme Pontiff,” that is, the Pope. See JOAN

sixteenth centuries were strongly influenced by the “voluntarist” school of natural law, of which the fourteenth-century philosopher William of Ockham was the leading exponent; yet Ockhamist philosophy, which emphasized the ultimate source of law in divine will, rather than divine reason, was no more “English” than that of Aquinas, which it opposed, was “Italian.”¹⁴

After the break with Rome and the accompanying intensification of English national consciousness, one might have expected the emergence of a distinctive English legal philosophy. Yet this did not occur during the Tudor period.¹⁵ In legal philosophy, as in other branches of thought, England retained strong intellectual links with the rest of Christendom throughout the sixteenth century. The name of St. German is often invoked—together with Fortescue’s—as one of the founders of modern English jurisprudence. Indeed, his *Doctor and Student*, written in 1531, on the eve of the English Reformation, in which the “student” defends the English common law against a “doctor of divinity,” showing its correspondence with fundamental principles of justice, does contain some seeds of later developments in English legal theory. Basically, however, St. German remained within the tradition of sixteenth-century European legal philosophy as it began to separate itself from earlier Roman Catholic theology and from the scholastic method. Reiterating theories similar to those of Aquinas but also drawing specifically on the writings of the fifteenth-century Ockhamist philosopher-theologian Jean Gerson, St. German stressed that all law, including English law, has its ultimate sources in the natural law of reason, the eternal law of God, general customs, and general legal principles (“maxims”). At the same time, he explained peculiarities of English law by distinguishing between “the law of primary reason” and the “law of secondary reason.” “The law of primary reason” consisted of general principles applicable at all times and places such as the elements that constitute murder or perjury or breaking the peace. “The law of secondary reason,” on the other hand, consisted of uniquely English laws that were the product both of reason and of particular English customs. St. German divided the latter laws into those that are “the laws of secondary reason general,” consisting of legal customs that are common to the whole world, and “the laws of secondary reason particular,” consisting of the unique legal customs of a given polity such as England.¹⁶ Thus, like Fortescue, and,

L. O'DONOVAN, *THEOLOGY OF LAW AND AUTHORITY IN THE ENGLISH REFORMATION* 49 (1991) (quoting *THE WORKS OF FORTESCUE*, *supra*, at 11).

14. For example, Reginald Pecock (c. 1395 - c. 1460), who was Bishop successively of St. Asaph and Chichester, traces the ultimate source of positive law to human will and the consent of the community, arguing that humanly created laws should be revised when they cease to be profitable to the people. See NORMAN DOE, *FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW* 12-19 (1990); Norman Doe, *Fifteenth-Century Concepts of Law: Fortescue and Pecock*, 10 *HIST. POL. THOUGHT* 257 (1989).

15. See Christopher W. Brooks, *The Place of Magna Carta and the Ancient Constitution in Sixteenth-Century English Legal Thought*, in *THE ROOTS OF LIBERTY*, *supra* note 10, at 57, 59.

16. See CHRISTOPHER ST. GERMAN, *DOCTOR AND STUDENT* 8-33 (T.F.T. Plucknett & J.L. Barton eds., 1974) (1523); see also J.A. GUY, *CHRISTOPHER ST. GERMAN ON CHANCERY AND STATUTE* 19 (1985)

indeed, like French and other legal humanists of the sixteenth century, St. German was concerned to give a universal legitimacy to the customary laws of the national polity.

During most of the sixteenth century, despite a flourishing English literature on political philosophy, there was a surprising dearth of systematic English writings on legal theory as such or, indeed, legal history—surprising in light of the wealth of such writings in contemporary Germany, Holland, France, Spain, and Italy, perhaps less surprising in light of the political pressures imposed by the Tudor monarchy to accommodate the tensions between the older English common law tradition and the Romanism of the new prerogative courts.¹⁷ For example, a major work by Thomas Smith, *De Republica Anglorum*, first published in 1583, which is often cited as an example of distinctive English legal thought, is a straightforward account of the legal powers of the crown and the parliament and of the main features of the law applied by the common law courts. The author, who had been a Regius Professor of Roman Law at Cambridge in the reign of Henry VIII, carefully avoids philosophical questions such as the relationship of positive law to natural law and divine law or the source of the common law in custom, and says virtually nothing about the historical origins and development of the common law. Although he emphasizes the powers of parliament, it is the king's parliament of which he writes, and he concludes his excursus on public law by stating, "To be short, the prince is the life, the head, and the authority of all things that be done in the realm of England."¹⁸

("Within St. German's framework, the universal laws of God and Nature were shown to be both rationally antecedent to, and harmoniously co-existent with, English common law (the law of man). . . .").

17. There was, to be sure, a flourishing literature on political theory. John Ponet, Christopher Goodman, and other Marian exiles developed sophisticated doctrines of limited monarchy and resistance to tyranny, and John Knox attacked the legitimacy of rule by women including the Queens of Scotland, England, and France, but these works contained very little on law as such. See CHRISTOPHER GOODMAN, *HOW SUPERIOR POWERS OUGHT TO BE OBEYD* (reprint ed. 1931) (1558); WINTHROP S. HUDSON, *JOHN PONET: ADVOCATE OF LIMITED MONARCHY* (1942); JOHN KNOX, *THE FIRST BLAST OF THE TRUMPET AGAINST THE MONSTROUS REGIMENT OF WOMEN* (reprint ed. 1972) (1558). The work of Tudor apologists also tended toward political theory rather than legal philosophy. Thus, for example, Thomas Starkey explored the ideal commonwealth following classical models, rather than discussing the nature and sources of law. See THOMAS STARKEY, *A DIALOGUE BETWEEN REGINALD POLE AND THOMAS LUPSET* (Kathleen M. Burton ed., 1948) (1536).

18. THOMAS SMITH, *DE REPUBLICA ANGLORUM* 62 (Leonard Alston ed., 1906) (1583) (spelling and punctuation modernized). Alston effectively refutes the position taken by Sir Frederick Pollock, among others, that Smith proclaimed the omnipotence of Parliament. On the contrary, as Alston shows, Smith only stated that "[t]he King is most powerful . . . when he is presiding over his parliament." Leonard Alston, *Introduction to SMITH, supra*, at xxxiii; see also MARY DEWAR, *SIR THOMAS SMITH: A TUDOR INTELLECTUAL IN OFFICE* (1964).

Proponents of the theory of the distinctiveness of the English "common law mind" from early times often cite another major work on English law published in the sixteenth century, namely, *The Commentaries or Reports of Edmund Plowden*, usually referred to as "Plowden's Reports" or simply as "Plowden," consisting of his digest of leading cases in King's Bench and Common Pleas from about 1550-1580. See *THE COMMENTARIES OR REPORTS OF EDMUND PLOWDEN* (London, Lintot & Richardson 1761); L.W. ABBOTT, *LAW REPORTING IN ENGLAND, 1485-1585*, at 198-239 (1973); Theodore F.T. Plucknett, *The Genesis of Coke's Reports*, 27 *CORNELL L.Q.* 190, 191-98 (1942); Van Vechten Veeder, *The English Reports 1292-1865*, 15 *HARV. L. REV.* 1, 7-9 (1901). Although Plowden's Reports are an important source

The English Romanist jurists—"civilians," as they were called, to distinguish them from the "common lawyers"—were also, for the most part, remarkably unphilosophical in their writings. This changed somewhat with the appointment of the Italian jurist Alberico Gentili to teach at Oxford in 1581. Gentili and his followers cited Justinian's texts to justify the supreme lawmaking authority of the English king. In England, Gentili wrote, the royal prerogative invoked by the Tudor monarchs signified an "extraordinary power," rendering the king "free from the laws."¹⁹ Gentili's protégé Richard Zouche wrote that the king possessed the sole power of making and interpreting the laws.²⁰ The authority of the Roman texts was buttressed with a voluntarist natural law theory, which subordinated reason to will in extraordinary circumstances.²¹ These arguments of the English civilians were essentially similar to arguments made by many—though by no means all—Romanist lawyers elsewhere in Europe.

A voluntarist theory of natural law was also reflected in Lutheran and Calvinist legal philosophies which emerged in the sixteenth century in many parts of Europe, including England. Many Lutherans (especially in Germany) and Calvinists (in France the Huguenots, in the Netherlands the Pietists, in Scotland the Presbyterians, in England the Puritans) held that both divine law and natural law are primarily an expression of God's will, enforced by divine sanctions, rather than primarily a rational principle, or Logos, inherent in creation itself.²² Protestants looked to the Bible, and especially the Ten

of knowledge about the common law, they contain very little concerning the broader questions that constitute the topics of a legal philosophy.

19. Alberico Gentili, *De Potestate Regis Absoluta*, in REGALES DISPUTATIONES TRES 10 (1605). Gentili wrote:

There are two kinds of supreme [monarchies]. The Laconian kings (as you have heard) were bound by the laws. But the Egyptian kings were especially bound; there were once laws which governed their walking, and bathing, and their lying with their wives. And any king accused [of violating the law] and convicted, was condemned, put to death, and denied burial. So recites Diodorus. And there are other kings, for whom their will suffices as law. . . . Among these other kings is our prince, whom we understand to be absolved from the laws, that is, his power is absolute.

. . . . And absolute power is fullness of power. It is fullness of will, subject neither to the rules of necessity nor to the rules of public law. Some say that this comes from Baldus. It is an extraordinary power, and free. It is that which in England one signifies (as I judge) by the term royal PREROGATIVE (regiae PRAEROGITIVAE). And so interpreters of law commonly write that there is a double power in the prince, an ordinary power restricted by law and an extraordinary power absolved from the law. And they define absolute power as that according to which the king is able to remove another's right, even a great right, even without cause.

(Translated from the Latin by the author).

20. See BRIAN LEVACK, *THE CIVIL LAWYERS IN ENGLAND, 1603-1641: A POLITICAL STUDY* 100 (1973).

21. John Cowell, for example, in his *Interpreter*, stated that in time of war the King "useth absolute power, in that his word goeth for law." *Id.* at 101 (quoting JOHN COWELL, *THE INTERPRETER: OR BOOKE CONTAINING THE SIGNIFICATION OF WORDS* (Cambridge, 1607)).

22. See Berman & Witte, *supra* note 4, at 1575-1602; see also I. JOHN HESSELINK, *CALVIN'S CONCEPT OF THE LAW passim* (1992); R.T. KENDALL, *CALVIN AND ENGLISH CALVINISM TO 1649 passim* (1979); Lee W. Gibbs, *The Puritan Natural Law Theory of William Ames*, 64 HARV. THEOLOGICAL REV. 37, 40-54 (1971).

Commandments, as the ultimate source of the content of natural law. The Calvinists, in particular, found the source of its binding character, however, not only in divine command as revealed in the Bible but also in human acceptance of the obligation to obey that command, effectuated by a covenant between God and man originally granted to Noah and his sons after the Flood and reiterated to Abraham, Moses, and the prophets. Both the divine command and the mutual Noachite covenant, they argued, bind the human conscience.²³ Similarly, they found the source of positive law in covenants, or contracts, among persons living in association with each other—among believers who constitute themselves freely into a church as well as among citizens who enter into a covenant to found a city or other civil society. These covenants, too, bind the human conscience. Thus a “command” theory of law and a “contract” theory of law may be found in the writings of English (as well as other European) Calvinist and neo-Calvinist legal philosophers in the sixteenth and seventeenth centuries.²⁴

All the conflicting legal philosophies that were advanced in the sixteenth century in the various countries of Europe had their roots in the scholastic jurisprudence, as it came to be called, that had first emerged in the West in the late eleventh and twelfth centuries.²⁵ Even those legal philosophers who opposed scholasticism most vigorously were concerned with the fundamental questions which their scholastic predecessors had first raised: the reality or nonreality of universal ideas of justice, the relation between natural law and positive law, and the relation between reason and will. Most important, they were all seeking to fill the gap left by the decline of papal power and the assertion of royal supremacy over the Church within the nation—the gap, that is, in the previous system of checks and balances against the arbitrary exercise of power.

An important challenge to the earlier scholastic jurisprudence also came from the French humanist school of legal historians.²⁶ This challenge had

23. See HESSELINK, *supra* note 22, *passim*; KENDALL, *supra* note 22, *passim*; Gibbs, *supra* note 22, at 40-54.

24. WILLIAM PERKINS, *A Discourse of Conscience*, in WILLIAM PERKINS, 1558-1602, ENGLISH PURITANIST I (Thomas F. Merrill ed., 1966). Perkins, a leading Puritan theologian, went so far as to impose an absolute moral liability for breach of divine law, stating that “the plea of ignorance [will not] serve for excuse; because whether we know God’s laws or know them not, they still bind us.” *Id.* at 10 (spelling modernized). John Selden reached a similar result respecting responsibility for breach of human law, stating that “Ignorance of the law excuses no man; not that all men know the law, but because it is an excuse every man will plead, and no man can tell how to confute him.” JOHN SELDEN, TABLE TALK 108 (Legal Classics Library reprint ed. 1989) (1847).

25. A discussion of sixteenth-century Lutheran legal philosophy, as expounded especially by Philip Melancthon and Johann Oldendorp, is omitted here, despite its importance. The Lutheran emphasis on the role of conscience in the application of rules is mentioned *infra* p. 1723. For a full analysis, see Berman & Witte, *supra* note 4.

26. Secondary literature on the sixteenth-century French humanists Budé, Cujas, Hotman, L’Hôpital, Baudouin, Dumoulin, Doneau, and Pasquier includes (in alphabetical order): P. Bouteiller, *Un historien du XVI^e siècle: Etienne Pasquier*, in 6 BIBLIOTHEQUE D’HUMANISME ET RENAISSANCE: TRAVAUX 357 (1945); MYRON P. GILMORE, HUMANISTS AND JURISTS: SIX STUDIES IN THE RENAISSANCE (1963); GEORGE

both a negative and a positive aspect. By systematic study of the ancient sources, humanist jurists undermined the historical foundations of the existing Roman and canon law—exposing especially their distortions of the texts of Justinian—and thus raised serious doubts concerning the relevance of past history to present needs altogether.²⁷ On the other hand, French historicism led also to the glorification of the ancient Gallican tradition of French law, which was held up as a model in much the same way as Anglo-Saxon legal institutions were held up as a model by English jurists such as Fortescue and St. German.²⁸ Both kinds of historicism—that which exposed the ways in which past history was distorted to lend authority to subsequent legal innovations and that which exposed the ways in which past history was betrayed (or, as in the English case, challenged) by subsequent legal innovations—represented a sharp break with the scholastic method, and especially with the scholastic reverence for authoritative legal texts.²⁹

Nevertheless, scholastic jurisprudence survived these various challenges, albeit in modified forms. Within the Roman Catholic Church, the Council of

HUPPERT, *THE IDEA OF PERFECT HISTORY: HISTORICAL ERUDITION AND HISTORICAL PHILOSOPHY IN RENAISSANCE FRANCE* (1970); DONALD R. KELLEY, *FOUNDATIONS OF MODERN HISTORICAL SCHOLARSHIP: LANGUAGE, LAW, AND HISTORY IN THE FRENCH RENAISSANCE* (1970) [hereinafter KELLEY, *FOUNDATIONS*]; DONALD R. KELLEY, *FRANÇOIS HOTMAN: A REVOLUTIONARY'S ORDEAL* (1973); Donald R. Kelley, *Vera Philosophia: The Philosophical Significance of Renaissance Jurisprudence*, 14 *J. HIST. PHIL.* 267 (1976); DOMENICO MAFFEI, *GLI INIZI DELL'UMANISMO GIURIDICO* (1956); Linton C. Stevens, *The Contribution of the French Jurists to the Humanism of the Renaissance*, 1 *STUDIES IN THE RENAISSANCE* 92 (William Peery ed., 1954). Cf. GERALD STRAUSS, *LAW, RESISTANCE AND THE STATE: THE OPPOSITION TO ROMAN LAW IN REFORMATION GERMANY* (1986).

Although the French humanist challenge to scholastic jurisprudence was the most direct, the Lutheran challenge, which did not wholly reject the older scholastic theories, was the most profound. See Berman & Witte, *supra* note 4.

27. Guillaume Budé, following the early Italian humanist Lorenzo Valla, emphasized the discontinuities between past and present, the flawed and fragmentary nature of legal texts (especially Roman law texts), and the seeming irrelevance of much of Roman law to contemporary needs. See KELLEY, *FOUNDATIONS*, *supra* note 26. Perhaps the chief exponent of this "critical" approach to legal history was Jacques Cujas. When students challenged him to use his historical findings to resolve polemics surrounding the French wars of religion he replied, "*Quid hoc ad edictum praetoris?*" J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 10-11 (2d ed. 1987).

28. In his *Franco Gallia* François Hotman argued that the French monarchy was a constitutional one, with representative bodies rendering both advice and consent. Like the English Anglo-Saxonists of the sixteenth and seventeenth centuries, he used this historical argument to criticize absolutist tendencies in the monarchy of his time. He did not, however, develop a theory that the monarchy was legally bound by the historical experience which he recounted—only that as a moral and political matter it ought to follow the ancient examples. See generally Ralph E. Giesey & J.H.M. Salmon, *Introduction* to FRANÇOIS HOTMAN, *FRANCOGALLIA* 62-72 (Ralph E. Giesey ed. & J.H.M. Salmon trans., Cambridge Univ. Press 1972) (1573).

29. Both forms of historicism must also be sharply contrasted with the English belief in historicity which developed in the seventeenth century. Kelley, Huppert, and other authors cited *supra* note 26 generally fail to recognize this contrast and, more particularly, fail to distinguish between reverence for the past on the one hand, and on the other, belief in the normative significance of ongoing historical experience. J.G.A. Pocock makes a similar error in tracing the historical jurisprudence of Sir Edward Coke to François Hotman's idealization of the Gallican past. See POCOCK, *supra* note 27, at 1-29. Hotman invoked the ancient French constitution against the subsequent betrayal of it; Coke claimed that the ancient English constitution survived intact despite incremental changes in it. See *infra* notes 73-74 and accompanying text.

Trent reaffirmed Thomist natural law theory, and a strong neo-Thomist school of legal philosophy came to prevail in Spain and Italy.³⁰ In England, where royal supremacy over the Church was virtually complete, and to challenge it was treason, an expressly Roman Catholic jurisprudence only survived underground, although philosophical debates that had taken place within the Church prior to the Reformation continued to have repercussions in the conflicts between common lawyers and civilians and between Puritans and Anglicans.

Richard Hooker's "Comprehensive" Legal Philosophy. It was the Anglican theologian and political philosopher Richard Hooker, more than any other single writer, who, in his multivolume work, *Of The Laws of Ecclesiastical Polity*, laid the theological and philosophical foundations for what in the seventeenth century became the first distinctively English jurisprudence. Hooker's book was written in the 1590's in part to defend the Anglican Church against the assaults of radical Puritans; its spirit, however, was not one of sharp confrontation but rather of conciliation with the more moderate elements within the Calvinist ranks. It was also written in part to defend royal supremacy over the Anglican Church against both Puritan and Roman Catholic attack, while still emphasizing the autonomy of the Church and the subjection of the monarch to the "law of the Commonweal."³¹ Finally, Hooker was concerned to identify his own Anglican philosophy with the traditional Aristotelian and Thomist philosophy that prevailed in the Roman Catholic Church;³² nevertheless, at crucial points he departed radically, albeit respectfully, from Aristotelian and Thomist thought. In short, he well earned the sobriquet, "the judicious Hooker," although he did not deserve the

30. On the emergence of the sixteenth-century neo-Thomists, see Christoph Bergfeld, *Katholische Moralthologie und Naturrechtslehre*, in 2 HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE, pt. 1, at 999, 1016-33 (Helmut Coing ed., 1977) and the literature cited therein. The influence of sixteenth-century neo-Thomist thought on the development of the general theory of contract law is analyzed in depth in JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991).

31. Hooker called the Law of the Commonweal "the order expressly or secretly agreed upon touching the manner of [men] living together." RICHARD HOOKER, *The Laws of Ecclesiastical Polity* [hereinafter *Ecclesiastical Polity*], bk. 1, ch. 10, at 1, reprinted in 1 THE WORKS OF RICHARD HOOKER 239 (Burt Franklin reprint ed. 1970) (John Keble ed., 7th ed. 1888). At a later point Hooker wrote that

[W]here the law doth give him dominion, who doubteth but that the king who receiveth it must hold it of and under the law? According to that axiom, *Attribuat Rex legi, quod lex attribuit ei, potestatem et dominium* and again *Rex non debet esse sub homine, sed sub Deo et lege* ["the king will give to the law that which the law gives to him, power and dominion," and again "the king ought to be under God and the law, not under man"].

Ecclesiastical Polity, *supra*, bk. 8, ch. 2, at 3, in 3 THE WORKS OF RICHARD HOOKER, *supra*, at 342. This last expression, drawn from Bracton, is used repeatedly by Hooker in his working notes to *Ecclesiastical Polity*. See A.S. McGrade, *Constitutionalism Late Medieval and Early Modern—Lex Facit Regem: Hooker's Use of Bracton*, in ACTA CONVENTUS NEO-LATINI BONONIENSIS: PROCEEDINGS OF THE FOURTH INTERNATIONAL CONGRESS OF NEO-LATIN STUDIES 116, 117 (R.J. Schoeck ed., 1985).

32. Hooker calls Thomas Aquinas "the greatest amongst the school-divines." *Ecclesiastical Polity*, *supra* note 31, at bk. 3, ch. 9, at 2, in 1 THE WORKS OF RICHARD HOOKER, *supra* note 31, at 381. See also PETER MUNZ, *THE PLACE OF HOOKER IN WESTERN THOUGHT* 50-59, 112-46 (1952), for a comparison of Hooker with Aristotle and Aquinas.

distortions of his philosophy committed by various later writers who seized on one part of it or another and neglected its subtlety, its integrity, and its comprehensiveness.³³

Hooker had a strong premonition that the religious conflicts that divided England would lead to acute civil strife. In the first words of the Preface to his book he wrote that his sole purpose in writing it was "that posterity may know we have not loosely through silence permitted things to pass away as in a dream."³⁴ He wrote as a postrevolutionary, that is, as one who looked back on the impending transformation and sought to reconcile it with what had gone before; it is not accidental that his book only became the classical statement of Anglican theology and of English political philosophy a century after it was written, as the English Revolution was drawing to a close. John Locke drew heavily on it in his *Second Treatise of Government*, written in the 1680's. Even in the eighteenth and early nineteenth centuries, Hooker's book continued to reflect mainstream English political and religious thought to a far greater extent than did the works of writers of "liberal" or "Enlightenment" persuasion.

For Hooker, law was founded in reason and morality and in man's natural sociability; to that extent he adhered to classical scholastic natural law theory. But he also asserted that law is founded in will and politics and in the corruption of human nature, which requires, for the sake of sociability itself, submission to the commands of a political authority. Government is the result of man's natural inclination to sociability; however, all particular forms of government are the result of man's express or tacit consent to submit to those particular forms, and it is such initial consent from which the binding character of the positive law of a particular government is derived.³⁵ Thus there is a strong element of voluntarism in Hooker's theory as well as a strong implication that the legitimacy of a particular government is rooted in the consent of the people. A century later, Locke read into Hooker's work a theory of social contract that would justify revolution against a tyrannical government. In fact, however, Hooker understood the initial agreement of men to form a civil society not as a social contract in the Lockean sense but as an expression of universal consent to a permanent status of subjection to political authority.³⁶ The permanence of the status was related, in Hooker's exposition,

33. On Hooker's theological comprehensiveness, see John E. Booty, *Hooker and Anglicanism*, in *STUDIES IN RICHARD HOOKER* 207, 207-39 (W. Speed Hill ed., 1972); JOHN S. MARSHALL, *HOOKER AND THE ANGLICAN TRADITION: AN HISTORICAL AND THEOLOGICAL STUDY OF HOOKER'S ECCLESIASTICAL POLITY* (1963).

34. *Ecclesiastical Polity*, Preface, ch. 1, at 1, *supra* note 31, in 1 *THE WORKS OF RICHARD HOOKER*, *supra* note 31, at 125.

35. See *Ecclesiastical Polity*, *supra* note 31, at bk. 1, ch. 10, at 1, in 1 *THE WORKS OF RICHARD HOOKER*, *supra* note 31, at 239. Cf. EBENEZER T. DAVIES, *THE POLITICAL IDEAS OF RICHARD HOOKER* 65 (1946).

36. See W.D.J. Cargill Thompson, *The Philosopher of the "Politic Society": Richard Hooker as a Political Thinker*, in *STUDIES IN RICHARD HOOKER*, *supra* note 33, at 3, 39; cf. ROBERT K. FAULKNER,

to the corporate nature of the political community. “[T]he act of a public society of men done five hundred years since,” he wrote, “standeth as theirs who presently are of the same societies, because corporations are immortal; we were then alive in our predecessors, and they in their successors do live still.”³⁷

Thus the laws laid down by the political authority in the past remain binding in the present—binding on the entire commonwealth, including its rulers. They may, of course, be changed, but only lawfully, since that limitation was implicit in the initial consent of the people to form a lawmaking government. “Laws they are not, therefore, which public approbation hath not made so.”³⁸ Such approbation exists where the laws are enacted by the representatives of the people acting in their name. Laws of absolute monarchs, according to Hooker, are also binding, because such monarchs enjoy their authority either by divine appointment or, as in England, by consent of the people.

Hooker’s “judiciousness” found expression in his repeated distinction between beliefs or practices that are “necessary” and those that are only “probable.” The Puritans, he charged, often insisted on the “necessity” of certain rituals or doctrines which in fact were not in themselves objectionable but which were, at the same time, only of “probable” value, that is, they were what Melancthon had called *adiaphora*, “matters of indifference.” Similarly, Hooker left open the matter of specific forms of government, requiring only that they be based either on divine institution or on consent of the people or on both. Applying the same distinction to legal institutions, Hooker attributed to natural law (or, as he called it, the law of reason³⁹) the purposes for which laws are made but not necessarily the means prescribed for accomplishing those purposes. Thus he wrote that the requirement that theft, for example, be punished, is universal but he left to the positive law of individual polities the type and degree of punishment to be applied.⁴⁰ His tendency was to reduce substantially the necessary requirements of true Christian faith and of a just political and legal order. Implicit was a constitutional theory—that the sovereign political authority is bound by fundamental law but that its subsidiary laws may vary according to the needs of particular times and places.

RICHARD HOOKER AND THE POLITICS OF A CHRISTIAN ENGLAND 110-14 (1981) (discussing Hooker’s “famous doctrine of consent”).

37. *Ecclesiastical Polity*, *supra* note 31, at bk. 1, ch. 10, at 8, in 1 THE WORKS OF RICHARD HOOKER, *supra* note 31, at 246 (spelling modernized).

38. *Id.*

39. Hooker uses the phrase “natural law” or “law of nature” to refer to the phenomena of inanimate nature and of animal and human biology, and the phrase “law of reason” to refer to human moral and intellectual processes. See DAVIES, *supra* note 35, at 49.

40. *Ecclesiastical Polity*, *supra* note 31, at bk. 3, ch. 10, at 3, in 1 THE WORKS OF RICHARD HOOKER, *supra* note 31, at 387; DAVIES, *supra* note 35, at 53.

Hooker's *Laws of Ecclesiastical Polity* set the stage for the debates concerning the nature, sources, and purposes of law that raged between Anglicans and Puritans throughout the seventeenth century. In the first decades of the century, however, it was overshadowed by another legal philosophy, namely, that of King James himself, who not only wrote an important book setting forth his theory of law and government but also effectively enforced that theory against those who dared openly to oppose it.

The Legal Theory of Absolute Monarchy: James I and Bodin. King James presented a coherent philosophy of the interrelationship of divine law, natural law, and positive law.⁴¹ In *The Trew Law of Free Monarchies*, written in 1598, when he was king only of Scotland, as a rebuttal of Calvinist anti-monarchical views as well as of Roman Catholic claims of papal supremacy, James met head-on the pre-Reformation theory that it is the law that makes the king, and not the king the law, and that therefore the king is under the law. He answered that God, as the creator of the natural order, appoints monarchs to carry out his will on earth. Thus kings derive their power directly from God and not through a social contract with their people. Indeed, as he told Parliament in 1610, "Kings are not only God's Lieutenants upon earth, and sit upon God's throne, but even by God himself they are called Gods."⁴²

As divine law is the will of God revealed in Scripture and tradition, so human law is the will of the supreme ruler. Through law, the ruler keeps order in society just as through law God keeps order in nature. Reason, in King James' philosophy, is not immanent in nature and in society, as it was believed to be by most scholastic theologians and philosophers ever since St. Anselm and Abelard. Reason, according to King James, is a standard to which will ought generally to conform, as well as a means through which will ought generally to be effectuated, but ultimately it is the will of the ruler that determines what reason is and what it requires; and in exceptional cases the ruler, like God, may act arbitrarily, against reason, and none may call him to account.⁴³

41. See THE POLITICAL WORKS OF JAMES I *passim* (Charles H. McIlwain ed., 1918).

42. Glenn Burgess, *The Divine Right of Kings Reconsidered*, 107 ENG. HIST. REV. 837, 837 (1992) (quoting James) (spelling and punctuation modernized). Burgess properly distinguishes between the divine right theory and absolutism. *Id.* at 841. He misses the point, however, that if the divine right theory is carried to an extreme (as in the case of James), it merges with absolutism, since under it no one is authorized to challenge a royal act or decision on the ground of its injustice.

43. Referring to *Psalms* 82:6, James states: "Kings are called Gods." James I, *The Trew Law of Free Monarchies*, in THE POLITICAL WORKS OF JAMES I, *supra* note 41, at 53, 54 [hereinafter James I, *Trew Law*]. Unlike God, however, a ruler might prove to be evil. Such a ruler is to be tolerated as condign punishment for sins, rather than resisted:

I grant indeed, that a wicked king is sent by God for a curse to his people, and a plague for their sins: but that it is lawful to them to shake off that curse by their own hand, which God hath laid on them, that I deny, and may so do justly. Will any deny that the king of *Babel* was a curse to the people of God, as was plainly forespoken and threatened unto them in the prophecy of their captivity? And what was *Nero* to the Christian Church in his time? And yet *Jeremiah* and *Paul* . . . commanded them not only to obey them, but heartily to pray for their welfare.

The reason to which the king's will ought to conform was found by King James in those principles that correspond to the nature of God and that are therefore necessary to the preservation of human nature. Thus, in a state of nature, kingship is necessary because otherwise society would consist simply of a headless multitude. The relationship of the king to his subjects, James wrote, is a natural relationship comparable to that of the queen bee to her subjects in the hive or the father to the other members of the family. James also compared absolute monarchy to the natural relation between a soul and a body. Kingship, in his theory, is the soul of the body politic. Kings are God's representatives on earth, endowed by him with divinity itself.

This theory was not, of course, original with King James but was in fact the prevailing theory of those who supported absolute monarchy in the Europe of his time. James derived many of his ideas from the influential sixteenth-century French political and legal philosopher Jean Bodin, who had argued that as in nature God rules the universe as an absolute monarch, so in human society sovereignty should be exercised in each political territory by an absolute monarch. According to Bodin, God has "established . . . [sovereign princes] as His lieutenants for commanding other men."⁴⁴ Theories of sovereignty had been developed by others in the sixteenth century, and the concept of absolute monarchy—that is, monarchy superior to and hence "absolved" from the laws—had been put forward by lawyers and debated and qualified in earlier centuries as well.⁴⁵ Bodin, however, was the first major writer to develop a systematic theory of an indivisible sovereignty—not merely a superiority but a total supremacy, a single ultimate human lawmaking authority from which all other human lawmaking authority is derived.

It is certain then (as I have already by the Law of God sufficiently proved) that patience, earnest prayers to God, and amendment of their lives, are the only lawful means to move God to relieve them of that heavy curse.

Id. at 67 (spelling and punctuation modernized).

44. JEAN BODIN, ON SOVEREIGNTY 46 (Julian H. Franklin ed. & trans., 1992) (1583 ed.) [hereinafter BODIN, ON SOVEREIGNTY]. Franklin has translated Bodin's central arguments on sovereignty from JEAN BODIN, LES SIX LIVRES DE LA RÉPUBLIQUE [THE SIX BOOKS ON THE REPUBLIC] (Aalen, Germany, Scientia Verlag reprint ed. 1961) (1583 ed.) [hereinafter BODIN, THE REPUBLIC], which was first published in 1576.

45. A fragment of Ulpian found in the Digest 1.3.31, stating that the prince is absolved from the laws (*Princeps legibus solutus est*), served as a focal point for constitutional analysis from the twelfth through the seventeenth centuries. It was once thought the expression was a catch-phrase for the absolutist tendencies of the Roman glossators of the thirteenth and fourteenth centuries. See A. Esmein, *La Maxime Princeps legibus solutus est dans l'ancien Droit public français*, in *ESSAYS IN LEGAL HISTORY* 201, 201-03 (Paul Vinogradoff ed., 1913). It has now been established that when writers like Accursius, the thirteenth-century author of the Magna Glossa on the Justinian texts, used this expression they meant to circumscribe the ruler with a variety of constitutional limitations. As Brian Tierney has put it, "[Accursius] did not associate the words *legibus solutus* with any ideas of arbitrary government. There was no suggestion . . . that the Prince, because he was 'loosed from the laws,' could change the law at his own whim or set it aside in individual cases to please favorites." Brian Tierney, *The Prince Is Not Bound by the Laws: Accursius and the Origins of the Modern State*, 5 *COMP. STUD. SOC'Y HIST.* 378-90 (1963). In the sixteenth and seventeenth centuries, the constitutional limitations that were implicit in the work of the earlier civilians were stripped away and the expression came to stand for a monarchy unencumbered by legal restraints. This is how James I understood the expression when he spoke of "free monarchies," that is, monarchies "loosed from the law."

Bodin was also the first major writer to develop a systematic theory of the total absolutism of the sovereign authority—by definition—from subservience to the laws that it made. Anticipating by almost a century the writings of Thomas Hobbes, Bodin postulated that in every stable political order there must be an ultimate power, whether it be a single person or a group of persons, which makes the laws and therefore stands above them. This differed from Hobbes' positivist jurisprudence chiefly in its postulate of an immediate divine source of the state's lawmaking power. It differed also, however, from both Roman Catholic and Lutheran doctrines of the divine right of kings, which emphasized that together with that right there were also divinely imposed obligations, which were not only moral but also legal, and which were owed not only to God but also to the king's subjects. Under Bodin's theory—and James'—the absolute power of the monarch lies in his right to give people laws without their consent.⁴⁶ This meant that no one had the legal right to resist his commands, however unlawful they might be from any point of view other than that they were his commands.⁴⁷

Bodin's major work, *The Republic*,⁴⁸ was directed in part against Huguenot doctrines of divided sovereignty, legal limitations on monarchical authority, and a right of resistance to monarchs who defy such limitations. In general, the Huguenots, following Calvin, advocated the Bible-based right and duty not of every person to kill a tyrant (as John of Salisbury had advocated in the twelfth century),⁴⁹ but of the responsible leaders of the Christian community, the elders or magistrates, to overthrow a monarch who persecutes adherents of the true faith. In attacking this theory, Bodin did not exclude the possibility of an aristocratic order; he argued, however, that monarchy was far preferable.⁵⁰ Indeed, Bodin elaborated a complex mathematical system to

46. BODIN, ON SOVEREIGNTY, *supra* note 44, at 23 ("the main point of sovereign majesty and absolute power consists of giving the law to subjects in general without their consent"); see Burgess, *supra* note 42, at 842 n.1. Burgess states that "[t]he essential feature of absolutism was its claim that the king alone was superior to the positive law and not bound by it." *Id.* at 842.

47. Burgess, *supra* note 42, at 842. Burgess correctly criticizes those who identify absolutism with the divine right of kings. "Nevertheless it is true," he states, "that in sixteenth- and seventeenth-century Europe the two traditions were generally fused into a theory of divine-right absolutism. The question is whether or not England followed this pattern." *Id.* (footnote omitted). I would say not "generally"—not, for example, in many of the German Länder—but "often." Burgess goes on to argue that in fact Reformation and Stuart England experienced the divine right of kings without absolutism. *Id.* at 842-46. It is difficult, however, to reconcile this conclusion with the evidence which he himself presents, let alone the additional evidence presented in this Article.

48. BODIN, THE REPUBLIC, *supra* note 44.

49. JOHN OF SALISBURY, POLICRATICUS bk. 3, ch. 15 (Cary J. Nederman, ed. & trans. 1990); see also John Dickinson, *Introduction* to THE STATESMAN'S BOOK OF JOHN OF SALISBURY, BEING THE FOURTH, FIFTH, AND SIXTH BOOKS, SELECTIONS FROM THE SEVENTH AND EIGHTH BOOKS, OF THE POLICRATICUS at lxxiii-lxiv (John Dickinson trans., Alfred A. Knopf 1963) (1159). For an extensive discussion of John of Salisbury's political theory, including his doctrine of tyrannicide, see BERMAN, *supra* note 5, at 276-88.

50. See JULIAN H. FRANKLIN, JEAN BODIN AND THE RISE OF ABSOLUTIST THEORY 23, 54 (1973). In his earlier writings Bodin had defended a limited sovereignty, but in *The Republic* he argued that in every ordered commonwealth there must be a single center of absolute authority, and that apparent constitutional restrictions on monarchical power, such as the monarch's oath to obey the laws of the realm and his

show that religious upheavals follow certain cycles and that only the force exerted by an absolute monarch can counter such disturbances. He also argued that certain climates lead to certain types of human behavior, and that absolute monarchy is appropriate to the climate of Europe.⁵¹

In England, the philosopher and scientist Francis Bacon, King James' faithful Attorney General, also argued—like Bodin—that monarchy is a natural thing, and that as nature requires and produces monarchy, so monarchy requires and produces law. Bacon told Parliament in 1610 that forms of government other than absolute monarchy “come speedily to confusion and dissolution.”⁵² Forty years later Hobbes made a similar argument, defending absolute monarchy as that form of government which corresponds to the laws of motion followed by physical bodies.

Thus the theory that the monarch is the final source of positive laws, and that at the same time he himself is ultimately absolved from them, was closely linked with the scientific and philosophical thought of the time. A major characteristic of that thought was its assumption that the entire universe is based on a single explanatory model, that all phenomena—stars, billiard balls, forms of government, whatever—follow the same basic principles. Bodin, Bacon, Descartes, Hobbes, Filmer, and others were all obsessed by this reductionist view.⁵³

It was also shared by many, if not most, of the English “civilians,” the Romanist lawyers who studied at Oxford and Cambridge, were members of the Doctors' Commons, and practised chiefly in the prerogative courts. Like Bodin—like King James—they typically believed in the harmony of nature, the harmony of nature and government, and the harmony of nature, government, and law. This theory supported their desire for systematization of the law. Many of them looked down upon the common law applied in the courts of Common Pleas, King's Bench, and Exchequer, with its apparent lack of system, its archaic forms, its inconsistencies, and its reliance on fictions. They despised also the customary law—with which the common law was often identified—that grew out of usage and tacit understandings. Of the Lombard customary law, which, like the English common law, had an ancient tradition,

establishment of various offices to carry out various governmental functions, are not binding upon him. The sharing of sovereignty among prince, nobility, and people, he wrote, would amount to “anarchy.” *See id.* at 29.

The premises of James' argument for royal absolutism differed somewhat from Bodin's insofar as James relied heavily on Biblical sources, including, in particular, examples of absolute monarchical rule drawn from the books of Samuel, Chronicles, Kings, and Psalms.

51. *See* ANTON MEUTEN, *BODIN'S THEORIE VON DER BEEINFLUSSUNG DES POLITISCHEN LEBENS DER STAATEN DURCH IHRE GEOGRAPHISCHE LAGE* (1904).

52. Francis Bacon, A Speech of the King's Solicitor, Persuading the House of Commons to Desist from Farther Question of Receiving the King's Messages, in 2 *THE WORKS OF FRANCIS BACON* 276, 277 (Basil Montagu ed., Philadelphia, Parry & McMillan 1857).

53. *Cf.* Robert McRae, *The Unity of the Sciences: Bacon, Descartes, and Leibniz*, 18 *J. HIST. IDEAS* 27 (1957); James Daly, *Cosmic Harmony and Political Thinking in Early Stuart England*, 69 *TRANS. AM. PHIL. SOC'Y* pt. 7 (1979).

one of the civilians said it was non lex sed fex—not law but excrement! Bacon, though himself not a civilian but a common lawyer, proposed the systematization of the entire common law by subsuming all its various rules and procedures under an elaborate and comprehensive set of 300 fundamental principles, in order to overcome its uncertainties and ambiguities.⁵⁴

Bodin's absolute monarch—and King James'—was not supposed to be a tyrant. Quite the contrary: as God's representative, he was supposed to rule by just laws. Bodin, himself a lawyer by training, shared the almost universally held belief that kings are required by God to fulfill the divine commandment to maintain justice in their kingdoms and to observe the principles of natural law, that is, the principles of reason and conscience. Indeed, in his coronation oath the monarch—in England as well as in the other countries of Europe—swore to carry out not only the moral obligations but also the legal obligations of his office. What made him absolute, according to Bodin, and later according to King James, was his lack of accountability to anyone other than God himself: that was what was “modern” in Bodin's constitutional theory. The sovereign's oath was to God alone. If he violated that oath, and was a tyrant, his subjects were required nevertheless to obey him and patiently to suffer his despotic rule, albeit with prayers, sighs, and tears, recognizing that he was sent by God as a punishment of the people for their sins.

The monarch could indeed, and should, share with others the exercise of his powers. Legally, however, he could not, even if he wanted to, divest himself of any part of his indivisible supremacy, nor could he grant to others the lawful power to challenge a revocation by him of any jurisdiction that he had previously bestowed upon them. In Bodin's words,

As to control by way of law (*voie de justice*), the subject has no jurisdiction over his prince, since it is from him that all power and authority to command derives, and not only may he revoke all the power and jurisdiction of every magistrate, but in his presence the power and jurisdiction of all magistrates, guilds and corporations, estates and communities, entirely lapses⁵⁵

54. See DANIEL R. COQUILLETTE, FRANCIS BACON 35-48 (1992); cf. Paul H. Kocher, *Francis Bacon on the Science of Jurisprudence*, 18 J. HIST. IDEAS 3, 11-12 (1957) (“[A] maxim is for Bacon a precept of the law of nature or universal justice, resembling a middle axiom in natural science. It is obtained by induction from congruous lines of cases running through several different fields of law and, when applied back to those fields, serves to promote a consistency within and between them. It is thus a prime means for reforming the completeness, coherence, predictability, and certainty of law.”)

55. FRANKLIN, *supra* note 50, at 93 (quoting Bodin). Bodin did place two theoretical limitations on the absolute power of the monarch, namely, that kings are obliged to honor their contracts and that they may not deprive persons of property without compensation. The latter obligation included a restriction on royal power to impose arbitrary taxes. In view of these limitations, some writers dispute the view that Bodin advocated a theory of absolute monarchy. The point, however, is that Bodin did not propose any means for enforcing these limitations upon tyrannical power: no agency of government was empowered, in his theory, to oppose the monarch's will and no right of civil disobedience was attributed to the monarch's subjects. On the other hand, the French monarchy was, as a practical matter, under some significant restraints at the hands of the nobility. See generally J. RUSSELL MAJOR, REPRESENTATIVE

As Julian Franklin has put it,

In the constitutional conflicts of the seventeenth century, Bodin was to provide the English royalists with a ready-made arsenal of arguments, or, more precisely, with a model for developing their arguments. [Bodin's] *République* would help to show how all medieval checks on royal power could be deprived of binding force—how review by the courts [of the legality of royal statutes and proclamations] could be reinterpreted as a mere administrative function, how the work of Parliament could be understood as purely advisory or, at the most corroborative, and how all charters and engagements by the king could be construed as conditional and temporary. *Mutatis mutandis*, Bodin's recipe, devised primarily for France, could be applied to England also⁵⁶

Thus James, like Bodin, added to his philosophical argument an historical argument: that there were kings before there were any estates or parliaments or laws, and that it was kings who distributed the land and established the forms of government. "And so it follows of necessity," he wrote, "that the kings were the authors and makers of the laws and not the laws of the kings." The only "fundamental laws" were those maintaining the succession to the crown. Once a king's hereditary right is established, he is above the law and in no way bound to obey it, though he may and should do so "of his good will and for good example-giving to his subjects."⁵⁷ The monarch alone is "free." All branches of his government are responsible to him, not he to them. "As kings borrow their power from God, so judges borrow their power from kings"⁵⁸ "That which contains the mysteries of the King's power," he wrote, "is not lawful to be disputed."⁵⁹ Parliament is "nothing but the head court of the king and his vassals."⁶⁰ To illustrate these propositions he drew heavily on Tudor precedents. His language, however, was far less diplomatic than that of the Tudors. Elizabeth I would not have said—she could not have said—what James said in his address to his first English Parliament in 1603, "I am the Husband and the whole Isle is my lawful Wife: I am the Head, and it is my Body."⁶¹

INSTITUTIONS IN RENAISSANCE FRANCE, 1421-1559 (1960).

56. FRANKLIN, *supra* note 50, at 106.

57. James I, *Trew Law*, *supra* note 43, at 62-63 (spelling modernized).

58. James I, *A Speech in the Star Chamber*, in *THE POLITICAL WORKS OF JAMES I*, *supra* note 41, at 326, 327 (spelling modernized).

59. Charles H. McIlwain, *Introduction* to *THE POLITICAL WORKS OF JAMES I*, *supra* note 41, at xv, xl (quoting James).

60. James I, *Trew Law*, *supra* note 43, at 62.

61. McIlwain, *supra* note 59, at xxxv (quoting James). For historical background, see CHRISTOPHER HILL, *THE CENTURY OF REVOLUTION, 1603-1714* (1980); CHRISTOPHER HILL, *INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION* (1965); MAURICE LEE, JR., *GREAT BRITAIN'S SOLOMON: JAMES VI AND I IN HIS THREE KINGDOMS* (1990).

No doubt many members of Parliament were startled to hear from their new sovereign so blunt a statement of the theory of absolute (“free”) monarchy. Two points, however, need to be added, lest wrong inferences be drawn concerning the immediate political implications of James’ constitutional philosophy. The first point is that the theory he expounded was by no means new to England but for some seventy years had been implicit, and often explicit, in the language of supporters of the Tudor monarchy. Previously, the rhetoric had been somewhat softer, especially during the forty-five-year reign of Elizabeth; the first two Stuart kings of England were entirely lacking in the tact that enabled Elizabeth to hold together a people whose unity was continually threatened by gathering Puritan forces on the left and surviving Roman Catholic forces on the right. The crudeness with which both James I and Charles I addressed their subjects, and more fundamentally, their basic lack of understanding of the requirements of English political rhetoric as it had been developing, and of the accompanying emphasis upon the art of political compromise, undoubtedly contributed to the malaise that ultimately broke out in the Revolution. But, the underlying Stuart theory of government and law did not differ in its essentials from that which had prevailed under the Tudors. Indeed, James continually emphasized the consistency of his theories with previous Tudor practice.

The second point is that James I—and later his son Charles—did have, despite the bluntness of their theories of sovereignty and absolutism, a deep respect for English law, including the English common law, and a strong desire to preserve it. Faced with challenges by many of the common lawyers on the bench and in Parliament, of whom Sir Edward Coke was the most prominent, both James and Charles repeatedly affirmed their intention to abide by the precedents of the past and to maintain intact the legal tradition which they had inherited from their Tudor predecessors. And in *The Trew Law of Free Monarchies* James stressed the obligation of a “just king” to rule by law, even as God after the flood promised Noah to rule by law.⁶²

II. SIR EDWARD COKE, HIS MAJESTY’S LOYAL OPPONENT

Coke’s Acceptance of James’ Premises and the Sources of His Opposition to James’ Conclusions. It must be stressed at the outset that neither Coke nor his allies—except for the Puritans among them and those who secretly adhered to the outlawed Roman Catholic doctrines—challenged the basic theoretical concepts and principles of government and law that were articulated by James. Coke himself accepted without question the theory of absolute monarchy. He

62. Paul Christianson, *Young John Selden and the Ancient Constitution, ca. 1610-1618*, 128 PROC. AM. PHIL. SOC’Y 271, 274 (1984) (quoting James I, A Speech to the Lords and Commons of the Parliament at White Hall, in *The POLITICAL WORKS OF JAMES I*, *supra* note 41, at 306, 309).

loved the common law and fought for it against those who would curtail its scope and jurisdiction, including the king himself, but he never denied the truth of their philosophical premises. He agreed with them that it is the king's natural duty to safeguard the community, that the king is the supreme lawgiver, and that the king has absolute power to appoint and remove judges. As Elizabeth's Attorney General, in upholding her Act of Supremacy over the Church, he had stated that "by the ancient laws of this realm, this kingdom of England is an absolute empire and monarchy . . ."⁶³ Coke did not believe in Puritan concepts of Scriptural authority, congregationalism, and rule by inspired elders. He was no Calvinist! At the same time he did not believe in the Roman Catholic doctrine of a secular monarchy limited by ecclesiastical authority. He was, in fact, an Anglican and a monarchist through and through. For him the king was head of both state and church, and for him reason of state was divorced from both Puritan and Roman theology.

Yet as Chief Justice from 1606 to 1616 and later as a member of Parliament, Coke fought stubbornly to limit the king's prerogative powers and to subject them to the common law and to parliamentary control.

If Coke accepted King James' premises, how was he able to avoid King James' conclusions? The answer lies partly in the character of the man, partly in the ambiguities in King James' philosophy, and partly in the historical situation in which England found itself. I shall discuss each of these three points in turn.

(1) Coke was born in 1552, the son of a landed gentleman of Norfolk. Educated at Cambridge and at Clifford's Inn and the Inner Temple, he was called to the bar in 1578. Thereafter he became for twenty-eight years a highly successful practicing lawyer, while serving also part time in a variety of public capacities: as a local judge in Coventry, Norwich, and London successively; as a professor ("reader") in the Inner Temple; as a member of Parliament in 1589 and Speaker of the House of Commons in 1593; and as Solicitor General from 1592 to 1594 and Attorney General from 1594 to 1603 under Elizabeth and from 1603 to 1606 under James I. In 1606 James appointed him Chief Justice of the Court of Common Pleas and in 1613 Chief Justice of the Court of King's Bench. In 1616 the King dismissed him because of his refusal to yield to royal pressures. Thereafter, however, he regained royal favor and in 1617 was appointed to the Privy Council. In 1621, 1624, 1626, and 1628 he was returned to Parliament. His opposition to the royal prerogative in the 1621 Parliament led to his temporary imprisonment in the Tower on trumped-up charges. In the 1628 Parliament, he was the intellectual leader of the movement to induce King Charles I to accept the Petition of Right.

63. Caudrey's Case, 5 Coke's Rep. 1, 8 (K.B. 1595). The citation may also be found at 77 Eng. Rep. 1, 10.

Coke served with great distinction in each of these various capacities. He had the gift of playing each of his roles with complete dedication. As Attorney General he was completely loyal to the monarchy. As a common law judge he was completely loyal to the common law. As a member of Parliament he was an ardent supporter of parliamentary independence. He was a highly popular lecturer in the Inns of Court and from an early time in his career he was regarded as an outstanding legal scholar. His thirteen volumes of reports of common law cases, with extensive commentary, called *Coke's Reports*, and his four volumes which he called (imitating Justinian) *Institutes*, covering real property, pre-Tudor statutes, criminal law, and the court system, respectively, decisively shaped the course of the English common law for more than two centuries. Charles Gray has called him "the greatest lawyer in English history."⁶⁴

The main key to Coke's character as a public figure was his dedication to the law. He would not deviate, while he was in office, from his duty faithfully to interpret and apply the law as he had sworn by his oath to do. The measure of the man in this respect was taken in the famous colloquy in 1616 in which King James upbraided the twelve common law judges for exceeding their powers by restricting his exercise of the royal prerogative. The immediate occasion was their refusal to honor a royal request to stay proceedings and consult with him in a pending case involving his power to make a temporary appointment to fill an ecclesiastical vacancy.⁶⁵ With all twelve judges on their knees before the all-powerful monarch, James demanded that each of them swear in turn never again in such a case to flout his will. Each so swore, until it came finally to the turn of Chief Justice Coke, who (according to the official report) said only that "when that case should be, he would do that should be fit for a judge to do."⁶⁶ Once before Coke had stood his ground in person against the King's assertion of his power to subject the common law judges to his will.⁶⁷ For this new effrontery James removed Coke from the Bench

64. Charles M. Gray, *Introduction to MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND*, at xii (Charles M. Gray ed., 1971) (3d ed. 1739) (first edition published in 1713). For an excellent biography of Coke, see CATHERINE D. BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE* (1956). For Coke's parliamentary career from 1621 to 1628, see generally STEPHEN D. WHITE, *SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621-28* (1979). White points out that Coke's views on many different topics underwent many changes during the course of his life. It is nevertheless true that he remained committed throughout to the historical view of English law that is analyzed in this Article. White notes in passing that in summing up his argument for the 1628 Petition of Right before the House of Lords, Coke told the Lords that they were being "advised by the most faithful of counsellors that can be; dead men . . ." *Id.* at 242.

65. *Case of Commendams, Colt & Glover v. Bishop of Coventry & Lichfield*, 80 Eng. Rep. 290 (K.B. 1612).

66. *ACTS OF THE PRIVY COUNCIL OF ENGLAND, 1615-16*, at 607 (1925).

67. The earlier confrontation had taken place in 1607, when James, at the behest of the Archbishop of Canterbury, summoned the common law judges to instruct them to desist from issuing orders prohibiting the ecclesiastical courts to consider certain types of cases involving tithes (ecclesiastical taxes) and permitting the removal of such cases to the common law courts. According to the official report of the occasion, the King denounced the judges, saying that just as "the papists . . . allege scriptures and will

and at the same time ordered him to review all the cases in his previously published eleven volumes of Reports in order to eliminate erroneous statements concerning the royal prerogative. Coke took six months to review the cases and his commentary on them, and noted only a few very minor corrections.

(2) The ambiguities in King James'—and, for that matter, Bodin's—political and legal philosophy lay in the various meanings attached to the words “law” and “king,” not only by them but also, and especially, by those whom they addressed. The king was indeed said to be above the law in the sense, first, that he was the supreme maker of the law, and, second, that none could challenge him if he himself failed to observe the law that he had made. Yet those who were charged with the duty of interpreting and enforcing the law could not, and were not supposed to, look into the king's mind in each case in order to determine what the law said and what it meant. For them, the law necessarily consisted of concepts, principles, rules, and procedures that had been laid down or established in the past, whose meaning was conveyed by the language in which they were expressed. This, indeed, is a paradox inherent in the very concept of law: that rules laid down at one time remain binding at a later time—that the prevailing law is in effect, a memorial of the past. Similarly, “the king,” who in James' philosophy was the ultimate source of the law, was not only the person sitting on the throne at a given moment but rather a succession of royal personages from time immemorial. For Coke, and indeed for Englishmen generally, “the king's” laws included the laws not only of the reigning monarch but also of his predecessors: the Tudors, the Plantagenets, and the earlier Norman and even Anglo-Saxon rulers, who in and through their councils and their parliaments and their courts had, over the centuries, created

interpret the same,” so “the judges allege statutes and reserve the exposition thereof to themselves.” Coke replied that “the common law protects the king,” implying that the king is under the law, which “the King said was a traitorous speech, for the King protects the law and not the law the King. The King makes Judges and Bishops. If the Judges interpret the laws themselves and suffer none else to interpret, then they may easily make of the laws shipmen's hose.” See Roland G. Usher, *James I and Sir Edward Coke*, 18 ENG. HIST. REV. 664, 669 (1903). Another report states that the king spoke fiercely with clenched fist and was about to strike Coke, who fell flat on all fours and humbly beseeched His Majesty to take compassion on him and to pardon him if his “zeal had gone beyond duty and allegiance.” See *id.* at 670. In Coke's own report of the incident, which was published many years after his death and is much less reliable but nevertheless in many ways more revealing, the King argued that “he thought the law was founded upon reason, and that he and others had reason, as well as the Judges,” to which Coke replied:

[T]rue it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: and that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege* [That the king ought not to be under man but under God and the law].

Prohibitions Del Roy, 77 Eng. Rep. 1342, 1343 (K.B. 1607). Contrast Fortescue's statement a century and a half earlier that the law is based on universal principles which the prince can learn “in a short time.” See *supra* note 12.

a legal system that had duration in time and carried with it meanings remembered from the past. This, too, is a paradox of the law—that earlier lawmakers bind later lawmakers, at least presumptively. Thus it was entirely possible, and in a sense necessary, for Coke, appointed by the King to be chief justice of the common law courts, to consider that he was indeed best serving his monarch when he decided cases according to principles of the common law laid down by the courts and parliaments of “the king” in earlier centuries and not thereafter repealed or modified.⁶⁸

It was precisely Coke’s belief that the laws of James’ predecessors remained in force that was the chief bone of contention between him and the King. When members of Parliament in 1621 challenged the King’s policies with respect to Spain and the Roman Catholic Church, and James forbade them to discuss it further, Coke and others insisted that the freedom of speech of members of Parliament, like the powers of the courts and the liberties of the subject generally, were privileges inherited from previous reigns. James replied that their “privileges were derived from the grace and permission of our ancestors and us (for most of them grow from precedents, which show rather a toleration than inheritance)”⁶⁹ At Coke’s suggestion, the House of Commons entered into its journals a “Protestation” stating “that the liberties, franchises, privileges and jurisdictions of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England.”⁷⁰ It was for this assertion that Parliament “inherited” its liberties as a “birthright,” rather than possessing them by royal “toleration,” that James removed Coke from the Privy Council and had him committed to the Tower of London, where he remained in close confinement and virtual isolation for seven months.⁷¹

(3) I have argued that Coke was able, with integrity, to accept King James’ basic theory of government and law and yet boldly challenge specific uses of the royal prerogative, first, because of his personal unwavering dedication to the law and, second, because of the ambiguity of the concepts of law and of kingship in King James’ theory itself. One may find parallels in twentieth-century authoritarian regimes, where courageous persons have stood up against

68. Coke’s position on this point is set forth in *Calvin’s Case*, 77 Eng. Rep. 377, 388-89 (1608), where he quoted Plowden’s statement that “the King has in him two bodies, viz., a Body natural, and a Body politic,” the latter “consisting of Policy and Government” and being “utterly void of Infancy, and old Age, and other natural Defects and Imbecilities.” See also ERNST H. KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* 7 (1957); cf. Usher, *supra* note 67, at 669. Thus the king’s law could survive his death.

69. Letter from James I to George Calvert (Dec. 16, 1621), quoted in *CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I, A.D. 1603-1625*, at 287, 287 (J.R. Tanner ed., 1930) (spelling modernized).

70. Debates in the Commons on Privilege, in *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY: A SELECTION OF DOCUMENTS FROM A.D. 600 TO THE PRESENT* 427, 429 (Carl Stephenson & Frederick G. Marcham eds. & trans., 1937).

71. The pretext was that he had at one time failed to pay taxes to the Crown. The common law judges dismissed the complaint and Coke was thereupon released from custody. See BOWEN, *supra* note 64, at 455-57. Note that the “birthright” theory of the common law became important in the struggle of the American colonies against abuses of the royal prerogative.

oppressive dictatorships, challenging them to live up to their own laws. There was a third factor, however, in seventeenth-century England, namely, the historical situation of a people which had three generations before decisively repudiated a 400-year-old Roman Catholic heritage, in which Church and State checked and balanced each other, in favor of an Erastian sovereignty, in which Church and State were under a single head, but which found itself in the early 1600's still torn by acute internal religious conflicts, on the one hand, and, on the other hand, by a profound uncertainty concerning the ultimate source of the legitimacy of monarchical rule. In that situation, Coke did not quarrel with the Stuart theory of the source of its legitimacy in divine right, but he sought to support that legitimacy, and to condition it, in a way which the king found troublesome, to say the least. That is, Coke justified judicial decisions and parliamentary positions that had the effect of limiting royal power, on the ground that they were dictated by the historical precedents of English law—precedents endorsed by previous monarchs. The king could not object in principle to such a justification since he too justified his own actions partly on the basis of their consistency with English legal precedents endorsed by his royal predecessors. The conflict between them thus became a conflict concerning the interpretation of English legal history.

Coke's Philosophy of English Law. Coke accepted his monarch's philosophy of law, and yet he founded a new school of English legal philosophy diametrically opposed to it! This paradox may be resolved by distinguishing between a general theory of law, such as James' (and Bodin's), and a theory of English law.

A general theory of law directly addresses universal questions concerning the nature of law, the sources of law, the relation of law to morals and to politics, fundamental legal concepts of rights and responsibilities, and other related matters of a general nature. A theory of English law, on the other hand, addresses such questions indirectly and in the context of a particular legal system, posing questions concerning the nature of English law, the sources of English law, the relation of English law to morals and politics, etc. A study of seventeenth-century English legal philosophy in the first of these two senses would require an analysis of the philosophical writings of Thomas Hobbes, Robert Filmer, John Locke, James Harrington, and many other political and legal philosophers whose theories did, to be sure, reflect their English political and legal heritage, but whose primary focus, in their philosophical writings, was on politics and law in general, not English politics and English law in particular. Coke, on the other hand, was concerned above all to explain not law in general but English law, and to identify the factors that gave English law its particular character. The more general unarticulated philosophical and political implications of his analysis were subordinated to its more narrowly legal aspects, which he viewed in historical terms. In the next two generations, John Selden and Matthew Hale, among others, developed those general

philosophical and political implications more fully. Only in the latter eighteenth and the nineteenth centuries, however, especially in the writings of Friedrich Carl von Savigny, partly under the influence of Edmund Burke, did a full-blown historical school of legal philosophy in a more general sense grow from these roots.

Coke's legal philosophy was not only narrowly focused on English law, but was even more narrowly focused on one branch of English law, namely, the English common law—that is, the law that traditionally applied chiefly (though not exclusively) in the royal courts of Common Pleas, King's Bench, and Exchequer. Coke did not attempt to develop a theory of the canon law of the Church, which was applicable in the English ecclesiastical courts, or the mixture of Romanist and canonist rules and procedures applied in the wide variety of other English courts. Coke was entirely familiar with the canon law and Roman law applicable in various types of cases in these other courts, but he considered them—as they later came to be considered by most English legal historians—"foreign" law. It is to Coke more than to any other single person that we owe the widespread notion that "English law"—"the law of the land"—means only, and has always meant only, the English common law, and not in addition (as his opponents correctly argued) "the Law of the Chancery, the Ecclesiastical Law, the Law of the Admiralty. . . . the Law of the Merchants, the Martial Law, and the Law of State."⁷²

Coke not only proclaimed that the law applicable in the English common law courts, in contradistinction to the law applicable in other English courts, was "the law of the land," but in his *Institutes* he sought to present the English common law as a self-contained system (no mean task!), by organizing various parts of it in an encyclopedic form, with ample references to decided cases. It was no accident that he adopted Justinian's title *Institutes*. As Richard Helgerson has observed, Coke, who owned a glossed copy of Justinian in which he had made his own extensive notes in the margins, sought to systematize the English common law in such a manner that it would appear "Roman" and thus ward off the genuine article. "Coke's very insularity," Helgerson writes, "his myopic insistence on the uninterrupted Englishness of English law, was the product of . . . a persistent awareness of a rival system of law against which English law had to defend and define itself. Coke was insular not by ignorance but by ideological necessity."⁷³

72. This was the objection raised by Serjeant Ashley to the position taken by Coke and Selden and two other spokesmen for the House of Commons at a conference, "concerning the subject's Liberties and Freedoms from Imprisonment," held between the Lords and Commons in 1628, prior to the issuance of the Petition of Right. Ashley argued that the phrase *per legem terrae* in Magna Carta must be understood to refer to "divers laws of this realm," and not only to the common law. See Proceedings in Parliament Relating to the Liberty of the Subject, 3 Howell's State Trials 59, 153 (1627-28); see also J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 61-63 (1955).

73. RICHARD HELGERSON, FORMS OF NATIONHOOD: THE ELIZABETHAN WRITING OF ENGLAND 71 (1992). As Helgerson states, Coke's ideological insularity was shared by an entire generation of Elizabethan

To Coke also, more than to any other single person, we owe the origin of the idea—which the Revolution eventually made a political reality—that the common law courts were superior to all the other English courts and could determine the limits of their jurisdiction and reverse or overrule their decisions. This idea was a great bone of contention between Coke and James, since the King insisted that it was he, and not the common law judges whom he appointed, who had the final authority to allocate jurisdiction and to determine the relations among his various courts. After the King promoted him to be Chief Justice of the King's Bench, Coke insisted on calling himself "Chief Justice of England"—much to James' displeasure.

In addition, we owe to Coke more than to any other single person the belief in the unbroken continuity of the common law, and the survival of the authority of its precedents, from early times—indeed, according to Coke, following Fortescue, from earliest times, literally from pre-Roman times. His successors such as John Selden and Matthew Hale were content to trace the source of what they called "the ancient common law," and what scholars in recent decades have called "the Ancient Constitution," to the Anglo-Saxon period.⁷⁴ Later historians—to the present day—have postponed the starting point until after the Norman Conquest and, more precisely, the reign of Henry II. The remoteness of the origins, however, is not as important as the principle of unbroken continuity with the past. Coke stressed, more than did his successors, the continuity of many of the particulars, and not merely of the basic principles, of the common law; nevertheless, Coke fully understood that in the history of the law continuity necessarily involves change, even though his emphasis was on what survived.⁷⁵

and Jacobean writers seeking to establish English "nationhood." *Id.*

74. The seventeenth-century expression "ancient constitution" was given new vitality by J.G.A. Pocock, and has been widely accepted together with his main thesis. That thesis, which is similar in some basic respects to the argument of this Article, may be summarized as follows: After the Reformation, the common lawyers adopted an insular and parochial view of English law, proclaiming its source in the ancient and immemorial custom of the common law courts; further, this view, whose first great expositor was Sir Edward Coke, found a broader expression in the writings of Sir Matthew Hale and a century later in the historicist constitutional philosophy of Edmund Burke. See POCOCK, *supra* note 27, at 30, *passim*. Pocock's work, which first appeared in 1957, has been criticized for certain exaggerations. These include the failure to recognize that the common lawyers, including Coke, were aware that canon law and Roman law were widely practised in England outside the common law courts and further, that the common law itself, despite its "immemorial" character, had changed over the centuries. See JAMES R. STONER, JR., *COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM* (1992); Christianson, *supra* note 62; Gray, *supra* note 64; Hans S. Pawlisch, *Sir John Davies, the Ancient Constitution, and Civil Law*, 23 *HIST. J.* 689 (1980).

75. As if responding to Pocock, Charles Gray has written: "One must beware of parodying [Coke]. He did not inhabit a fool's eternity, wherein the law of seventeenth-century England looked simply indistinguishable from Anglo-Saxon law. He recognized the fact of change but tended to see it as degenerative on the one hand and restorative on the other. . . . There had been many departures from that system, largely for the worse, but these could be and had been reversed." Gray, *supra* note 64, at xxiii. A recent such parody of Coke is Morton Horwitz's attribution to "Sir Edward Coke and most other Whig lawyers" of "static conceptions either of an ancient constitution derived from immemorial custom or of a long-past golden age." Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 *HARV. L. REV.* 30, 44-45 (1993). Professor Horwitz states: "In fact, during

Coke's most important contribution to the philosophy of English law, however, was his identification of "the fundamental law" of England, its unwritten constitution, with the common law itself—that is, with the law that had been applied by the courts of King's Bench, Common Pleas, and Exchequer since their establishment in the twelfth and thirteenth centuries. This was entirely compatible with the prevailing historiography of his time—and of later times—which selected from earlier English history its distinctively national elements and sought to exclude, so far as possible, its Roman Catholic elements as well as other elements which the English had shared, and in many respects continued to share, with other peoples of Western Christendom. Coke went even farther in adding to the common law a primitive doctrine of precedent, which revived the authority of thirteenth-, fourteenth-, and fifteenth-century common law statutes and judicial decisions. The total political effect of this historiography was to minimize and reinterpret the constitutional changes that had been introduced during a century of Tudor-Stuart rule. This, too, became an essential tenet of mainstream English legal historiography. Ultimately it served the cause of common law supremacy over rival ecclesiastical and civilian systems.

Thus Coke's answer to the free monarchists' general theory of government and law was—no theory at all! He did not deny the validity of King James' version of natural law theory, that law is founded on Reason. Nor did he deny the validity of the King's version of what later came to be called legal positivism, that law is founded on Will, the will of the sovereign. He merely shifted the jurisprudential focus from law in general to English law, and more especially the English common law, which he then defined in historical terms. His answer to James was History, which he saw largely in terms of Tradition and Precedent. He could get away with this just because it was not—at the time—a theory, and because English monarchists themselves, and above all King James, continually insisted that the English precedents—which they interpreted quite differently—should be respected. For they, too, felt the need for an historical basis for the legitimacy of the monarchy.

At a later time Coke's "non-theory" came to be called "historical jurisprudence," and to be opposed to both legal positivism and natural law theory. Coke, however, would have been quite surprised to be told that he had founded (together with others, to be sure) a school of legal philosophy. He himself articulated no systematic philosophy. As a judge he relied on the authority of old statutes and judicial decisions—the older the better—to justify his refusal to accept what he considered to be abuses of the royal prerogative or derogations of the common law. His thirteen volumes of *Reports* consist of

most of the constitutional struggles of the seventeenth century the theory of the common law remained overwhelmingly static." *Id.* He qualifies this statement on the next page, where he attributes to Matthew Hale a "new view" of "law as changing," without noting, however, that Hale was continuing in the path started by Coke. See *infra* text accompanying notes 165-81.

over 450 judicial decisions of the common law courts from 1572 to 1616, set forth with his explanations. His four volumes of *Institutes* consist chiefly of scattered commentary on legal doctrines, statutes, and cases.⁷⁶ Yet from these sources one may tease out the rudiments, at least, of a jurisprudence.⁷⁷

By way of illustration:

(1) In 1607 the radical Puritan lawyer Nicholas Fuller was arrested by order of the Court of High Commission for slander of that court in a proceeding before it. He petitioned the King's Bench to issue a writ of prohibition forbidding the High Commission to try him, and when that petition was denied he sought a writ of habeas corpus, arguing that there was no justification for his being held in custody, but the King's Bench denied that also. According to Coke's report,⁷⁸ a conference was then convened of all twelve common law judges—the Justices of King's Bench and Common Pleas and the Barons of the Exchequer—who resolved, first, that the interpretation of both the statute of Elizabeth defining the powers of the Court of High Commission and of the letters patent issued under that statute was properly a function of the judges of the common law, since the High Commission had cognizance only of "spiritual causes" and was governed only by "spiritual law," whereas the interpretation of an Act of Parliament and of letters patent issued by the Privy Council "belongs to Temporal Judges." Otherwise, they said, the ecclesiastical judges would be likely to expand their jurisdiction to include nonecclesiastical causes. Five statutes were listed by the Justices in support of this holding—all dating from the fourteenth and fifteenth centuries. (No mention was made of the fact that they all were directed against expansion of the jurisdiction of the ecclesiastical courts of the Roman Catholic Church in England, which were subordinate to the papal curia in Rome.) The Justices resolved, second, that slander of the authority or power of the High Commissioners was to be determined and punished solely in proceedings before the judges of the common law. They based this conclusion on six other fourteenth- and fifteenth-century statutes, which, they said, gave to the common law judges the power to certify or refuse to certify an excommunication ordered by an ecclesiastical judge. It was implied that if the common law judges have power to refuse to certify an excommunication, then the High Commission has no power to punish for slander.

(2) In the background of Nicholas Fuller's case was the case of his clients, who had been arrested by the High Commission for refusing to take an

76. Parts II-IV of Coke's *Institutes* went through seven editions, while Part I, *Coke on Littleton*, went through at least nineteen editions as well as a number of abridgements and synopses. See HELGERSON, *supra* note 73, at 91.

77. Gray has said that Coke had "an ad hoc mind" and that "[h]e did not think philosophically." See Charles M. Gray, *Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke*, in *CULTURE AND POLITICS FROM PURITANISM TO THE ENLIGHTENMENT* 25, 28 (Perez Zagorin ed., 1980). Gray adds, however, that "in his attitudes, the outlines of a jurisprudence are discernible." *Id.*

78. Fuller's Case, 77 Eng. Rep. 1322, 1322-25 (K.B. 1607).

oath—called the *ex officio* oath—to answer truly any questions, on any subject, that might be put to them by ecclesiastical interrogators. The *ex officio* oath was quite different from the oath normally taken by a witness or a party in a judicial proceeding “to tell the whole truth,” since the latter oath is limited to matters that are relevant and material to particular charges, and questions that are irrelevant or immaterial or, indeed, otherwise improper are to be excluded by the judge. The *ex officio* oath had been permitted by the canon law of the Church of Rome, and later by the canon law of the Church of England, in certain types of cases, notably in cases of heresy. It was called “*ex officio*” because the questions to be answered proceeded “from the office” of the judge rather than from specific charges. To the Puritans, an oath in itself was abhorrent. To the common law judges, however, who were no Puritans, what was abhorrent was the potential abuse of an oath that enabled the interrogator to ask any questions he wanted to ask and then to convict the suspect out of his own mouth. Such a procedure was especially useful, if not necessary, in prosecutions for heresy where the matter at issue was the secret beliefs of the suspect.

In the same year, 1607, in connection with widespread revulsion against use of the *ex officio* oath, the House of Commons voted that the common law judges should be consulted on the matter. As a consequence, the Chief Justice of the King’s Bench, Popham, and Coke as Chief Justice of Common Pleas were asked to state “in what cases the Ordinary [that is, the Bishop or an ecclesiastical judge acting for the Bishop] may examine any person *ex officio* upon oath.”⁷⁹ Popham and Coke replied, first, that in principle

the Ordinary cannot constrain any man, ecclesiastical or temporal, to swear generally to answer to such interrogatories as shall be administered unto him; but ought to deliver to him the articles upon which he is to be examined, to the intent that he may know whether he ought by law to answer to them; and so is the course of the Star Chamber and Chancery: the defendant hath the copy of the bill delivered unto him, or otherwise he need not answer to it.⁸⁰

Second, the two chief justices said, citing a thirteenth-century statute, in only two types of cases may a person be examined *ex officio*, namely, matrimonial and testamentary causes, since “contracts of matrimony and the estates of the dead are many times secret, and [in addition] they do not concern the shame and infamy of the party, as adultery, incontinency, usury, simony, hearing of mass, heresy, etc.”⁸¹ In the latter types of cases, they said, to examine a man upon the secret thoughts of his heart or his secret opinion

79. Of Oaths Before an Ecclesiastical Judge *Ex Officio*, 12 Coke’s Rep. 26 (K.B. 1607).

80. *Id.*

81. *Id.*

is (quoting an unnamed civilian) "*inventio diaboli ad detrudendas miserorum animas ad infernum* [an invention of the devil for destroying the souls of the wretched in Hell]."⁸²

The answer of Popham and Coke was directly contrary to the practice of the High Commission specifically authorized by statute in heresy cases in 1533 and later, by royal order, in all types of cases before the High Commission. Nevertheless, Coke wrote in his *Institutes* that "[n]o person ecclesiastical or temporal ought in any ecclesiastical court to be examined upon the cognition of his heart, or what he thinketh . . ."⁸³

In other types of cases as well, Coke interpreted fourteenth and fifteenth century statutes giving the royal courts powers vis-à-vis "other" courts—which then meant the ecclesiastical courts subject to Rome—to be applicable to the powers of the common law courts vis-à-vis other royal courts—that is, the prerogative courts established in the sixteenth century by the Tudor monarchy. In the sixteenth century the common law courts had occasionally resisted the expansion of the jurisdiction of the prerogative courts, but never before Coke had common law judges stated, as the King's Bench, under Coke, did in 1615, that they had "cognizance of all other Inferior Courts[!] and [could] correct all errors and proceedings in them."⁸⁴

(3) Ultimately, Coke asserted the supremacy of the common law courts over the Chancery itself, whose pedigree and credentials were more ancient and more prestigious than those even of Common Pleas and King's Bench.⁸⁵ The crucial case was that of one Glanville, who had sold to Courtney, on credit, what he affirmed to be a diamond worth £300, when in fact it was "barely a topaz" and not worth more than £30.⁸⁶ In accordance with the widespread practice of the time, Courtney gave to Glanville his bond for £800, in a covenant under seal, defeasible on payment of the purchase price, and confessed judgment on the bond in the Court of Common Pleas; in other

82. *Id.*

83. SIR EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 658 (London, W. Clarke & Sons 1817). The High Commission was authorized to act in heresy cases by virtue of the statute of 25 Hen. 8, Cap. 14 (1533). This statute was repealed in 1548, but under Elizabeth the High Commission was once again authorized to act in heresy cases. For a discussion of the common lawyers' criticism of the ex officio oath, see Mary H. Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England*, in *ESSAYS IN HISTORY AND POLITICAL THEORY: IN HONOR OF CHARLES HOWARD MCILWAIN* 199 (Carl Frederick Wittke ed., 1936).

84. *Penson v Cartwright*, 79 Eng. Rep. 295, 296 (K.B. 1615) (spelling and punctuation modernized).

85. From the twelfth and thirteenth centuries on, Chancery was the primary source of the civil jurisdiction of the Court of Common Pleas and the Court of King's Bench, chiefly through its control of the issuance of writs providing for remedies in those courts. In the fourteenth and fifteenth centuries, Chancery also developed its own original jurisdiction over a wide variety of matters that the common law courts were unable or unwilling to handle properly—matters that came to be classified as matters of "equity." See Harold J. Berman, *Medieval English Equity*, in *FAITH AND ORDER*, *supra* note 1, at 55. In the sixteenth century the Tudor monarchs created the High Court of Chancery, expanding the traditional equity of the Chancellor to include commercial and other matters for which the common law courts were ill-suited. See W.J. JONES, *THE ELIZABETHAN COURT OF CHANCERY* (1967).

86. *Glanville's Case*, 72 Eng. Rep. 939 (K.B. 1614) (translated by author).

words, if Courtney did not pay the £300 purchase price on time, the common law judgment against him on the £800 bond would take effect.

Upon discovery that he had been defrauded, Courtney sought relief in Chancery, which held that the judgment on the bond had been procured by fraud and that Glanville should retake the jewel and be paid £100 and should acknowledge satisfaction of the judgment on the bond. Glanville refused to obey the Chancery decree and was committed to prison by order of Lord Chancellor Ellesmere. Glanville then obtained a writ of habeas corpus from the King's Bench, which released him, the court stating that after judgment on the bond given at common law it was unlawful for Chancery to entertain Courtney's suit. The Lord Chancellor then once again committed Glanville, who once again sued out another habeas corpus and was released a second time by the King's Bench. In the meanwhile, after the second habeas corpus petition was filed, the King's Bench drafted criminal indictments against Courtney, his lawyer, and a clerk in the Chancery. The indictments were drawn under a 1354 statute, the Statute of Praemunire, which made it a criminal offence, punishable by forfeiture of all the offender's land and goods and by imprisonment and outlawry, to "draw any out of the realm in any plea whose cognisance pertains to the King's court . . . or [to] sue in another court to defeat or impeach the judgments given in the King's court."⁸⁷ Coke, speaking from the bench, strongly urged a grand jury to issue the indictments, but it refused to do so.⁸⁸ Francis Bacon, who was then Attorney General, reported to King James that

this great and public affront, not only to the reverend and well deserving person of your Chancellor . . . but to your high court of Chancery, which is the court of your absolute power, may not (in my opinion) pass lightly, nor end only in some formal atonement; but use is to be made thereof for the settling of your authority and strengthening of your prerogative according to the true rules of monarchy.⁸⁹

James then issued a decree stating that the Chancellor should continue "to give our subjects . . . [remedies in] equity (notwithstanding any former proceedings at the common law against them) . . . ," and that it was solely the King's "princely care and office . . . to judge over all our Judges, and to [settle] such differences as at any time may . . . arise between our several Courts touching

87. Statute of Praemunire for Suing in a Foreign Realm, or Impeaching of Judgment Given, 1353, 27 Edw. 3, ch. 1, in 1 WILLIAM HAWKINS, STATUTES AT LARGE 254 (London, John Baskett 1735). Hawkins dates the statute as 1353, although he notes that it did not take effect until 1354.

88. This was one of the reasons the King dismissed Coke. See *supra* pp. 1675-76.

89. Letter from Francis Bacon to King James I (Feb. 21, 1615), in 12 THE WORKS OF FRANCIS BACON 249, 252 (James Spedding et al. eds., London, Longmans, Green, Reader & Dyer 1869).

their jurisdictions”⁹⁰ Ultimately, Coke’s behavior in *Glanville’s Case* was one of the express reasons King James removed him from the bench.⁹¹

In many other cases as well, Coke asserted the supremacy of the common law courts over all other courts as well as the subordination of the Crown itself, when it purported to exercise legal powers, and even the Parliament, to the common law as interpreted by the common law courts.⁹² Implicit in these judicial decisions was the theory that the common law, viewed as a body of principles, concepts, rules, and procedures that originated in a remote past, was, in effect, the fundamental law of the English people—then often referred to as “the ancient common law,” later to be called the unwritten English Constitution—to which all other law in England was subordinate.⁹³

90. Decree of July 18, 1616, 21 Eng. Rep. 65 (1616) (language modernized).

91. On June 26, 1616, Coke presented himself at the King’s commandment before the King in council, where charges were made against him by the Solicitor. The first charge had to do with an alleged corrupt act committed by Coke in 1604 when he was Attorney General. The second charge was for “speeches of high contempt uttered in a seat of justice”—namely those in *Glanville’s Case*. A third charge dealt with Coke’s actions at a meeting of the Privy Council on June 6, 1616, at which he defended the jurisdiction of the King’s Bench over Chancery decrees.

92. In *Peacham’s Case*, for example, involving the prosecution of a Puritan preacher for treason (a prosecution based on notes he had compiled for a sermon that remained undelivered), King James ordered the justices to be polled individually concerning their votes. Under Coke’s leadership, the Court of King’s Bench held that the King was required to respect its custom of passing judicial sentence collectively. *Case of Edmund Peacham*, 2 Howell’s State Trials 870, 873 (K.B. 1615). The significance of the case is discussed in JOHN D. EUSDEN, *PURITANS, LAWYERS, AND POLITICS IN EARLY SEVENTEENTH-CENTURY ENGLAND* 96-98 (1958). The *Case of the Proclamations* involved the King’s submission to the common law judges of a list of questions concerning his power to legislate through royal proclamations, in light of a petition of Parliament objecting to the declaration of new criminal offenses through such proclamations. Led by Coke, the justices declared that the King had no power to make new law by royal proclamation. 2 Howell’s State Trials 723, 728 (1610) (discussed by EUSDEN, *supra*, at 94-96).

In *Bonham’s Case*, the Royal College of Physicians had caused the imprisonment of the plaintiff for refusing to pay it a fine imposed by it for practicing medicine without a license issued by it, as required by statute. In granting his action against the College for false imprisonment, Coke held that it was contrary to law to permit the same body that issued licenses also to impose a fine on a physician who resists the licensing requirement since the College would be, in effect, a judge in its own cause. 77 Eng. Rep. 638, 645-46 (K.B. 1611). Coke’s opinion is sometimes taken to stand for the proposition that the courts may annul an Act of Parliament if it is in contradiction to fundamental law. It seems, however, that the holding of the case, narrowly construed, rests on an interpretation of the statute rather than an annulment of it. See Samuel Thorne, *Dr. Bonham’s Case*, 54 L.Q. REV. 54, 543-52 (1938) (criticizing some conclusions drawn in Theodore F. Plucknett, *Bonham’s Case and Judicial Review*, 40 HARV. L. REV. 30 (1926)). On the other hand, the subsequent report of the case by Coke goes farther. See Charles M. Gray, *Bonham’s Case Reviewed*, 116 PROC. AM. PHIL. SOC’Y 35 (1972). In any event, the line was relatively thin, in 1611, between judicial review of the constitutionality of a statute and judicial interpretation of a problematic statute in order to make it conform to constitutional requirements. If, as Coke assumed, the judges of the common law courts had final power to interpret the common law, then it would require a clear alteration of the common law by Parliament to avoid judicial control in a given case. There is an excellent discussion of *Bonham’s Case* together with a detailed summary of Coke’s opinion in the case in STONER, *supra* note 74, at 48-62, 229-31.

93. Some elements of the theory that was implicit in Coke’s analysis were made explicit in an important speech delivered in Parliament in 1610 by his contemporary and fellow common lawyer, Thomas Hedley. Largely ignored by legal historians, Hedley’s speech has been summarized and analyzed by Paul Christianson in *Ancient Constitutions in the Age of Sir Edward Coke and John Selden*, in *THE ROOTS OF LIBERTY*, *supra* note 10, at 89, 99-103. Hedley declared that “the parliament hath his power and authority from the common law, and not the common law from the parliament,” and that “the strength, honor, and estimation” of the common law is established through the test of time: “Time is wiser than the judges, wiser than the parliament, nay wiser than the wit of man.” *Id.* at 99 (quoting Thomas Hedley). Christianson

Coke's Historicism. One must ask, how could Coke and his fellow common lawyers have so fundamentally misrepresented the English history, the English tradition, and the English precedents, on which they relied? Equally important, how could they get away with it?

To answer these questions one must put oneself into their mind-set. First, history for them was not a science but a faith. It was, indeed, Coke's religion, and it became part of the religion of the English Revolution—a Revolution which was thought of as a restoration, a return of the wheel of time to points in the past. In the seventeenth century the English past acquired a spiritual significance. In contrast to the Elizabethan emphasis on innovation and modernity, the myth of “old England”—the older the better—became a dominant ideological force.

Second, Coke and his colleagues and supporters were not talking about what actually happened in 1066 or 1215 or at other times in the past, nor did their opponents charge them with hypocrisy or deceit in their historical interpretations. Opponents of a requirement of jury trial in cases of felony, for example, rarely if ever attempted to refute the common lawyers who relied on Magna Carta to support that requirement, by saying that in 1215 England still had trial by ordeal and trial by battle in criminal cases as well as arrest and trial by the king himself or his councillors. Similarly, opponents of the common lawyers' use of fourteenth century statutes giving the king's court power to punish persons for resorting to “other” courts did not argue that those older statutes were in fact directed against resort to Roman Catholic church courts, not against resort to other courts established by the royal authority itself.

History was viewed on all sides symbolically or metaphorically. The language of Magna Carta was invoked as a symbol of the restriction of the arbitrary exercise of power. One might compare to it the language of the United States Constitution prohibiting the imposition of “cruel and unusual punishment” or prohibiting the taking of property without “due process of law,” phrases which had a quite different meaning when they were adopted in 1791 from the meaning they acquired in later generations and centuries. Similarly, the seventeenth-century common lawyers were interested not so much in what criminal and civil law and procedure actually were a century or two centuries or four centuries earlier as in what they signified, what they said to them, in 1610, or 1625, or 1640.

Nor was Coke an antiquarian in invoking “the ancient common law” to support his positions. Indeed, the theory of the supremacy of the common law

emphasizes that in Hedley's view the unwritten nature of the common law provided greater certainty than statutes and civil law, since the common law, being the “work of time,” is accommodated to the kingdom as “the skin to the hand, which groweth with it.” *Id.* at 100. Statutes and civil law need continual interpretation, and may be reversed by parliament or by the royal council, whereas the common law is not “reversible by that power that made it.” *Id.* (quoting Thomas Hedley) (footnote omitted).

was itself a bold innovation, which carried with it radically new applications: that the *ex officio* oath was abhorrent to “English law,” that the equitable remedies of the Chancellor were subject to review in the common law courts, that a contract under seal must be enforced even if it was procured by fraud, that rights of private property and trade competition may not be infringed by royal grants of monopolies, and the like. Coke was not a reactionary but a radical conservative, who reached back into the remote past not only to strike down innovations of the preceding century of accumulating royal power but also to justify wholly new legal principles.

An illustration of Coke’s radical conservatism and of his symbolic conception of past history is provided by his account of how he changed his mind concerning whether a prisoner arrested by order of the Privy Council—in effect, by order of the king himself—had a right to be released on bail. As a judge, Coke had taken the view that in such a case there was no such right. Later, as a member of Parliament, he revised his opinion:

“[W]hen I perceived that some members of this house were taken away,” he said, “even in the face of this house, and sent to prison, and when I was not far from that place myself, I went to my book and would not be quiet till I had satisfied myself. Stamford at first was my guide, but my guide had deceived me, therefore I swerved from it; I have now better guides. I have looked out precedents and Statutes of the Realm, whereby I am satisfied that such commitments are against the liberty of the subject.”⁹⁴

Here Coke was saying that he started with the legal rule that the Privy Council could arrest and imprison without judicial control, but that experience, and especially parliamentary experience, showed that there were limits to that power, and a return to history confirmed that experience.

Finally, for Coke and his colleagues, the confirming power of history had the advantage of not being a “theory” in the philosophical sense of that word. Indeed, the only effective theories then available to justify opposition to royal absolutism were the radical Scriptural congregationalism of the Puritans, which was eventually tried and would eventually fail, and the Roman Catholic theory of a competing ecclesiastical jurisdiction centered in Rome, which had been tried in previous centuries and ultimately rejected. Eventually a quite different theory did become available to justify parliamentary rule, namely, the Enlightenment theory of democracy and public opinion. But that was more than a century off. In the meanwhile, a corps of English common lawyers had begun to define the nature, the sources, and the purposes of law in terms of the historical experience of the English people.

94. BOWEN, *supra* note 64, at 486 (quoting Coke).

Coke relied on history not only as a check against the arbitrary exercise of power but also as a guide to determining the limits and channels of political and legal authority. He was concerned to find legal guidelines not only for the Crown but for all branches of government, including Parliament and the judiciary itself. He thereby sought a way to avoid the impending clash of political forces. In Professor Plucknett's bold words:

Urged by a presentiment of the coming conflict between Crown and Parliament, he felt the necessity of curbing the rising arrogance of both, and he looked back on the country's legal history to find the means. . . .

The solution which Coke found was in the idea of a fundamental law which limited Crown and Parliament indifferently.⁹⁵

In this respect Coke, both as judge and as member of Parliament, played a prophetic role similar to that played previously by Bishop Hooker, whose sermons in the 1590's at the Inner Temple, which formed the basis of his subsequent *Laws of Ecclesiastical Polity*, Coke had faithfully attended.

Intended as a basis for peaceful change, Coke's recourse to history eventually provided a basis for violent overthrow of the existing order. History, Tradition, Precedent, became the slogans of revolution in the seventeenth-century sense of that word, and the struggle between Coke and James became a paradigm of the conflict which broke out a generation later in civil war and which ultimately transformed English government, English law, and English society as a whole.⁹⁶

Coke's Concept of the English Common Law as Artificial Reason. A principal key to Coke's historical jurisprudence is his conception of artificial reason, that is, crafted reason, reason that is brought into being not by nature but by human effort and human art.⁹⁷ In a passage often quoted, Coke wrote, "Reason is the life of the law [N]o man (out of his own private reason) ought to be wiser than the law, which is the perfection of reason."⁹⁸ On its face, this definition was perfectly acceptable to King James, as it would have

95. Plucknett, *supra* note 92, at 30-31.

96. The Royalists, to be sure, also invoked History, Tradition, and Precedent, as had King James. Cf. MARGARET A. JUDSON, *THE CRISIS OF THE CONSTITUTION* 111-22 (1949); Sommerville, *supra* note 7, *passim*. Of course, contradictory lessons may be drawn from history, as they may be drawn from morality or from politics. Nevertheless, to the extent that the "Great Rebellion" of 1640-1660, the "Restoration" of 1660-1688, and the "Glorious Revolution" of 1688-1689—all three—were justified by their adherents as a return to the traditions and precedents of the past, and indeed as a return dictated by a divine providence, a new concept of dynamic conservatism became embedded in English political and legal thought. It can hardly be doubted that the development of historical jurisprudence was associated with the supremacy of the common law, which in turn was closely related to the establishment of Parliamentary supremacy and a constitutional monarchy.

97. Gray has called Coke's concept of artificial reason "perhaps Coke's main gift to legal theory." Gray, *supra* note 77, at 30.

98. 1 SIR EDWARD COKE, *SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND* 1 (J.H. Thomas ed., Philadelphia, Alexander Towar 2d American ed. 1836).

been to Thomas Aquinas. Indeed, the King said to Coke, in a famous colloquy, that since the law is reason, and since the King has at least as much reason as any of his judges, therefore his interpretation of the law is entitled to as much weight as the interpretation of Coke or of those whom Coke cited. Coke responded—to James' great displeasure—that God had indeed endowed His Majesty with great intellectual capacity but that the reason of the law is not the natural reason of any person but rather the artificial reason of the law itself.⁹⁹ “The common law itself,” Coke wrote, “is nothing else but reason which is to be understood [as] an artificial perfection of reason gotten by long study, observation, and experience.” “The Law of England,” he continued, “by many successions of ages . . . has been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this realm, [that] the old rule may be justly verified of it, *Neminem oportet esse sapientiores legibus*: no man, out of his own private reason, ought to be wiser than the law, which is the perfection of reason.”¹⁰⁰

Coke's conception of the English common law as the embodiment of the reasoning of many generations of learned men had important philosophical implications. It represented a different concept of reason from that which had

99. Coke's version of the colloquy is given at length in *Prohibitions del Roy*, 12 Coke's Rep. 63 (K.B. 1608). Although it is highly colored, it does represent accurately the nature of the conflict and many parts of it are corroborated by other sources. It reads as follows:

Note upon Sunday the 10th of November in this same term, the King, upon complaint made to him by Bancroft, Archbishop of Canterbury, concerning prohibitions, the King was informed that when the question was made of what matters the ecclesiastical Judges have cognizance, either upon the exposition of the statutes concerning tithes, or any other thing ecclesiastical, or upon the statute 1 Eliz. concerning the high commission, or in any other case in which there is not express authority in law, the King himself may decide it in his Royal person; and that the Judges are but the delegates of the King; and that the King may take what causes he shall please . . . from . . . the Judges, and may determine them himself. And the Archbishop said it was clear in divinity, that such authority belongs to the King by the word of God in the scripture.

To which it was answered by me, in the presence and with the clear consent of all the judges of England, and Barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal, as treason, felony, etc., or betwixt party and party, concerning his inheritance, chattels, or goods, etc., but this ought to be determined and adjudged in some court of justice, according to the law and custom of England, and always judgments are given *ideo consideratum est per curiam* [thus it was considered by the Court] so that the court gives the judgment. . . .

Then the King said that he thought the law was founded upon reason, and that he and others had reason as well as the Judges . . . to which it was answered by me that true it was that God had endowed his Majesty with excellent science and with great endowments of nature. But his Majesty was not learned in the laws of his realm of England, and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience before . . . a man can attain to cognizance of it; and that the law was the golden met-wand and measure to try the causes of the subjects, and which protected his Majesty in safety and peace; with which the King was greatly offended and said that then he should be under the law, which was treason to affirm, as he said; to which I said that Bracton saith: *quod Rex non debet esse sub homine sed sub Deo et lege* [the King ought not to be under man but under God and the law].

100. 1 COKE, *supra* note 98, § 97b (spelling modernized).

previously prevailed in Western legal philosophy as well as in Western philosophy generally. Both the scholastic philosophers of the twelfth to fifteenth centuries and the humanist and neo-scholastic philosophers of the sixteenth century had understood reason to be a natural faculty of the human intellect, a capacity to understand and to form judgments. Reason was contrasted with will, which was understood to be a natural faculty of the emotions, motivating a person to direct his or her mind or conduct to desired goals or otherwise to control thoughts and actions. Scholastic legal philosophers had contended that reason not only enables a person to distinguish between justice and injustice but also dictates that justice is preferable. Reason, they argued, naturally tends toward promotion of the common good, and hence positive laws that are contrary to reason have no claim to observance. Thus they identified reason with timeless moral principles inherent in human nature itself—not with the laws of any particular nation but with a universal natural law applicable in all nations. Humanist legal philosophers, both Catholic and Protestant, did not fundamentally change this concept of natural law but added to it a greatly increased emphasis on the importance of rationalizing and systematizing legal rules in order better to effectuate sound public policy. Thus for the humanist legal philosophers, who for the most part had less confidence in reason—and more confidence in will—than did their scholastic forebears, moral reason was linked with an overriding political reason, which, however, was also conceived to be a faculty of human nature capable of being analyzed in general terms applicable universally.

Coke did not doubt the existence of natural reason and of natural law, as defined by the moral and political philosophers, but he juxtaposed to it a different kind of reason, which might be called historical reason. Reason, for Coke, was identified, in at least one of its aspects, with the historical development of national tradition, and, more particularly, with the tradition of the English common law. The “reason” on which the English common law was based, he argued, is the reasoning of English lawyers, that is, the way the “grave and learned men” of English law over the centuries have traditionally reasoned about legal matters. This was not the reason implanted by God in human nature as such. It was not to be found in the “private reason” of individuals. It was the practical prudential reason of the experts, the persons of experience, who have made a special study of their subject, who know its history, and who build on the learning and wisdom of many generations of other experienced persons. They will know—even in the most complicated circumstances—what is reasonable and what common sense requires.¹⁰¹ They

101. Indeed, the translation of “reason” into “reasonableness” and the exaltation of “common sense” are English developments of the seventeenth century, to which Coke contributed. To this day it is difficult to find in other languages precise equivalents for the English words “reasonable” and “common sense.” The usual foreign translation of “reasonable” into equivalents of “rational” is a distortion; as Lon L. Fuller used to say, “to be reasonable is to be not too rational.” Likewise, common sense is not the same as public

will therefore be able to solve problems that will baffle the layman or amateur. More particularly, they will seek solutions to problems within the contours of the subject itself. They will look for its reason, its internal logic. In law, they will look for the logic, the reason, the sense, the purposes, of the law itself—the law as a whole and the law in all its parts.¹⁰²

Coke's concept of the artificial reason of the law was, however, even narrower than this, since he was primarily concerned not with law in general but with the English common law. His concept of artificial reason might, indeed, be applied to other types of law—canon law, Roman law, or, for that matter, natural law or divine law, since in all such subjects the trained expert, the person of learning and experience in the subject, will be better able than others to understand its inherent reason, logic, sense, and purposes. But for Coke, the artificial reason of the English common law was the unique reason, logic, sense, and purposes of the historically rooted law of the English nation, a repository of the thinking and experience of the English common lawyers over many centuries. Therefore it had to be understood in the light of that history. Natural law was part of it: in *Calvin's Case*, Coke expressly stated "that the law of nature is part of the law of England."¹⁰³ In *Bonham's Case*, Coke held that the principle that no man may be judge of his own cause is a tenet of "common right," that is, of common law.¹⁰⁴ In his *Institutes*, Coke wrote that the right to be heard in one's own defense is a principle of divine justice, and he quoted favorably the words of a fifteenth-century chief justice of Common Pleas, "[T]o those laws which Holy Church hath out of Scripture we ought to yield credit; for that . . . is the common law upon which all laws are founded."¹⁰⁵ Thus Coke did not deny the validity of natural law, he considered that its legal effect in England is determined by its having been incorporated into the English common law.

opinion; it is more like the shared moral judgment of the community. See also John U. Lewis, *Sir Edward Coke (1552-1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory*, 84 L.Q. REV. 330 (1968); cf. Christopher Hill, "Reason" and "Reasonableness" in *Seventeenth-Century England*, 20 BRIT. J. SOC. 235 (1969); MICHAEL LOBBAN, *THE COMMON LAW AND ENGLISH JURISPRUDENCE 1760-1850*, at 6-7 (1991).

102. Gray gives the example of a case of first impression, which natural reason might decide without reference to the implications of the decision for other related cases. He states that Coke's claims for the artificial reason of the law are, in effect, claims for what he calls "the legal imagination," the task of which is to assure the coherence of the legal system, "to see . . . that a decision here, which may be plausible in itself, does not jar with rules or concepts used by the system for some other purpose." Gray, *supra* note 77, at 33-34; see also Lewis, *supra* note 101, at 337 ("When Coke used the terms 'reason' and 'reasonable' to define law, he did so . . . in order to provide a principle that could give English law an internal consistency.").

103. See *Calvin's Case*, 77 Eng. Rep. 377 (K.B. 1607); cf. Gray, *supra* note 77, at 37, 55 n.24. In time, the phrase "natural justice" came to be used by the English courts more frequently than "natural law," and eventually to replace it. On early use by St. German and Bishop Hooker of the phrase "law of reason" in place of "natural law," see *supra* text accompanying notes 16, 35-40.

104. *Bonham's Case*, 77 Eng. Rep. 638, 644 (K.B. 1611).

105. 2 COKE, *supra* note 98, at 625 (spelling modernized); see EUSDEN, *supra* note 92, at 124.

Positive law was also part of the common law. Coke never doubted the binding force of legislation, but he viewed legislation within the historical context of the precedents of the English common law courts, the historical common law statutes of Parliament such as Magna Carta, and, more generally, the understandings of the bench and the bar concerning the vast complex of concepts, principles, rules, procedures, and institutions that constitute the numerous branches of the law—constitutional law, administrative law and procedure, criminal law and procedure, civil law and procedure, and the rest. These, taken together, were in Coke's view the product of the history of the English people, their political and economic values viewed in the perspective of many centuries, their fundamental morality. Only one steeped in this age-old law was qualified to understand even recent legislation and to apply it to particular cases.

Thus Coke established in the English context the first principle of the historical school of jurisprudence, which was developed further by his English followers in the seventeenth and eighteenth centuries and which ultimately blossomed into a full-scale general theory of law, taking its place alongside natural law theory and legal positivism. That first principle consisted in the proposition that a nation's law is to be understood above all as the product of that nation's history—not merely in the obvious sociological sense that existing institutions are derived from preexisting institutions but also in the philosophical sense that the past history of a nation's law both has and ought to have a normative significance for its present and future legal development. This was essentially a theory of law, and only by implication a theory of history. It meant that the primary sources of law, to which one should look first in making a legislative or judicial or administrative decision, or in determining the meaning of a legal concept or principle or rule or procedure, are custom and precedent. Other sources of law, especially universal moral concepts of justice (which take precedence under a theory of natural law) and political considerations of legislative will or legislative policy (which take precedence under a theory of legal positivism) should, according to the historical school, be viewed in the light of, and considered subordinate to, the historical development and historical circumstances of the particular legal system under consideration.

The historical school of legal theory is itself divided between a conception of past history as a series of fixed points—in law, fixed rules and decisions—to be preserved and reiterated, which I would call historicism, and a conception of past history as a process of adaptation of past experience to changing needs, which I would call historicity. Jaroslav Pelikan has made a similar distinction between tradition, which he calls the living faith of the dead, and traditionalism, which he calls the dead faith of the living.¹⁰⁶ The tension

106. JAROSLAV PELIKAN, *THE VINDICATION OF TRADITION* 65 (1984).

between these two versions of historical jurisprudence is strikingly apparent in contemporary American constitutional adjudication, in which some judges rely solely on the original intent of the framers of the Constitution while others interpret constitutional texts in the light also of the changing meanings of their words over the intervening generations and centuries. Sir Edward Coke is sometimes classified, from this point of view, as a traditionalist, since he repeatedly challenged particular exercises of the royal prerogative as innovations, holding up particular ancient laws and court decisions as authoritative. And it is indeed true that he often seemed to invoke the authority of a fixed event of the past, and called for it to be repeated for its own sake. He glorified the antiquity of the English common law and the immemorial character of its basic principles. He repeated with relish Chaucer's proverb, "Out of the old fields must spring and grow the new corn."¹⁰⁷ At the same time he has been severely criticized by many historians, and was challenged in his own day, for using historical precedents in ways that could hardly have been contemplated when they were first introduced. Both his resort to precedent and his apparent abuse of it must be understood, however, in the light of his situation: not only did he have no inclination to challenge abuses of the royal prerogative on any other ground than that they violated ancient statutes and decisions, but he could not do so, for the most part, without forfeiting his public office and risking imprisonment.

Whatever his motives, Coke was no mere antiquarian who viewed the past in static terms. His belief that the English common law was based on "immemorial custom," going back to Anglo-Saxon times, did not blind him to the many changes that had taken place in it over the centuries. At the same time, he did not view the past, as many do today, as a mere datum or a mere cause or precondition of subsequent events. On the contrary, he saw purposes in it, and norms. Yet the past for Coke was not primarily the immediate past but, above all, the ancient past, which meant primarily the pre-Tudor past, the past especially of Bracton and the Year Books. That was what made his conservatism—in its historical context—revolutionary.

III. JOHN SELDEN'S LEGAL PHILOSOPHY

Coke to Selden to Hale. Coke's influence on English legal thought was enormous, through his two great published works, the *Reports* and the *Institutes*, from which for more than a century and a half English (and American) lawyers learned their law, as well as through his judicial decisions and his parliamentary career. It took two generations of his followers, however,

107. Sir Edward Coke, *Preface* to THE FIRST PART OF THE REPORTS OF SIR EDWARD COKE, KT. (London, D. Browne 1727); cf. GEOFFREY CHAUCER, THE PARLIAMENT OF FOULES 52 (T.R. Lounsbury ed., Boston, Ginn & Heath 1877) (ca. 1380) ("For out of olde feldys, as men sey, Comyth al this newe corn from yere to yere.").

to develop his philosophy of English law into an English philosophy of law. In the first of those generations, the leading figure in that development was John Selden (1584-1654). In the second, the leading figure was Matthew Hale (1609-1676). The links between the three men were very strong. Selden at age thirty-seven worked with the sixty-nine-year-old Coke in drafting the House of Commons' Protestation of 1621, for which both men were subsequently sent to the Tower; later Selden himself was elected to Parliament, where he joined his older colleague in drafting and securing enactment of the 1628 Petition of Right, for which he was once again sent to the Tower.¹⁰⁸ In the 1630's and 1640's, Selden, in turn, became the mentor and close friend of the young Hale, whom he eventually appointed to be one of the executors of his will. Hale, in turn, reorganized Coke's *Institutes* to make them more systematic and to draw out their philosophical implications.¹⁰⁹ All three men started their careers as practising lawyers. All three were deeply involved in the great constitutional struggles of their times. All three were dedicated and prolific scholars.

Selden's scholarship was much broader than Coke's. He was an historian of the first rank, the acknowledged master of the Society of Antiquaries, the leading English historical society of the time. He was also an accomplished Biblical scholar, Orientalist, and philosopher.¹¹⁰ John Milton called him "the chief of learned men reputed in this Land . . ." ¹¹¹

Selden's Historicity Versus Coke's Historicism. Selden's major contribution to the development of English legal philosophy derived from his study of the historical evolution of the English common law. He carried Coke's historicism one giant step beyond the conception of an immemorial past and an unchangeable fundamental law to the conception of an evolutionary past and an evolving fundamental law. For Selden the great changes that English law had experienced in the course of its history, especially after the Norman Conquest, constituted not only a progressive movement forward but also one which committed future generations to continue to move forward.

Coke had fully understood that the common law had changed after the Norman Conquest; his whole emphasis, however, was on its continuity; he

108. Selden's first term in the Tower of London lasted only five weeks. In his second term, commencing in 1629, he was released early from imprisonment but remained under restraint until early 1635. See DAVID S. BERKOWITZ, *JOHN SELDEN'S FORMATIVE YEARS* 231-90 (1988).

109. See *supra* note 76.

110. Some of Selden's leading works on biblical, Orientalist, and philosophical themes include: *DE DIS SYRIS SYNTAGMATA* II (1617); *DE ANNO CIVILI ET CALENDARIO VETERIS ECCLESIAE* (1644); and *THEANTHROPOS*, or God made man (1661). Selden's most important legal works include: *HISTORY OF TYTHES* (1617); *JANI ANGLORUM FACIES ALTERA* (1610); *MARE CLAUSUM* (1636); *NOTES UPON FORTESCUE'S DE LAUDIBUS LEGUM ANGLIAE* (1616); *TABLE TALK* (1689); *TITLES OF HONOUR* (1614); and *VINDICAE MARIS CLAUSI* (n.d.). His *DE IURE NATURALI ET GENTIUM IUXTA DISCIPLINAM EBRAEORUM LIBRI SEPTEM* (1640) [hereinafter *DE IURE NATURALI*] synthesizes legal, biblical, and philosophical themes. For a collection of these and other works by Selden, see *JOHN SELDEN, WORKS* (London, T. Wood 1726) [hereinafter *SELDEN, WORKS*].

111. *JOHN MILTON, AREOPAGITICA* 16 (John W. Hales ed., Oxford, Clarendon Press 1886).

viewed the changes as incidental to that continuity. Selden, coming at a later stage in the prerevolutionary and revolutionary conflict, reaffirmed the continuity but also emphasized the changes. He stressed development, growth. He believed in the immemorial and permanent character of basic English constitutional institutions and principles, such as government by assemblies of notables and judicial responsibility to law. But he saw the changes that occurred at various times as examples of the gradual perfection of those basic institutions and principles.

Unlike Coke, Selden had a strong sense of chronology. Also he viewed skeptically later interpretations of previous historical developments and insisted on going back to contemporary or near-contemporary sources. He was, in that sense, in the humanist tradition of sixteenth- and seventeenth-century European, and especially French, historical scholarship, with which he was, of course, familiar.¹¹² Selden used the word "synchronism" to signify the method of grouping historical events and personages according to the times and places and circumstances of their occurrence. His concern with narrative sequence and with congruence was linked to his antipathy both towards mythical interpretations of the past and towards mere antiquarianism.¹¹³ At the same time, humanist scholarship led him to recognize breaks in the evolution of English law. He recognized, for example, that the Norman Conquest brought substantial changes, including the introduction of feudal law and the establishment of separate church courts. He understood outside influences on English law in the twelfth century, including the influence of Roman law, as part of a general revival of learning which took place at that time throughout Western Europe. From Arab versions of ancient Greek texts, he wrote, "physics, moral philosophy, logic, medicine, and mathematics began almost simultaneously to shine out like stars that had long been obscured, and so likewise canon law and theology."¹¹⁴

112. On this humanist tradition, see *supra* notes 26-29. Cf. Christianson, *supra* note 62, at 273.

113. See F. SMITH FUSSNER, *THE HISTORICAL REVOLUTION: ENGLISH HISTORICAL WRITING AND THOUGHT 1580-1640*, at 292 (1962); cf. ARTHUR B. FERGUSON, *CLIO UNBOUND: PERCEPTION OF THE SOCIAL AND CULTURAL PAST IN RENAISSANCE ENGLAND 120-21* (1979). Selden did, however, at one point pay lip service to mythic history as a source of national identity. In Arthur Ferguson's words, "Of Brutus and the Trojan myth [of Britain's founding], [Selden] wrote with ironic tolerance: since no nation 'can justify itself but by tradition, . . . you shall enough please Saturn and Mercury, presidents of antiquity and learning, if with the author you foster this belief.'" ARTHUR B. FERGUSON, *UTTER ANTIQUITY: PERCEPTIONS OF PREHISTORY IN RENAISSANCE ENGLAND 126* (1993).

114. FERGUSON, *supra* note 113, at 295 (quoting JOHN SELDEN, *AD FLETAM DISSERTATIO*). Selden's understanding of the Western legal tradition was in many ways superior to that of his successors, even down to the twentieth century. He understood, for example, that the Roman law of Justinian was not simply "received" into European law. He denied

the usual English assumption that "the supreme and governing law of every other Christian state (saving England and Ireland) . . . [is] the old Roman imperial law of Justinian[.]" [H]e insisted that "no nation in the world is governed by [that law]." "Doubtless," he continued, "custom hath made some parts of the imperials to be received for law in all places where they have been studied, as even in England also," but that only means that they have become part of the local law. England is thus not unique in its uniqueness. "Every Christian state hath its own common law, as this kingdom hath."

Unlike the French humanists, however, Selden saw in history—or at least in English political and legal history—a long-range process of gradual improvement. Moreover, he attached to the historical development of English law a normative significance. For example, he traced a development of the Germanic wapentakes described by Tacitus into the witanes of the Anglo-Saxons, which in the thirteenth century became parliaments;¹¹⁵ and he found, in that development, principles applicable to parliamentary government in his own time. He treated the ancient British, the Saxon, and the Norman periods of English history as three distinct phases of a single historical development, whose common elements were successively refined. Although most of the ancient laws were superseded, their fundamental structure not only survived but underwent improvement.

Selden's historical jurisprudence was much more, however, than a philosophy of English law. All legal systems, he wrote, are to be understood as historical in character. In a remarkable passage, he set forth his historical theory of law in the following terms:

[A]ll laws in general are originally equally ancient. All were grounded upon nature . . . and nature being the same in all [nations], the beginning of all laws must be the same [T]his beginning of laws . . . remained always [what] they were at first, saving that additions and interpretations in succeeding ages increased, and somewhat altered them, by making a *determinatio juris naturalis* [a specification of natural law], which is nothing but the civil law of any nation. For although the law of nature be truly said [to be] immutable, yet it is as true that it is limitable, and limited law of nature is the law now used in every state. All the same may be affirmed of our *British* laws, or *English*, or other whatsoever. But the diverse opinions of interpreters proceeding from the weakness of man's reason, and the several conveniences of diverse states, have made those limitations, which the law of nature hath suffered, very different. And hence is it that those customs which have come all out of one fountain, *nature*, thus vary from and cross one another in several commonwealths. . . . Diverse nations, as diverse men, have their diverse collections and inferences; and so make their diverse laws to grow to what they are, out of one and the same root the beginning of all here being in the first peopling of the land, when men by nature being civil creatures grew to plant a common society. This rationally considered, might end that obvious question of those which would say something against the laws of *England* if they could. 'Tis their trivial demand, *When and how began your common laws?* Questionless it is fittest answered by affirming, when and in like kind as the laws of all other States, that is, *When there was first a state in that land which the common law now governs:* Then were natural laws limited for the convenience of

HELGERSON, *supra* note 73, at 68 (quoting SELDEN, HISTORY OF TYTHES).

115. Christianson, *supra* note 62, at 276.

civil society here, and those limitations have been from thence, increased, altered, interpreted, and brought to what now they are; although . . . now, in regard of their first being, they are not otherwise than the ship that by often mending had no piece of the first materials, or as the house that's so often repaired *ut nihil ex pristina materia supersit* [that nothing remains of the original material], which yet, by the civil law, is to be accounted the same still . . . Little then follows in point of honor or excellency specially to be attributed to the laws of a nation in general, by an argument thus drawn from difference of antiquity, which in substance is alike in all. Neither are laws thus to be compared. Those which best fit the state wherein they are, clearly deserve the name of the best laws.¹¹⁶

Here Selden lays the foundation of an historical jurisprudence that resolves the traditional conflict between natural law theory and positivism—and, more broadly, between reason and will and between philosophical realism and nominalism. He postulates as an immutable law of nature that men are civil creatures, who, when they first people a land, “plant a common society.” In succeeding ages, however, they add to, interpret, and limit natural law according to “the several conveniences,” that is, the particular wants and needs, “of diverse States.” The relative quality of the law of a people, therefore, including (by implication) the common law of England, must be judged not by its superior antiquity (as Coke, following Fortescue and St. German, would have it), since all systems of law are equally ancient, but by the extent to which it “best fits” the wants and needs of the particular people. At the same time, the diverse customs of diverse peoples, which are the source of their respective systems of civil law, though rooted in a common human nature, are subject to a continuous organic process of change, by which natural law is specified and altered. Thus the relative quality of the law of a people must be judged also by the extent to which it remains faithful to the organic continuity of its past—the extent to which, like the ship or the house whose materials have been entirely replaced, it is to be accounted the same ship or house.¹¹⁷

The Consensual Character of Moral Obligations. Selden did not deny—indeed, in the passage quoted he affirmed—that the source of all civil law is in “Nature,” that is, in the nature of God’s creation, including above all the moral nature of man. In an important book on natural law,¹¹⁸ he developed at length the theory that the ultimate source of both moral and legal

116. JOHN SELDEN, NOTES ON SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLICAE, in 3 SELDEN WORKS, *supra* note 110, at cols. 1891-92 (spelling modernized).

117. Christianson states that Selden “presented a detailed historical model of the ancient constitution in which the fundamental form of mixed government endured while particular laws, practices, and institutions slowly changed over time to accommodate various shifts in society. This view accommodated both historical continuity and change.” Christianson, *supra* note 62, at 272. Richard Tuck has characterized the passage from Selden, quoted above, as an expression of “the Burkean theory of English law.” RICHARD TUCK, NATURAL RIGHTS THEORIES 84 (1979).

118. DE IURE NATURALI, *supra* note 110.

obligation is in divine command, which he found revealed primarily in Scripture, especially the covenant between God and Noah whereby God imposed and Noah accepted certain prohibitions. According to Talmudic tradition, these were prohibitions against idolatry, blasphemy, homicide, incest, theft, the eating of live animals, and disobedience to civil laws. Selden stressed the importance not only of the covenantal, or contractual, nature of the Noachite obligations but also of God-given human reason in understanding them and of God-given human conscience in fulfilling them.¹¹⁹ His entire analysis followed generally the prevailing theological and philosophical tendencies of contemporary Protestant thought.¹²⁰ Perhaps his most distinctive contribution was his interpretation of the contractual character of moral obligations generally: it is not only breach of the prohibition that is offensive to God, and punishable by him, but also breach of the covenant. Indeed, for Selden the most important rule of natural law appears to have been the rule that contracts are to be kept, *pacta sunt servanda*,¹²¹ which he applied not only to divine contracts but also to human contracts generally.¹²² His strong conception of the absolute obligation to keep one's contracts was related to his conception of the binding force of customary law, which he viewed as essentially consensual in nature.

The Origins of Positive Law in Customary Law. Distinctive in Selden's thinking, and of decisive importance in the development of English legal philosophy, was his historical and sociological concept that legitimate diversities among national legal systems have their source in the diverse customs of diverse peoples. Just as individuals differ from each other, he wrote, so nations differ, and those differences give rise to differences in their customary law. This concept gave a new meaning to the principle—advocated by Bishop Hooker and others—that the ultimate source of the legitimacy of human laws lies not only in their correspondence to divine law, including the law of reason and conscience, and not only in their correspondence to the will of the legitimate lawmaking authority, but also in their conformity to the consent of the people. Selden gave to the doctrine of government by consent of the people—which all the conflicting parties of the time advocated, though each gave it its own meaning—a new legal dimension: consent, in Selden's

119. Johann P. Sommerville, *John Selden, the Law of Nature, and the Origins of Government*, 27 *HIST. J.* 437, 440-42 (1984).

120. Tuck argues that Selden's political philosophy was highly original and represented a decisive break with much of the theologically based political theory of the time. See TUCK, *supra* note 117, at 90-100. Sommerville has shown, however, that while Selden was a highly original legal historian (as well as scholar of Hebrew and Greek antiquities), he nevertheless contributed little that was new to contemporary debates on political theory as such. See Sommerville, *supra* note 119, at 446. It is argued here that the chief elements of Selden's originality lay not in his general political philosophy but in that special part of his political philosophy which was constituted by legal philosophy.

121. See TUCK, *supra* note 117, at 90.

122. See Harold J. Berman, *The Religious Sources of General Contract Law: An Historical Perspective*, 4 *J.L. & RELIGION* 103, 118-19 (1986), reprinted in FAITH AND ORDER, *supra* note 1, at 187.

view, was manifested in custom, that is, in the patterns and norms of behavior tacitly or expressly accepted by the community. He argued that all law originates, historically, in customary law. Indeed, the English common law was itself conceived by him and his colleagues to be essentially customary law, in the sense that it was the embodiment of the patterns and norms of behavior developed by the common lawyers over many generations and centuries.

Magna Carta and the Five Knights' Case. Selden's historical jurisprudence was dramatically reflected in his argument to the court in the famous Five Knights' Case in 1627. Denied subsidies by Parliament for the financing of his wars against Spain and France, King Charles had resorted to compulsory loans imposed on those who would normally be taxed in order to finance the parliamentary subsidies. Those few who refused to "loan" the money were imprisoned. Five of them sought release on writs of habeas corpus. The Privy Council instructed the warden of the Fleet to enter on the return of the writs that the five were committed by special order of the King.¹²³ Four of the five retained counsel to contest the sufficiency of the return. Representing one of the four, Sir Thomas Darnel, Selden argued that to imprison a person without giving a specific reason was a violation of Chapter 29 of Magna Carta, which provides (as Selden translated it) that "No freeman shall be imprisoned without due process of law."¹²⁴ The phrase "due process of law" had been used in various fourteenth-century statutory renditions of Magna Carta,¹²⁵ although the original Latin, *per legem terrae*, means "by law of the land" (whether "by a law of the land" or "by the law of the land" was hotly debated in the Five Knight's Case; Latin, the original language of Magna Carta, does not have the definite or indefinite article.)

Selden's argument was historical in two different senses of the word, one realist or scientific, the other metaphorical or symbolic. On the one hand, he analyzed the text of Magna Carta in linguistic terms, citing evidence of different versions of the statute enacted and re-enacted at various times, analyzing the significance of its apparent applicability solely to freemen and not to villeins, and construing the phrase "law of the land" as a reference to the common law, under which there could be no trial for a felony without a presentment or indictment by a grand jury. Repeating arguments he had made in his historical writings, Selden sought to rebut the Attorney General's contention that "law of the land" in Chapter 29 referred not only to the common law but also to other law, including "the law of state." Selden

123. Proceedings on the Habeas Corpus, brought by Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir John Heveningham, and Sir Edmund Hampden, 3 Howell's State Trials 17 (K.B. 1627) [hereinafter *The Five Knights' Case*].

124. *Id.* at 18. In Latin, *Nullus liber homo capiatur vel imprisonatur nisi per legem terrae*. Chapter 29 (in later editions, 39) is, of course, much longer.

125. See J.C. Holt, *The Ancient Constitution in Medieval England*, in *THE ROOTS OF LIBERTY*, *supra* note 10, at 22, 45-46.

retorted, "We read of no law of state." Moreover, as he later repeated in Parliament, in supporting the Petition of Right:

[N]one of these laws can be meant [in Magna Carta] save the common law, which is the principal and general law, and is always understood by the way of excellency [that is, of supremacy] when mention is of the law of the land generally. And that though each of the other laws which are admitted into this kingdom by custom or act of parliament may justly be called 'a law of the land,' yet none of them can have the preeminence to be styled 'the law of the land.'¹²⁶

On the other hand, Selden's resort to Magna Carta was in other respects entirely unhistorical in the scientific or realist sense. To argue that the Great Charter of 1215 forbade the English king to order the arrest or imprisonment of a person without a presentment or indictment of a grand jury flies in the face of repeated royal practice under the criminal procedure systems of the Privy Council and the Chancery in the thirteenth, fourteenth, and fifteenth centuries and of the prerogative courts in the sixteenth and seventeenth centuries. Moreover, in 1215 and thereafter, indictment by grand jury was by no means the only procedure for bringing criminal charges against a freeman.

From a metaphorical or symbolic standpoint, however, "history" was in Selden's favor—though in the instant case the court rejected his argument and kept his client in prison. In the next decades, the common law did become the supreme "law of the land," grand jury indictment did become a prerequisite for prosecution for all serious crimes, and habeas corpus did become a remedy for releasing from custody persons arrested "by special order of the king" without specification of the charges against them.

Selden had argued to the court that "by the constant and settled laws of this kingdom, without which we have nothing," the king and/or the privy council cannot justly imprison a man without a cause of the commitment expressed in the return.¹²⁷ Unless this was merely lawyers' rhetoric, he believed that his interpretation of Chapter 29 of Magna Carta was "constant and settled law"—although the long-standing practice not only of king and council but also of parliaments and courts was to the contrary. One is reminded of Coke's discovery that his own view on the subject was erroneous: confronted with the shocking consequence that a royal power to arrest without cause could violate parliamentary freedom, he concluded that at law such a power never existed.¹²⁸ In Selden's legal philosophy, history, custom, and

126. 2 COMMONS DEBATES 1628, at 530 (Robert C. Johnson & Maija J. Cole eds., 1977). For a discussion of Selden's method, see Paul Christianson, *John Selden, the Five Knights' Case, and Discretionary Imprisonment in Early Stuart England*, in 6 CRIMINAL JUSTICE HISTORY 65, 68-69, 80 (1985).

127. *The Five Knights' Case*, 3 Howell's State Trials at 17.

128. See *supra* p. 1688.

consent were not to be measured according to fixed points in the past. They were ongoing in their nature. Magna Carta was coming to mean—in the minds of the common lawyers—something different from what it had been understood to mean before.

Selden articulated and developed further Coke's understanding of history as an ongoing process, and of legal history, therefore, as present in the interpretation of laws and the decision of cases. He added to this two other elements of an historical jurisprudence. The first was the concept that legal history is itself a process of adapting past solutions to present circumstances—when, as he put it, the “precious” and “useful” part of the past is invoked in order to give “light” to the present.¹²⁹ The second element was the belief that this process has a normative value—in other words, that the best law is that which best adapts past law to evolving historical circumstances.

IV. SIR MATTHEW HALE'S LIFE AND WORKS

Hale's Personal Integrity in a Revolutionary Age. Selden was twenty-five years old and Coke was fifty-seven when Matthew Hale was born in 1609. Coke lived another twenty-five years and Selden another forty-five, and both had a profound influence on Hale. It does not appear that Hale ever met Coke, but as a student in the 1620's he must surely have followed Coke's activities in Parliament. Subsequently he was an avid reader of Coke's *Institutes* and *Reports*. Selden became his close personal friend, despite the difference in their ages. In his scholarship as well as in his legal career, Hale followed in the footsteps of both these men, and in many ways surpassed them.¹³⁰

It was Hale who first articulated a general theory of historical jurisprudence which was implicit in Coke's portrayal of the English common

129. Harold D. Hazeltine, *Selden as Legal Historian: A Comment in Criticism and Appreciation*, pt. 1, 24 HARV. L. REV. 105, 113 (1910) (quoting Selden).

130. Holdsworth writes of Hale: “His character and talents made him easily the greatest English lawyer of his day . . . [and] the most scientific jurist that England had yet seen.” 6 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 580-81 (2d ed. 1937) [hereinafter HOLDSWORTH, *A HISTORY OF ENGLISH LAW*]. Elsewhere, Holdsworth states:

[Hale] was the greatest common lawyer who had arisen since Coke; and . . . though his influence has not been so great as that of Coke, he was, as a lawyer, Coke's superior. The position which they respectively occupy in our legal history is as different as their character and mental outlook. Coke stands midway between the medieval and the modern law. Hale is the first of our great modern common lawyers. Coke was essentially a fighter both in the legal and political arena: when Hale was on the Bench the legal contests about the jurisdiction of courts had been settled, and there was a lull in political strife. He was what Coke never was—a true historian; and, like Bacon, he had studied other things besides law, and other bodies of law besides the English common law. He possessed what Coke never possessed—a judicial impartiality, even when he was dealing with matters of public law.

W.S. Holdsworth, *Sir Matthew Hale*, 39 L.Q. REV. 402, 424-25 (1923) [hereinafter Holdsworth, *Sir Matthew Hale*]. An excellent comparison of Coke and Hale may also be found in Gray, *supra* note 64, at xxiii-xxxii. Valuable insights into the relationship between Hale's legal philosophy and the political developments in which he participated may be found in HOWARD NENNER, *BY COLOUR OF LAW: LEGAL CULTURE AND CONSTITUTIONAL POLITICS IN ENGLAND, 1660-1689* (1977).

law and in Selden's historical and philosophical studies. In contrast, however, to the schools of historical jurisprudence that flourished in the nineteenth and early twentieth centuries, Hale—here, too, building on both Coke and Selden—integrated his historical theory with its two major competitors, natural law theory and legal positivism.

Hale's extraordinary character justifies a more extensive account of his personal life than we have given of Coke's or Selden's.¹³¹ His mother died when he was three years old and his father, who gave up the practice of law because of moral scruples against the then required practice of submitting false pleadings, died when he was five. Under the guardianship of a relative of his father, Hale was first instructed by the local vicar, a Puritan minister, and was later sent by his guardian to Oxford to be educated by a leading Puritan theologian. The young Hale himself intended to become a minister, but his youthful attraction to sports, the theater, fine clothes, and partying seems to have distracted him from that goal. He turned instead to the study of law, including Roman law, and also mathematics, optics, medicine, and philosophy, in addition to theology.

At the age of nineteen Hale entered Lincoln's Inn. While he was there, a dramatic experience, in which he witnessed a friend drink himself almost to death (Hale thought he had indeed died), led him to a radical change of life. He gave up drinking except at meals and turned to wearing common clothes instead of fancy gentlemen's clothes. He worked indefatigably to prepare himself for a blameless life of public service. He avoided speaking ill of anyone. He methodically gave one-tenth of his earnings to the poor as well as additional gifts to people in need. These and related qualities remained characteristic of him throughout his life. As a judge he refused not only bribes, which it was then common for judges to accept, but gifts or favors of any kind, even from the highest nobility, and when certain extra emoluments were privately paid to judges in such a way that it was difficult to refuse them, Hale would send his—anonously—to be given to the poor.¹³² Although people who occupied his position in public life were almost invariably wealthy, Hale lived extremely modestly and died leaving only a relatively small estate.

His absolute integrity was acknowledged by virtually everyone who came in contact with him.¹³³ It characterized not only his personal relations but also his public life—as legal counsel, for example, to leading royalists tried for

131. The classic biography of Sir Matthew Hale remains the one written by his near contemporary, Gilbert Burnet. See GILBERT BURNET, *THE LIVES OF SIR MATTHEW HALE AND JOHN EARL OF ROCHESTER* (London, W. Nickerson 1805) (n.d.); see also EDMUND HEWARD, *MATTHEW HALE* (1972). Additional biographical data can be found in Holdsworth, *Sir Matthew Hale*, *supra* note 130, *passim*; Gray, *supra* note 64, at xiii-xxxvii.

132. See BURNET, *supra* note 131, at 37-38 (recounting Hale's rejections of gratuities from persons who might be affected by his judicial decisions).

133. Holdsworth expresses the view of nearly all Hale's contemporaries when he states that "Hale was a man of a really saintly character." 6 HOLDSWORTH, *A HISTORY OF ENGLISH LAW*, *supra* note 130, at 579.

treason in the 1640's and 1650's; as intercessor in behalf of Puritans charged with treason under Charles II in the 1660's;¹³⁴ as head of an important parliamentary law reform commission in 1652; as a judge of the Court of Common Pleas from 1653 to 1657 under Cromwell; and as Chief Baron of the Exchequer under Charles II; and, from 1671 until just before his death in 1676, as Chief Justice of the King's Bench.¹³⁵

Hale's integrity and the profound religious convictions on which it was based help to explain his ability to maintain an essentially neutral political stance throughout a long period of revolutionary upheavals and to serve in high places under successive opposing regimes. Charles Gray is undoubtedly right in attributing Hale's political neutrality to his allegiance to the common law. "Regimes come and go, the common law abides. . . . [This made] sense, . . . for the antagonists in the English revolution largely shared an interest in maintaining the common law."¹³⁶ "For Hale," Gray adds, "legal continuity was vital for civic identity."¹³⁷ It must be added, however, that his devotion to the continuity of the common law is itself to be explained at least partly by his intense religious beliefs. As a Puritan in spirit, who remained, as many Puritans did, a devout Anglican, Hale believed that not only legal continuity but also religious continuity was vital for civic identity. He believed, moreover, that the continuity of the English common law was grounded in English religious faith—a faith that transcended the sharp differences in doctrine and ritual that divided the different branches of Protestant Christianity. It is characteristic of Hale that in the late 1660's he introduced a bill into Parliament to admit Presbyterians to be members of the Anglican Church—not as a matter of toleration but as a matter of their "comprehension" within the

134. Holdsworth indicates that Hale may have served as counsel to Charles I during his trial, and that he advised Charles to plead to the jurisdiction of the High Court of Justice. Holdsworth, *Sir Matthew Hale*, *supra* note 130, at 403. It seems that Hale also advised Strafford on the occasion of his impeachment and provided legal services to Laud as well. *See id.*

135. Many examples can be given of specific legal contributions that reflected Hale's religious outlook. As a judge, he set an example of scrupulous fairness to prisoners in criminal cases. He once persuaded a jury, with some difficulty, to acquit a man who had stolen a loaf of bread because he was starving. Holdsworth, *Sir Matthew Hale*, *supra* note 130, at 406. He shared the overriding Puritan concern with poor relief; his *Discourse Touching Provision for the Poor*, reprinted in 1 THE WORKS, MORAL AND RELIGIOUS, OF SIR MATTHEW HALE, KNT. 515 (Rev. T. Thirlwall ed., London, R. Wilks 1805), which was written in 1659, contained a detailed plan for providing work for the poor, anticipating reforms that were only carried out a century-and-a-half later. On the other hand, he also shared the Puritan horror of witchcraft and in 1664 he imposed the death penalty, as provided by statute, on two women found by the jury to be guilty of bewitching certain children. *See G. Geis, Lord Hale, Witches, and Rape*, 5 BRIT. J.L. & SOC'Y 26, 30-35 (1978).

136. Gray, *supra* note 64, at xiv.

137. *Id.* at xiv-xv. Hale's view of the importance of legitimacy is the best explanation of his decision to resign his judicial office in 1658 when Richard Cromwell assumed the office of Lord Protector upon the death of his brother, Oliver. *But see* HEWARD, *supra* note 131, at 56 (giving reasons both of scruples and expediency as explanations for Hale's resignation).

Church of England.¹³⁸ Hale was also an early advocate of “toleration” of the other dissenting sects, including even the Quakers.¹³⁹

Hale’s strong personal character, his devotion to the common law, and his religious faith—all three—help to explain not only his career as a lawyer in public life but also his intellectual life, which, though devoted chiefly to legal scholarship, included the natural sciences, philosophy, and theology. He was an active member of the Royal Society, England’s elite circle of scientists and philosophers, and he numbered among his close friends the leading Puritan theologian Richard Baxter as well as other prominent theologians. He was a master of political and legal history and the author of the first history of English law ever written.¹⁴⁰ His writings on English criminal and civil law represent the first systematic studies in those fields.¹⁴¹ Moreover, he was a serious student of the Roman law and also wrote tracts in the fields of mathematics, natural science, philosophy, and theology.¹⁴²

Hale’s religious beliefs profoundly affected both his motivation to be a scholar and his effort to make sense, as a scholar, of the history and system of common law.¹⁴³ His habits of prayer led him to ask deep questions

138. HEWARD, *supra* note 131, at 101-07. Hale’s bill was “killed stone dead” by the opposition of the Anglican clergy, who feared that it “meant more competition for preferment and livings.” *Id.* at 103.

139. *See id.* at 94-107.

140. Hale’s *History of the Common Law* was first published in 1713. *See* MATTHEW HALE, *THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND* (Legal Classics Library reprint ed. 1987) (1713) (containing two separate tracts, *History of the Common Law and Analysis of the Law*). In fact, none of Hale’s voluminous legal writings were published in his lifetime, though many of them circulated widely in manuscripts.

141. Hale’s *History of the Pleas of the Crown*, first published in 1716, was not a history but a textbook on criminal law and procedure dealing with capital crimes. SIR MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN* (Classical English Law Texts 1987) (1716) [hereinafter, HALE, PLEAS]. Heward writes: “This book is a *tour de force*. It is systematic and detailed . . . Hale succeeded in reducing the mass of material to a coherent account of the criminal law relating to capital offenses . . .” HEWARD, *supra* note 131, at 133-34.

Hale’s *Analysis of the Law* divides the law into two main divisions, namely, civil law and criminal law. However, the tract itself deals only with civil matters, which it divides into civil rights or interests, wrongs or injuries related to those rights, and relief or remedies applicable to those wrongs. *See* HALE, *supra* note 140. Civil rights are subdivided in the Romanist style into rights of persons and rights of things.

142. Hale admired Roman law and, in the words of his contemporary biographer, Burnet, “lamented much that it was so little studied in England.” HEWARD, *supra* note 131, at 26. Hale’s systematization of English law was greatly influenced by Romanist legal science as it had developed in the West since the late eleventh century. However, Hale did not write any tracts on Roman law. His systematization of English law was also greatly influenced by his knowledge of the exact and natural sciences, on which he did write several long tracts. He was well acquainted with Boyle and Newton and with some of the founders of the Royal Society of London. Three of his discourses on religion were published after his death by his friend, the Puritan minister, Richard Baxter. They are summarized in HEWARD, *supra* note 131, at 127-28.

143. Gray, *supra* note 64, at xvi-xix. Gray writes,

To the Puritan sensibility, the world was a dubious enterprise, a scene of confusion. Yet it was not to be fled. A Christian man must do his work in the place to which he was called. The work was witness to the faith; and, within limits, the working of Christian men could impress a moral quality on the world’s business. The dream that the saints could subdue the world and reshape nature was the excess and perversion of Puritanism. . . . The more orthodox and enduring thrust of Puritanism was to circumscribe the potentiality of works and to balance action with inwardness. . . . To act on the world effectually, a man needed to pull back into critical consciousness of self.

concerning the meaning of life and the purposes of human history. His intense devotion to scholarship and his prolific writings seem to have been inspired chiefly by his personal relationship to his Maker and only secondarily by a sense of social or political obligation. Indeed, of the dozens of books and articles that he wrote and circulated to friends and acquaintances, he allowed only two scientific tracts to be printed during his lifetime, and forbade all but four short works on various subjects to be published after his death.¹⁴⁴ (Fortunately he did not destroy the others.) Gray writes, “Perhaps Hale’s drive to grasp general principles and clarify particulars was primarily a need to make sense to himself, to render a private accounting of the intellectual milieu of the law in which he passed his worldly life.”¹⁴⁵ “[R]endering an account of oneself to God could easily pass over into accounting intellectually to oneself.”¹⁴⁶ Hale’s remarkable essay on the office of a judge and his rules for judging—written in his diary in 1668 while he was sitting on circuit and published for the first time in 1988—is a good example of both an intellectual accounting to himself and a personal testimony to God.¹⁴⁷ It would appear that Justice Hale had a strong sense of the presence of God in his courtroom.

Id. at xvi.

144. *Id.* at xv. The four writings were another scientific tract, a book of religious contemplations, a brief abstract on criminal law, and a translation of Cornelius Nepos’ life of Pomponius Atticus, a Roman Stoic whose life served as a model for Hale.

145. *Id.* at xix.

146. *Id.* at xvi.

147. See Matthew Hale, *Holograph Diary: The Osborn file in the Beinecke Rare Book and Manuscript Library, Yale Univ.*, in Majja Jansson, *Matthew Hale on Judges and Judging*, 9 J. LEGAL HIST. 201, 204-12 (1988). Hale’s diary reveals a powerful reliance on divine guidance in the performance of his judicial duties. He writes that judging is a “difficult employment so that it is a wonder that any prudent man will accept it, and a greater wonder that any man in his right judgment should desire it or not desire to decline and be delivered from it.” *Id.* at 205. He lists twelve of its onerous requirements, including that “it requires a mind constantly awed with the fear of almighty God and sense of His presence” *Id.* Describing his feelings in trying criminal cases, he writes that

it is the grace and goodness of God that I myself have not fallen into as great enormities as those upon which I give judgment. I have the same passions and lusts and corruptions that even those malefactors themselves have But even while the duty of my place requires justice and possibly severity in punishing the offense, yet the same sense of common humanity and human frailty should at the same time engage me to great compassion to the offender.

Id. at 209-10. Hale writes that a judge must “avoid all precipitancy and haste in examining, censuring, judging, [and must] pause and consider, turn every stone, weigh every question, every answer, every circumstance” *Id.* at 207. These meditations lead Hale to the conclusion that if, in a criminal case, “upon the best inquisition a man can make, the scales are very near even,” a judgment of acquittal is fitter than a judgment of condemnation:

for though to condemn the innocent and to acquit the guilty are both abomination unto God, yet that is where a sufficient evidence of guilt appears, but *in obscuris et in evidentibus praesumitur pro innocentia* and I had rather through ignorance of the truth of the fact or the unevidence of it acquit ten guilty persons than condemn one innocent. For the hand of divine justice in the way of His providence may reach in after time a guilty person, or of evidence to convict him, he may hereafter repent and amend; but the loss of the life of an innocent is irrecoverable in this world. But this must be intended where upon a sincere, judicious, impartial, inquiry the evidence is inevident, not where a man out of partiality or vain pity will render use to himself to ease himself of doing justice upon a malefactor.”

Id. at 207-08.

It was also characteristic of Hale that no one of his written works constitutes an adequate statement of his legal philosophy. Each, in fact, is incomplete and fragmentary in nature. His *History of the Common Law* was the first attempt to give a comprehensive portrayal of the historical origins and growth of English law, and it remained the standard book on English legal history until the late nineteenth century. Yet it carried most of the details of the story only through what Hale considered to be its formative era in the twelfth and thirteenth century and cited no laws whatever of the Tudor-Stuart period. More important, Hale's effort in that work to portray English legal history in philosophical terms, and to articulate its underlying theory, was only partly successful.¹⁴⁸ In another important work, *The Analysis of the Law*, Hale presented the English common law as a coherent system; yet in the Preface he admitted that English law was too complex for him alone to "reduce it to an exact logical method."¹⁴⁹ He did once give to friends an outline sketch of such a systematization of the law, but said that to carry it out was a work that would have to be undertaken by order of the State together with other men learned in the law.¹⁵⁰ Nevertheless, he did succeed in completely reorganizing the extensive scattered annotations of Littleton in the first volume of Coke's *Institutes* and in extracting their broader philosophical implications. (It was chiefly from Hale's edition that subsequent generations of lawyers read "Coke on Littleton.") Similarly, his *Reflections on Mr. Hobbes' Dialogue of the Law*, in which he responded to Hobbes' attack on Coke, laid the basis of a full-blown jurisprudence, but its approximately seven thousand words, printed (for the first time) in 1921, did not allow room to build a structure on that foundation.¹⁵¹ His more technical legal writings also contain remarkable insights into the nature of English law and of law in

148. "Some concrete problems Hale solved to his satisfaction, some abstract principles he articulated. Yet the philosophic history he was reaching for eluded him . . ." Gray, *supra* note 64, at xviii.

149. Barbara J. Shapiro, *Law and Science in Seventeenth-Century England*, 21 STAN. L. REV. 727, 746 (1969) (quoting MATTHEW HALE, *THE ANALYSIS OF THE LAW* at A3 (2d ed. 1716)) (spelling modernized). Shapiro emphasizes that Hale approached both the common law and the civil law as "system[s]," that is, as a "series of interrelated parts" rather than as random assortments of writs or rules. *Id.* at 746. Hale was, in fact, heavily indebted to the new legal science pioneered by Phillip Melancthon, Johann Oldendorp, and other sixteenth-century Lutheran jurists, called "the topical method." See Harold J. Berman & Charles J. Reid, Jr., *Roman Law in Europe and the Jus Commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century*, 20 SYRACUSE J. INT'L L. & COM. (forthcoming 1994).

150. Hale's biographer, Burnet, reports that some persons once said to Hale that they "looked on the common law as a study that could not be brought into a scheme, nor formed into a rational science, by reason of the indigestedness of it, and the multiplicity of cases in it." Hale's reply was decisive. He "was not of their mind," he said; and he drew on a large sheet of paper "a scheme of the whole order and parts of it . . . to the great satisfaction of those to whom he sent it." See 6 HOLDSWORTH, *A HISTORY OF ENGLISH LAW*, *supra* note 130, at 584.

151. Matthew Hale, *Reflections by the Lord Chief Justice Hale on Mr. Hobbes[:]* His Dialogue of the Law, in W.S. Holdsworth, *Sir Matthew Hale on Hobbes: An Unpublished Manuscript*, 37 L.Q. REV. 274 (1921) (spelling modernized) (containing a short introduction by Sir Frederick Pollock).

general, but once again, they leave it to the reader to develop from them their general philosophical implications.¹⁵²

It is nevertheless possible by a study of the entire corpus of Hale's writings to reconstruct the coherent legal philosophy that underlies them. One may conclude from such a study that legal philosophy, when understood in the context of Hale's biography, represents the philosophy which dominated English legal thought in the late seventeenth, eighteenth, and early nineteenth centuries and which still plays an important part in the intellectual outlook of many, if not most, English (and American) practising lawyers and judges, though not—any longer—of many English (or American) writers on legal philosophy.

Hale's Integrative Jurisprudence. Coke was not, properly speaking, a legal philosopher. As we have seen, he limited his attention chiefly to English law and did not attempt to state general propositions that would apply to all legal systems. Moreover, Coke stressed the element of continuity in English legal history from the earliest times, and did not attempt to characterize the many historical changes that had taken place over the centuries, although he was entirely familiar with them. He was not, properly speaking, an historian. Selden was, indeed, both a philosopher and an historian. Yet he, too, writing in the prerevolutionary period of struggle between the common law courts and the prerogative courts, had emphasized the ancient tradition of limitations upon the royal prerogative. It was left to Hale—building on Selden—to emphasize not only the ancient roots of the English legal tradition but also its capacity to evolve and to adapt itself to new needs. Laws must change with the times, he wrote, or they will lose their usefulness.

Hale developed the outlines of a third major theory of jurisprudence, the historical theory, which two centuries later competed for supremacy with the natural law theory and the positivist theory, but which Hale put forward in conjunction with, rather than in opposition to, the other two theories. Hale's historical theory treats law partly—in the nineteenth century, historicists would say it should be treated primarily—as a manifestation of the historically developing ethos, the historical ideals and traditions, the evolving customs, of a people or society whose law it is. By virtue of its source in this ethos, law imposes limitations both on the sovereignty of the lawmaking power, the political "is," and on the authority of reason and conscience, the moral "ought to be."¹⁵³

Hale's legal philosophy may be divided into the following four parts. First is his conception of the relationship of what may be called historical law, that

152. Some of Hale's more technical legal writings include *The Jurisdiction of the Lord's House*, *Considerations Touching the Amendment and Alteration of Laws*, *A Short Treatise of Sheriff's Accompts*, and *A Treatise on the Admiralty Jurisdiction*. Holdsworth, *Sir Matthew Hale*, *supra* note 130, at 415-26; see also HEWARD, *supra* note 131, at 130-55.

153. Cf. Berman, *supra* note 1, at 780-81.

is, law in its historical dimension, to natural law, that is, law in its moral dimension, and to positive law, that is, law in its political dimension. Second is his conception of the nature of the historical development of a legal system. Third is his elaboration of the concept of artificial reason which Coke had first adumbrated. Fourth is his theory of sovereignty and of the nature of sovereignty in England. I shall take these up in turn.

(1) Hale believed that natural law constitutes a distinct body of law, as does positive law, and that it is binding upon states. This traditional Western conception differed from Coke's view that natural law is only binding in England to the extent that it has been made part of the English common law. Thus Hale wrote of criminal law that there are many offenses that are prohibited by natural law and therefore are and should be universally proscribed. These, he said, may also be proscribed by divine law, which (like other Protestants) he confined to Biblical law. Homicide and theft, he wrote, are contrary both to divine law and to the law of nature and are and should be made criminally punishable by all states, whether Christian or heathen.¹⁵⁴

Hale nevertheless limited the scope of both divine law and natural law. Some crimes proscribed by the Bible, he wrote, were fitted only to the Israelite state and are hence not obligatory for other states.¹⁵⁵ Moreover, the kinds and measures of punishment "are not determined by the laws of nature, . . . but are for the most part, if not altogether, left to the positive laws and constitutions of several kingdoms and various states."¹⁵⁶ Those positive laws of various states relating to punishment are to be studied and understood, so far as possible, in terms of their historical development. From a detailed study of laws of the Hebrews, the Greeks, the Romans, and the Anglo-Saxons, Hale concluded that

penalties therefore regularly seem to be *juris positivi*, and *non naturalis*, as to their degrees and applications, and therefore in different ages and states have been set higher or lower according to exigencies of the state and wisdom of the lawgiver. Only in the case of *murder* there seems to be a justice of retaliation, if not *ex lege naturali*, yet at least by a general divine law given to all mankind, *Gen. ix. 6. . . .*

In other cases, the *lex talionis* [law of retribution] in point of punishments seems to be purely *juris positivi*, and although among the *Jewish* laws we find it instituted, *Exod. xxi. 24, 25, Eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe*; yet inasmuch as the party injured is living and capable of another satisfaction of his damage (which he is not in case of murder) I have heard men greatly read in the *Jewish* lawyers

154. See 1 HALE, PLEAS, *supra* note 141, at 1-13.

155. *Id.* at 1-3.

156. *Id.* at 1 (spelling and punctuation modernized in this quotation and those that follow).

and laws affirm that these *taliones* among the *Jews* were converted into pecuniary rates and estimates to the party injured¹⁵⁷

Thus divine law, in Hale's view, is found in those Biblical precepts that are intended to have universal application, such as the Ten Commandments. Natural law includes such divine law as well as other legal principles and institutions that are in fact common to all nations. Divine law and natural law are binding on all rulers. Positive law is distinct from natural law, in that it is subject to the discretion of the lawgiver, although the wise lawgiver will act according to reason and will do what is socially useful under the historical circumstances.

When Hale turned to an analysis of English criminal law, however, he viewed historical experience as not only instructive but also normative. Thus in arguing that the canonists are wrong in saying that capital punishment should not be inflicted for theft, Hale wrote that not only utility may require so drastic a punishment "[w]hen the offenses grow enormous, frequent and dangerous to a kingdom or state," but that in England the law—historically considered—had so developed as to require in his time the death penalty for theft, leaving almost no discretion to the judge.¹⁵⁸ He recognized a certain relativity in that regard. "If we come to the laws and customs of our own kingdom," he wrote, "we shall find the punishment of theft in several ages to vary according as the offence grew and prevailed more or less."¹⁵⁹ In contrast to Coke, Hale thus presented an historical jurisprudence with a changing content.

With respect to criminal punishment generally, Hale took the utilitarian view—against the natural law theory—that

the true, or at least, the principal end of punishments is to deter men from the breach of laws . . . and the inflicting of punishments in most cases is more for example and to prevent evils, than to punish. When offenses grow enormous, frequent and dangerous to a kingdom or state, . . . or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom and its inhabitants, severe punishments, even death itself, is necessary to be annexed to laws in many cases by the prudence of law-givers, though possibly beyond the single demerit of the offense itself simply considered.¹⁶⁰

Such a view of the "true or at least principal" purpose of punishment is congenial to a positivist theory of law, which subordinates both the moral and the historical dimension of law to the political dimension. On the other hand,

157. *Id.* at 13-14.

158. *Id.* at 13.

159. *Id.* at 11.

160. *Id.* at 13.

Hale's view of the nature of the offenses to be prohibited by criminal law reflected his belief in the moral dimension of law and is congenial to a natural law theory. He combined these two theories in his analysis of particular legal systems and especially the English legal system, whose historical experience determined the limits and the interrelations of their political and their moral aspects. Thus Hale may be said to have articulated in a new way the integrative jurisprudence which was implicit in the Western legal tradition from the time it was formed, although the legal philosophers had tended (as legal philosophers often do) to assert the supremacy of one theory or the other.

(2) Hale did not advance a sophisticated theory of the nature of the historical development of legal systems, as Savigny, Maine, Durkheim, Max Weber, and other legal scholars did in the nineteenth and early twentieth centuries.¹⁶¹ He did, however, have a profound knowledge of the history of a number of foreign legal systems, which enabled him to make some generalizations about the history of law and to apply those generalizations to the particular character of the history of English law. Thus he wrote that it is

161. Savigny viewed the development of law as a part of the historical development of the common consciousness of a society. Law, he wrote, is developed first by custom and by popular belief, and only then by juristic activity. As a people becomes more mature and its social and economic life becomes more complex, its law becomes less symbolic and more abstract, more technical, requiring administration and development by a professional class of trained jurists. The professional or technical element should not, however, Savigny wrote, become divorced from the symbolic element or from the community ideas and ideals that underlie both the early and later stages of legal development. Thus Savigny combined an historical and sociological with a normative analysis. See FRIEDRICH CARL VON SAVIGNY, *VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* (Heidelberg, J.C.B. Mohr 1840) (2d ed. 1828) (first published in 1813). For an English translation, see FRIEDRICH CARL VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (Abraham Hayward trans., Legal Classics Library 1986) (3d ed. 1831) [hereinafter SAVIGNY, *VOCATION OF OUR AGE*].

Maine also saw a normative element in the development of modern law from its origins in "early" societies, stressing the transition over many centuries from fictions to equity to legislation as the main source of legal innovation and from status to contract as the main source of legal obligation. See HENRY S. MAINE, *ANCIENT LAW* (University Ariz. Press 1986) (1861); HENRY S. MAINE, *LECTURES ON THE EARLY HISTORY OF INSTITUTIONS* (New York, Henry Holt & Co. 1888) (1875).

Durkheim echoed Savigny in emphasizing the source of law in the moral sense and collective consciousness (*conscience collective*) of a people, and built partly on Maine in tracing a movement of the center of gravity of law from repressive to restitutive sanctions. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (The Free Press 1964) (1893); EMILE DURKHEIM, *DURKHEIM AND THE LAW* (Steven Lukes & Andrew Scull eds., 1983) (a collection of Durkheim's writings on law and legal evolution). In contrast to Savigny and Maine, however, Durkheim did not expressly attach normative significance to his evolutionary theory. Similarly, Weber, in distinguishing between charismatic, traditional, and formal-rational types of law, did not expressly attribute a normative character to historical development within a particular type of law or from one type to another. See MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954).

In an interesting review of the works of a long list of nineteenth-century and contemporary English and American exponents of an "evolutionary jurisprudence" (including Savigny, Maine, John Henry Wigmore, Arthur Corbin, Robert C. Clark, Richard Epstein, and George L. Priest, in addition to many economists and sociobiologists), E. Donald Elliott characterizes the attribution of significance to the historical origins and development of law as merely a useful "creation myth." See E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 92-93 (1985). He dismisses with a brief and misleading footnote the contribution of Alexander Bickel, *id.* at 64 n.173, who was one of the few American jurisprudential "evolutionists" of recent decades who attached normative significance to historical experience.

in the nature of laws “to be accommodated to the conditions, exigencies and conveniences of the people, for or by whom they are appointed, [and] as those exigencies and conveniences do insensibly grow upon the people, so many times there grows insensibly a variation of laws, especially in a long tract of time.”¹⁶² This wholly unremarkable statement had the importance of enabling Hale to accept the differences between the common law doctrines as described by Glanvill in the time of Henry II and those discussed by Bracton in the time of Henry III. It enabled him to show the importance of legislation under Edward I, “the English Justinian,” who was in many ways the hero of Hale’s History, and, more generally, to stress the great role played by legislation throughout English legal history. Coke, of course, had minimized legislative changes, though he knew them well, and had stressed judicial continuity. Hale, however, who himself headed the famous Hale Commission for law reform under Cromwell, had a different personal background from that of Coke, but, more important, lived in a period of revolutionary upheaval. Like Selden, Hale viewed the history of the English common law as a process of adaptation to changing needs. In a long perspective, he saw such adaptation as a process of gradual improvement and self-perfection. In the eighteenth century this view was captured in the expression, made famous by Lord Mansfield, that “the common law works itself pure.”¹⁶³

It was the nature of legal change in England, however, (and here Hale agreed with both Selden and Coke) that the basic constitutional framework of the law remained constant. Hale accepted the doctrines of the partisans of the common law and of parliamentary independence that parliamentary institutions had prevailed from the days of the Anglo-Saxon witsans and moots, that trial by jury antedated—in a different form—the Norman grand and petty assizes, and that, in general, neither the Norman Conquest nor any subsequent upheavals represented a fundamental break in English constitutional history, although Hale—in contrast to Coke—recognized that the Conquest brought

162. HALE, *supra* note 64, at 39 (spelling modernized).

163. This expression appears to have been first articulated by Lord Mansfield as solicitor general in the case of *Omychund v. Barker*, 1 Atkyns 21, 33 (K.B. 1744) (shortened version reported in 22 Eng. Rep. 339). At issue was whether the testimony of an Indian, who had sworn an oath in accord with “Gentoo” (Hindu) religion, could be accepted as evidence in an English court, since a statute of Parliament required the oath to be taken on the Gospels. Mansfield argued that “principles of reason, justice, and convenience” required that the testimony be admitted. In explaining why the Court should go beyond the statutory language in this case he stated: “A statute very seldom can take in all cases, therefore the common law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.” *Id.* at 33. The Court subsequently accepted this reasoning. See GOUGH, *supra* note 72, at 188 (discussing the case). This view closely approximates Matthew Hale’s theory of legal development. Michael Lobban has stated: “Hale reconciled the immemoriality of the common law with its flexibility by putting forward a Burkean view: the common law was a body, which grew and adapted itself to the people’s needs, ever approaching perfection.” LOBBAN, *supra* note 101, at 3. Lobban quotes Hale’s statements that “by use, practice, commerce, study and improvement of the English people, [the laws] arrived in Henry II’s time to a greater improvement,” and that under Edward I, the “English Justinian,” the law “obtained a very great perfection.” *Id.* (quoting HALE, *supra* note 64, at 84, 101).

enormous legal changes in property law and other fields. In this, as in other matters, Hale built on the insights of Selden.¹⁶⁴

Hale's conception of the balance between continuity and change in English legal history is captured by his striking analogies of the ship of the Argonauts and the biography of a human being:

But though those particular variations and accessions have happened in the laws, yet they being only partial and successive, we may with just reason say, they are the same English laws now, that they were 600 Years since in the general. As the Argonauts' ship was the same when it returned home, as it was when it went out, though in that long voyage it had successive amendments, and scarce came back with any of its former materials; and as Titius is the same man he was 40 years since, though physicians tells us, that in a tract of seven years, the body has scarce any of the same material substance it had before.¹⁶⁵

This paradox of identity despite change was more than a restatement of a philosophers' conundrum.¹⁶⁶ In the context of the Western legal tradition, it was a new way of addressing the problem of the reality of universals. The reality of the unwritten English constitution consisted above all in the growth of the English common law, its successive accommodations to the exigencies and conveniences of the people "as those exigencies and conveniences do insensibly grow upon the people."¹⁶⁷ History, and especially the history of law, was viewed as a true story, a narrative of the gradual unfolding of a people's experience from earliest times.¹⁶⁸ The alternatives to this middle

164. Whether the Norman Conquest brought a decisive rupture in the history of the common law was a question of fundamental importance in the constitutional debates of the late sixteenth and early seventeenth centuries. Parliamentarians like Coke emphasized the antiquity of the privileges of representative institutions vis-à-vis the Crown, arguing that the Norman Conquest did not represent a fundamental breach in English legal history and that the origins of Parliament could be traced back into the mists of Anglo-Saxon times. Royalists like Archbishop Laud, on the other hand, viewed the appeal to an Anglo-Saxon past as little better than "a stimulus to rebellion." See CHRISTOPHER HILL, *PURITANISM AND REVOLUTION: STUDIES IN INTERPRETATION OF THE ENGLISH REVOLUTION OF THE 17TH CENTURY* 57-67 (1958). Selden and Hale took a middle view, asserting, with Coke, a continuity of representative government from Anglo-Saxon times but departing from Coke in tracing the introduction of feudal property law and other related matters to the Normans. POCOCK, *supra* note 27, at 170-81, 337-39, discusses the controversy but oversimplifies the positions taken by Coke, Selden, and Hale.

165. HALE, *supra* note 64, at 40 (spelling modernized). The Argonaut image builds on Selden. See *supra* p. 1698. The image of the human body is more powerful. Hale also at various points compared the common law to a river that is fed from many tributaries.

166. Cf. John P. Reid, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, in *THE ROOTS OF LIBERTY*, *supra* note 10, at 147, 163.

167. HALE, *supra* note 64, at 39.

168. In recent decades there has developed in Europe and America a very widespread and deep skepticism concerning the human capacity to represent reality through narrative, whether historical or literary or legal, and a widespread belief that "texts" can only have the meanings attributed to them by their various readers. In an important recent book on the philosophy of history, David Carr has brilliantly analyzed and exposed the fallacies of such skepticism. DAVID CARR, *TIME, NARRATIVE, AND HISTORY* (1986). Carr maintains that "real human time" is inevitably experienced by individuals and communities

course between philosophical realism and philosophical nominalism—categories with which Hale was entirely familiar—were, on the one hand, the Platonic notion of the reality of abstract principles of justice, characteristic of extreme versions of natural law theory, and the Machiavellian notion of the unreality of anything except particular decisions of a sovereign will, characteristic of extreme versions of legal positivism.¹⁶⁹ The nature of the historical development of the English legal system, according to Hale, is that the constitution as a whole—the ship of state—is itself constituted by the successive changes in its parts experienced over centuries.

(3) Hale accepted and developed further, in more general terms, Coke's concept that the common law is itself artificial reason, that is, that its internal logic, the coherence of its structure and functioning, consists of the reasoned experience of the lawyers and judges and legislators who have made it in the course of many centuries. Hale defended Coke's thesis against direct attack by Thomas Hobbes. In doing so, Hale articulated the philosophical underpinnings of the thesis, so that it became part of Hale's version of what we have called an integrative jurisprudence.

Hobbes' attack on Coke was contained in the form of a dialogue between a philosopher, who presents largely, though not entirely, the thought of Francis Bacon and Hobbes himself, and a lawyer, who relies largely, though not entirely, on the writings of Coke.¹⁷⁰ Hobbes wrote that Coke's conception of law as artificial reason was, in the first place, untrue, since in fact law does not originate in lawyers' or judges' reasoning, or indeed in reason at all, but in the will of the sovereign. To require that the sovereign's laws, in order to be enforceable, conform to reason, whether or not "artificial," would lead to

as the unfolding of an historical narrative, of which both the individual and the community are subjects. Hale viewed history in a similar way.

169. The historical middle ground between will and reason has regrettably been ignored in some recent histories of legal theory. Thus Michel Bastit traces the "birth of modern law" to the emergence of a rigid voluntarism and nominalism attributed to Duns Scotus and, especially, William of Ockham, who allegedly destroyed the synthesis that had been wrought by Thomas Aquinas. While Aquinas stressed an ordered hierarchical ranking of law accessible to a human reason which, despite its defects, still bears some resemblance to the divine intellect, Scotus and Ockham emphasized the remoteness, inscrutability, and, indeed, potential irrationality of the divine, and hence the arbitrariness of all attempts to generalize in order to categorize knowledge. It was this emphasis on will and the singular that led, according to Bastit, to the development of modern forms of positivism. See MICHEL BASTIT, *NAISSANCE DE LA LOI MODERNE* (1990). Although there is much truth in Bastit's account of the contrast between the two philosophies viewed in the abstract, a contextual analysis would refute the implication that Scotist or Ockhamist theories led inevitably to modern forms of positivism. One must take into account that at least until the late eighteenth- or early nineteenth-century, modern legal thought in Germany, England, and elsewhere was able to reconcile the philosophical antinomies of will and reason in the context of historical experience.

170. See THOMAS HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* (Joseph Cropsey ed., 1971) [hereinafter HOBBS, *DIALOGUE*]. The *Dialogue* runs to 168 printed pages. It was first published in 1681, two years after Hobbes' death, and was written after 1661 and before Hale's death in 1676. Hale saw it in manuscript form. His reply was also not published until after his death, but, like Hobbes' essay, was no doubt circulated during his lifetime in manuscript form. Hobbes' essay was a shorter but in some respects stronger statement of the political and legal philosophy contained in his famous *Leviathan*, published in 1651.

disobedience on the part of every man (or in the case of artificial reason, by inference, every lawyer or judge) who claims to be more reasonable than the law itself. Hobbes wrote that the concept of artificial reason is, in the second place, obscure, since it does not clarify the relationship between lawyers' and judges' reasoning and the actual laws, that is, commands of the sovereign, which judges only interpret and apply in particular cases. "It is not Wisdom but Authority that makes a Law," says the Philosopher.

Hale—without mentioning Coke by name—does not answer these charges directly but instead starts, characteristically, with a definition of Reason. Here he distinguishes between (a) the reason in things, their congruity or fit of interdependence, what we might call their internal logic, as when we say that "the reason" a watch runs is because of the interrelationship of the spring and the hands, or "the reason" an apple falls from a tree is because of the force of gravity, and (b) the human faculty of reasoning, which connects cause and effect or perceives the proportion between lines and surfaces, or otherwise understands phenomena. Hale calls this faculty "[r]atiocination, . . . a faculty common to all reasonable creatures."¹⁷¹ The most important kind of reason is the combination of these two kinds of reason, Hale wrote, "when the reasonable faculty is in conjunction with the reasonable subject, and habituated to it by use and exercise, and it is this kind of reason or reason thus taken that denominates a man a mathematician, a philosopher, a politician, a physician, a lawyer"¹⁷²

"The reasonable faculty," the capacity to reason, is present in all people, but the reason inherent in various subjects, or various activities, varies; therefore, to be a good engineer, a good surgeon, or a good mathematician requires "the application of the faculty of reason to the particular subjects . . . by particular methods." Thus one man's reason may be suited to one subject but not to the other. "Tully that was an excellent orator, and a good moralist, was but an ordinary statesman and a worse poet." "And . . . commonly those that pretend to a universal knowledge are but superficial and seldom pierce deep into any thing."¹⁷³

Hale wrote that of all subjects law is the most difficult for the faculty of reason to understand, since it deals with "the regulation and ordering of civil societies and [with] the measuring of right and wrong, when it comes to particulars."¹⁷⁴ Moral actions are infinitely complex—"scarce two moral actions in the world are every way commensurate"¹⁷⁵—and in applying moral principles to particular moral actions it is impossible to establish the kinds of certainty and of proof that one finds in the natural sciences. Consequently,

171. Hale, *supra* note 151, at 286-87 (spelling modernized).

172. *Id.* at 287.

173. *Id.*

174. *Id.* at 288.

175. *Id.* at 291.

Hale wrote, even the most intelligent people disagree concerning particular applications of common notions of justice to particular instances and occasions. Indeed, moral philosophers, who are accustomed to

high speculations and abstract notions touching justice and right . . . differ extremely among themselves when they come to particular applications, [and] so are most commonly the worst judges that can be, because they are transported from the ordinary measures of right and wrong by their over fine speculations, theories, and distinctions above the common staple of human conversations.¹⁷⁶

Hale thus established that, as one might say today, different methods are appropriate to different sciences, depending on the subject matter under investigation. Therefore a general faculty of reason cannot in itself give one an understanding of the science of law, and moreover, moral philosophers (including, by implication, Mr. Hobbes) are peculiarly unfitted to understand law, since it involves not only general principles but concrete applications of general principles by particular persons in particular situations. In order to avoid instability, uncertainty, and arbitrariness in the application of reason to particular instances, "and to the end that men might understand by what rule and measure to live and possess, and might not be under the unknown, arbitrary uncertain judgment of the uncertain reason of particular persons," Hale concludes that "the wiser sort of the world in all ages agreed" to institute particular laws and particular rules and methods of administration of justice.¹⁷⁷

The need for certainty, however, is not fully met by the establishment of laws and procedures for enforcing them, since there still remains the problem of applying such rules and procedures in a multitude of particular cases. There must therefore be an elaboration of the law, in order to meet enormously diverse circumstances. No individual can, by his own reason, determine what these laws should be. Even if he thinks he knows what it is right to do in a particular case, he must recognize that his knowledge may be inferior to that of others more experienced in such matters. Hale writes that

it is a reason for me to prefer a law by which a kingdom has been happily governed four or five hundred years than to adventure the happiness and peace of a kingdom upon some new theory of my own though I am better acquainted with the reasonableness of my own theory than with that law.¹⁷⁸

He gives the following illustration:

176. *Id.* at 289.

177. *Id.*

178. *Id.* at 291.

It is a part of the law of England that all the lands descend to the eldest son without a particular custom altering it. That a Freehold passeth not without livery [of] seisin, or attornment by an act in pais, but where statutes have altered [the former rules] that an estate made by deed to a man for ever passeth only for life without the word heirs and infinite more of this kind. Now if [even] the most refined brain under heaven would go about to enquire by speculation, or by reading of Plato or Aristotle, or by considering the laws of the Jews, or other nations, to find out how lands descend in England, or how estates are there transferred, or transmitted among us, he would lose his labour, and spend his notions in vain, till he acquainted himself with the laws of England, and the reason is because they are institutions introduced by the will and consent of others implicitly by custom and usage, or explicitly by written laws or acts of Parlement.¹⁷⁹

Thus Hale comes finally to Coke's artificial reason against which Hobbes had inveighed:

And upon all this that hath been said it appears that men are not born common lawyers, neither can the bare exercise of the faculty of reason give a man a sufficient knowledge of it, but it must be gained by the habituating and accustoming and exercising that faculty by reading, study and observation to give a man a complete knowledge thereof.¹⁸⁰

In contrast to Coke, however, Hale answered Hobbes not primarily by an argument from the particular history of the English common law, but primarily by an argument from the nature of law generally, which is illustrated in English legal history but which is also illustrated in the history of other legal systems. Hobbes had sought timeless answers to timeless questions. His philosophy was unhistorical, and he opposed Coke's historicism on the ground that no truths, no lessons, could be derived from it. "Experience concludeth nothing universally," Hobbes wrote.¹⁸¹ To this Hale replied, in effect, as Coke might have replied: that a single important experience may be invoked to disprove a universal proposition, and further, that from universal experience one may indeed draw certain universal conclusions.¹⁸²

Hobbes had said that Coke's argument was (a) false, because it failed to recognize that law consists of rules which reflect the will of the sovereign, and (b) obscure, because it defined law as the decisions of judges whereas judges actually only interpret and apply the sovereign's rules in particular cases. In fact, it was Hobbes' argument that was false, because it failed to recognize that

179. *Id.* at 292.

180. *Id.*

181. The author distinctly remembers reading this remarkable statement in Hobbes' works but cannot now locate the precise place. See THOMAS HOBBS, *LEVIATHAN* 4-27 (A.R. Waller ed., 1904) (1651).

182. Hale, *supra* note 151, at 293.

in England, at least, the sovereign inherits its law from the past and can only change it within limits set by the past; and with respect to obscurity, Hobbes simply erred in supposing that Coke defined the common law as the will of the judges—in fact, Coke cited judicial precedents as evidence of an age-old professional customary law that grows out of the reasoning of many generations of learned persons.

In Hale's terms, what Coke called artificial reason is the combination of the reason inherent in law itself and the reasoning of experienced students and learned practitioners of law. Hale differed from Coke in attributing such reason (without using the term "artificial") not only to the English common law but also to law generally; and not only to its historical dimension but to its political and moral dimensions as well. Thus not only historical reason but also political reason and moral reason—in Aristotelian terms, all practical reason, as contrasted with pure reason—is, in Hale's view, a product of the application of the faculty of reasoning to the reason inherent in the subject matter, its own internal logic.

(4) The second part of Hale's response to Hobbes is entitled "Of Sovereign Power." (The first part is entitled "Of Laws in General and the Law of Reason".) Hobbes had defined sovereignty as the supreme factual power in a state; he postulated a purely theoretical initial condition of anarchy in the world, a war of all against all, leading those living in such a "state of nature," through the exercise of "natural reason," to enter into a social contract whereby a commonwealth was formed and a sovereignty instituted, whether of one or of many. Given human nature, he contended, it is only through sovereign power that it is possible to obtain habitual obedience and thus to maintain peace in society.¹⁸³ The sovereign may exercise his will through laws. However, these laws cannot bind him, since otherwise he would lose his supreme power to keep order. "A law," wrote Hobbes in a famous passage, "is the command of him or them that have the sovereign power [over] them that be his or their subjects, declaring publicly and plainly what every one of them may do and what they must forbear to do."¹⁸⁴ The characteristic form of law is therefore statute law. "Statutes," says the Philosopher in Hobbes' *Dialogue*, "are not philosophy as is the common law and other disputable arts, but are commands, or prohibitions which ought to be obeyed, because assented to by submission . . . to whosoever [has] the sovereign power . . ."¹⁸⁵ Coke had said it is the nature of law to be reasonable, and that the test of reasonableness

183. Man's "natural" reason, which for Hobbes is the supreme reason, recognizes the need for a social contract in order to preserve the human race from self-destruction. By such a social contract, however, men subordinate their will to that of the sovereign. The sovereign's reason then becomes their reason. The sovereign's justice becomes their justice. HOBBS, *DIALOGUE*, *supra* note 170, at 67.

184. *Id.* at 71 (spelling modernized).

185. *Id.* at 69; see also D.E.C. Yale, *Hobbes and Hale on Law, Legislation, and the Sovereign*, 31 *CAMBRIDGE L.J.* 121, 123-24 (1972).

is its ability to withstand the test of time.¹⁸⁶ As D.E.C. Yale put it, “Hobbes could not admit reasonableness as a criterion, for if men . . . might question the validity of laws on grounds of unreasonableness, how could there be habitual obedience?”¹⁸⁷

Hale’s critique of Hobbes’ conception of sovereignty takes the form, principally, of a legal analysis of the nature of political power under the English system of government. From a Hobbesian point of view, this misses the mark. Hobbes did not purport to describe any existing polity; his Leviathan was a model—an “ideal type,” in Max Weber’s terminology. Yet as in all such ideal types, behind the ideal lay an existing reality, however much the idealization might vary from it; otherwise it would not be an ideal type, a model, but only a utopia, a “nowhere.” The Weberian interprets the reality as an imperfect example of the ideal type. If, however, it is objected that in important respects the reality does not correspond to the ideal type, the Weberian will respond by saying that the ideal type is only an ideal type, a model.¹⁸⁸ Hale understood full well that Hobbes defined sovereignty as factual power, supreme and indivisible. He also understood, however, that Hobbes prescribed this model for an England which had been torn by two decades of civil strife and was still in the turmoil of the aftermath. Hale therefore countered Hobbes’ ideal type not only with moral and political arguments but also with the reality of English constitutional history, to which he attached normative significance.

Hale began—in his usual way—with definitions, in this case with definitions of different kinds of power, using a classification familiar to legal scholars of the time. There is, first, coercive power (*potestas coerciva*). The king is not under the coercive power of the laws, though his subjects are. (This was written before 1689, the year when the king became subjected to the coercive power of the laws under a new sovereign power, that of Parliament.) There is also, however, second, directive power (*potestas directiva*). The king has taken a solemn oath at his coronation to observe the fundamental law, including especially laws that concern the liberties of his subjects. He may not be coerced to observe these laws, but they nevertheless have directive power, they direct him. Third, there is a *potestas irritans*, an invalidating power, in the laws themselves, that is, the power to make acts void if they are against the law. Thus the sovereignty of the king exists within a legal framework. Hale then lists six great “powers of sovereignty” that inhere in the kingship: the power to make peace and declare war, the power to give value and

186. John U. Lewis, *Sir Edward Coke: His Theory of ‘Artificial Reason’ as a Context for Modern Basic Legal Theory*, 84 L.Q. REV. 339 (1968).

187. Yale, *supra* note 185, at 124.

188. Harold J. Berman, *Some False Premises of Max Weber’s Sociology of Law*, 65 WASH. U. L.Q. 758, 759-60 (1987), reprinted in FAITH AND ORDER, *supra* note 1, at 239; cf. BERMAN, *supra* note 5, at 538-58 (“Beyond Marx, beyond Weber”).

legitimation to the coin of the realm, the power to pardon persons who have committed public offenses, the power to determine the jurisdiction of courts, the power to raise military forces by land and sea, and the power to make laws.¹⁸⁹ He even identifies certain qualifications of this limited list of powers. He cites ancient statutes providing that the king cannot force anyone to go out of the kingdom or impose certain taxes without the consent of Parliament, and that, more generally, he cannot make laws without the advice and assent of the two houses of Parliament.¹⁹⁰

Hale holds these realities of English constitutional law up against Hobbes' argument that—in his model of sovereignty—there can be no qualifications or modifications of the power of a sovereign prince, and that the prince may make, repeal, or alter any laws he pleases, impose any taxes he pleases, derogate from his subjects' property how and when he pleases, and meet all public dangers in any way he thinks fit.¹⁹¹ "These wild propositions," Hale states, "are 1. Utterly false. 2. Against all natural justice. 3. Pernicious to the Government. 4. Destructive to the common good and safety of the Government. 5. Without any shadow of law or reason to support them."¹⁹² He takes up each of these objections in turn.

Hale's contention that Hobbes' conception of sovereignty is "false," that is, untrue, reflects his historical jurisprudence. One may ask, how can a "model" be untrue? Hale's answer is that "in things of this nature the best measures of truth or falsehood are not imaginary notions or reasons at large, but the laws and customs of this kingdom which have determined reason at large and bound it up within the bounds of such laws and usages."¹⁹³ Here Hale pierces the veil of sovereignty as a model, or ideal type, and looks behind it to the historical reality of sovereignty in a particular place and time. In Hobbes' theory, sovereignty is a hypothetical factual power. Hale, on the contrary, argues that, as a matter of truth or falsehood, sovereignty is not hypothetical (an "imaginary notion") but real, and that it is not necessarily merely factual power but may be power constrained by a legal framework, and, finally, that the truth of these propositions is proved by English historical experience.

It is characteristic of Hale that he did not rely solely on an historical justification of his position but combined it with a moral and a political justification. Natural justice, he wrote, binds princes to carry out their pacts with their people: contracts must be kept. To this obligation, he wrote, "is superadded . . . the great solemnity of the oath which [the king] takes at his coronation to observe and keep those laws and liberties. And though it is true

189. Hale, *supra* note 151, at 296.

190. *Id.* at 296-97.

191. *Id.* at 297-98.

192. *Id.* at 298.

193. *Id.*

that the king's person is sacred, and not under any external coercion . . . yet no man can make a question whether he be not in the sight of God and by the bond of natural justice obliged to keep it."¹⁹⁴

Similarly, political considerations, expressed in the positive laws, whether of England or of other countries, normally limit and divide sovereign power. It is a fiction to say that the sovereign may not irrevocably delegate some of his powers to others. Hobbes had argued that the prince cannot be bound by laws, because an invasion or rebellion or other emergency might occur which would require him to act contrary to them, and if he could not do so, his subjects would lose the benefit of that protection for which his sovereignty was initially established. Hale answers that "it is a madness to think that the model of laws or government is to be framed according to such circumstances as very rarely occur. Tis as if a man should make agarike and rhubarb his ordinary diet, because it is of use when he is sick which may be once in 7 years."¹⁹⁵ Here Hale meets Hobbes on his own positivist and utilitarian ground. Independently of both historical considerations and moral considerations, taking law simply as the will of the sovereign expressed in statutory commands, the prince should be bound by his own laws, Hale declares, since "it is better to be governed by certain laws though they bring some inconvenience at some time than under arbitrary government which may bring many inconveniences that the other does not."¹⁹⁶

V. THE RELATIONSHIP OF ENGLISH HISTORICAL JURISPRUDENCE TO SEVENTEENTH-CENTURY RELIGIOUS AND SCIENTIFIC THOUGHT

The legal philosophy of such men as Coke, Selden, and Hale must be understood as an integral part of their total philosophy, including their religious philosophy and their philosophy of the natural sciences. Indeed, the term "natural philosophy" was used in the seventeenth century to embrace scientific knowledge of the divine nature, human nature, and the nature of the physical world—all three;¹⁹⁷ and scientific knowledge of the nature of man embraced the sciences of politics and law. It was understood, of course, that the science of law differed from, say, the science of astronomy, or optics, or other physical sciences, both in its method and in the certainty or degree of probability of its conclusions. Nevertheless, all the sciences were considered to be (as someone then put it) "of a sociable nature," dwelling side by side with each other in a common fellowship.

It should not be surprising, then, that Coke, Selden, Hale, and many of their colleagues of the bench and the bar were steeped in knowledge not only

194. *Id.* at 301.

195. *Id.* at 302.

196. *Id.*

197. *Cf.* McRae, *supra* note 53.

of law but also of theology and of the physical sciences, that their views of each of these branches of knowledge were related to their views of the others, and that the revolutionary changes that they introduced into legal philosophy in the seventeenth century paralleled the revolutionary changes that were taking place contemporaneously in virtually all aspects of "natural philosophy." In fact, Hale's historical jurisprudence paralleled in remarkable ways the Calvinist belief-system in which he was trained in his youth, many of whose tenets eventually penetrated the Anglican faith to which he adhered all his life; and it also drew heavily on the empirical method, which constituted one important component of the new developments in the natural sciences that he discussed and wrote about as a member of the Royal Society.

Jurisprudential Counterparts of Basic Calvinist and Neo-Calvinist Religious Beliefs. Despite the many differences among different branches (and indeed different congregations) of persons who professed Calvinist or neo-Calvinist doctrines, they shared certain basic religious beliefs, which ultimately became part of an English world outlook and which found reflection in the historical jurisprudence expounded by Hale and his colleagues. Six such basic Calvinist or neo-Calvinist religious beliefs are listed below, together with their jurisprudential counterparts.

One was the belief that history is a revelation of divine providence, a spiritual story of the unfolding of God's own purposes, and more particularly, that God works in history, in part, through his elect nation, England, which is historically destined to reveal and incarnate God's mission for mankind. This belief undergirded the conviction that the English common law had unfolded over many centuries, gradually perfecting itself, and that it was peculiarly English and superior, at least for England, to any "foreign" law.

A second basic religious belief, grounded partly in Calvinism, was that the reformation of the world is a religious commitment, commanded by God. This belief undergirded the new emphasis on public spirit and civic virtue which was a hallmark of parliamentary and judicial rule by the English aristocracy and which helped to give English law its legitimacy as a system of justice.

A third basic religious belief, grounded partly in Calvinism, was that God is a God of law, who inspires his followers to translate his will into legal precepts and institutions. The historical jurisprudence of Coke and Selden and Hale found a secular equivalent of Biblical law in the pre-sixteenth-century heritage of the English common law, which they invoked in order both to delegitimize the exercise of the royal prerogative by the Tudor-Stuart dynasty and to provide a basis for substantial reformation of the common law itself.

A fourth element of Calvinist theology was its strong social dimension based on covenant and its belief in the corporate character of the local community of the faithful. This religious teaching found secular expression in the strong emphasis of historical jurisprudence on the central importance of custom in the development of the common law—the customs of the local

community and the customary law developed by the close-knit judiciary and bar.

A fifth characteristic of the English Calvinist belief-system was its stress on hard work, austerity, frugality, reliability, discipline, and vocational commitment—what came to be called the Puritan ethic. In subtle but important ways, this divinely commanded ethic undergirded the emphasis of English historical jurisprudence on case law and, more particularly, on the necessity of the most meticulous examination of the facts of previous analogous cases in order to determine the applicability of a legal rule or doctrine. As is apparent from his diary entry, quoted above,¹⁹⁸ concerning the enormous responsibility and burden of judging, and the need to “turn every stone” before reaching a decision, Hale—like Oldendorp in Germany a century before¹⁹⁹—considered judging to involve a deep search by the judge of his own conscience. At the same time, the differences between Oldendorp and Hale in this regard reflect differences in their theories of the sources of law. The specifically English heavy reliance on analogy of cases, as contrasted with the Romanist/canonist reliance on analogy of doctrine, is an integral part of English historical jurisprudence. For Hale, as a century later for Lord Mansfield, it was “the reason and spirit of cases” that made law, not “the letter of particular precedents”²⁰⁰ but also not primarily the reason and spirit of an elaborately systematized body of legal concepts, doctrines, and rules. Thus for Hale, it was not only the conscience of the individual judge but also the conscience of the judiciary, the conscience embodied in the line of previous cases, that was crucial.

Finally, Calvinist theology undergirded important changes in various branches of the common law—changes which were thought to have roots in

198. Hale, *supra* note 147, at 107.

199. See Berman & Witte, *supra* note 4, at 1635-42.

200. Fisher v. Prince, 97 Eng. Rep. 876, 876 (K.B. 1762), quoted in CECIL H.S. FIFOOT, LORD MANSFIELD 219 (1936). Mansfield's concept of “the reason and spirit of cases,” as contrasted with “the letter of particular precedents,” resulted in attaching authority to a line of similar decisions on a particular matter rather than to the holding of a single case. This was a later development of Hale's concept of the doctrine of precedent, which was expressed in his statement that “[T]he Decisions of Courts of Justice . . . have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times.” HALE, *supra* note 64, at 45. Only in the later nineteenth century was this declarative theory of precedent, as it came to be called, replaced—both in England and the United States—by the strict doctrine, called *stare decisis*, that the holding of a single case whose facts are “on all fours” with the facts of a later case is binding in the later case. The later theory reflected an historicism that was quite different from Hale's or Mansfield's conception of historicity. Late nineteenth-century historicism was associated with a drive toward predictability based on rational systematization of authoritative legal principles and rules, and was more consonant with Enlightenment concepts associated with the French Revolution, legislative supremacy, and the codification movement than with the idea of an ongoing tradition of judicially declared law associated with the seventeenth-century English Revolution. Cf. Berman, *supra* note 9, at 607-08; HAROLD J. BERMAN & WILLIAM R. GREINER, THE NATURE AND FUNCTIONS OF LAW 586-89 (4th ed., 1980); RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 24-36 (4th ed., 1991); Charles M. Gray, *Parliament, Liberty, and the Law*, in PARLIAMENT AND LIBERTY: FROM THE REIGN OF ELIZABETH TO THE ENGLISH CIVIL WAR 155, 157-60 (J.H. Hexter ed., 1992).

its historical development. Thus the emphasis on the innate sinfulness of all persons, including the judge himself, was strongly reflected not only in Hale's philosophy of judging but also in his theories of criminal law. Of special interest in this connection is Hale's statement of a presumption of innocence and his justification of it in religious terms: that although God requires the judge to convict the guilty and acquit the innocent, where the evidence of guilt is not conclusive the judge should acquit, even though he thereby risks acquitting the guilty, since God himself is the final judge and, moreover, the guilty person who has mistakenly been acquitted may repent and reform.²⁰¹ Similarly, the Calvinist emphasis on the source of community in divinely inspired covenants undergirded new doctrines of strict liability for breach of contract.²⁰² Also, Biblical authority was invoked for protection of rights of property.²⁰³ In each of these developments, the common lawyers found—or invented—historical authority that paralleled Biblical authority.

Contrasts and Parallels Between the New Jurisprudence and the Revolution in the Natural Sciences. That English historical jurisprudence—in Hale's time and place—was linked with the Puritan religious revolution is easier to show than that it was linked with the contemporaneous scientific revolution. In some ways the changes in the natural sciences ran parallel to—and supported—the changes in legal philosophy. In other ways the premises and methods of the two bodies of thought were, and were recognized to be, contrary to each other.

Although the scholastic method, with its heavy reliance on casuistic interpretation of authoritative texts, had been under fierce attack for more than one hundred and fifty years, and although the scholastics had based their method to a substantial extent on Aristotelian premises, nevertheless Aristotelian philosophy continued to play a major part in Western thought until the early seventeenth century. It was only then that Galileo first shattered the Aristotelian view of the universe by his skepticism concerning the possibility of arriving at certain truth through the evidence of the senses and his resort to mathematics as the primary method of achieving certain knowledge of physical nature. The universe, Galileo wrote, is a "great book which ever lies before our eyes . . . [whose] language is mathematics, and the characters are triangles, circles, and other geometric figures."²⁰⁴ "God hath made all things," he wrote, "in number, weight, and measure."²⁰⁵ A generation later Descartes built on Galileo's skepticism of sense perception and his mathematical method, and eventually Hobbes, Leibniz, and Spinoza also adopted the "geometrical

201. See *supra* note 147.

202. Berman, *supra* note 122, at 116-22.

203. See JOYCE O. APPLEBY, *ECONOMIC THOUGHT AND IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND* (1978).

204. JOHN H. RANDALL, JR., *THE MAKING OF THE MODERN MIND* 237 (1976) (quoting Galileo).

205. *Id.*

way” of reaching certainty in matters of political and moral philosophy. The “geometrical way” was to posit a hypothesis concerning the nature of the problem or object under investigation, then by an elaborate system of classification to break it down into a complex of separate simple elements, and finally to apply to the analysis of each of those elements mathematical measurements designed to describe the matter and the motion of which they consist. Through such a deductive method Galileo had proved the truth of Copernicus’ hypothesis that the earth moved around the sun. The method could also be reversed: like Francis Bacon, one could start with discrete facts and by a series of gradual inductions arrive at proof of the certainty of the general truths which they reflect. Also, of course, the deductive and the inductive method could be combined, as they were by Galileo himself, and above all, perhaps, by Newton. The main point was that the universe was now thought to be a mechanical structure made up “essentially” of matter and motion, and these were thought to be discoverable by the mathematical method, whether solely or in combination with empirical proof.

This method was thought to be applicable not only to knowledge of the physical universe but to all branches of knowledge. As Descartes wrote, “All the disciplines are so interconnected that it is much easier to study them all together than to isolate one from all the others.”²⁰⁶ Indeed, throughout the West there appeared books and articles in which all the various branches of “philosophy” were juxtaposed—physical, human, and divine. It was generally accepted, however, that “philosophy” meant *certain* knowledge—as contrasted with knowledge that is only probably true. Therefore, there could be no “philosophy” of history, for example, because (it was said) a knowledge of history is based only on memory, that is, on testimony from the past, which was considered to be unreliable.²⁰⁷ Whether or not there could be a “philosophy” of law was debatable. Francis Bacon believed that a philosophy of law was possible since law, he believed, could be rendered certain if properly classified under a limited number of broad “maxims”—universal principles—whose truth could be tested by examples of specific rules drawn from all parts of the legal system.²⁰⁸

The scientific revolution of the seventeenth century proceeded at first on Galilean and Cartesian and (to a lesser extent) Baconian lines. Its philosophical foundations—in both the seventeenth- and the twentieth-century senses of the word “philosophy”—were anti-Aristotelian. The belief in the physical reality of universals, especially of mathematical universals, was essentially Platonic. Truth was identified with what the mind (by use of mathematics) can weigh,

206. RENÈ DESCARTES, RULES FOR THE DIRECTION OF THE MIND, in 31 GREAT BOOKS OF THE WESTERN WORLD I (Robert M. Hutchins ed., 1952).

207. See Lucien Lévy-Bruhl, *The Cartesian Spirit and History*, in PHILOSOPHY AND HISTORY: ESSAYS PRESENTED TO ERNST CASSIRER 191 (Raymond Klibansky & H.J. Paton eds., 1936).

208. Cf. *supra* text accompanying note 54.

measure, and count, which in turn presupposed the total objectivity of the observer. The identification of causation, in one of its aspects, with purposes, as in the Aristotelian concept of "final causes," was rejected in favor of a reduction of all forms of causation to what Aristotle had called "efficient causes," now viewed also in Platonic terms of rational necessity. The Aristotelian conception of a purposive and organic universe was rejected in favor of a morally neutral and mechanical universe.²⁰⁹

A sharp split developed, however, in the course of the seventeenth century, between the mathematical method and the empirical method. The empirical method came to be viewed by many—especially in England—not in Baconian terms of inductive logic, designed to yield truth that is certain, but rather in probabilistic terms: the experimental method, it was asserted by Bacon's successors, could only yield "moral" certainty, that is, a high degree of probability. The Galilean postulate that the conclusions of natural science, being founded on mathematics, are objectively certain and do not depend on human judgment, underwent modification, insofar as scientific experimentation came to be understood in terms of trial and error. The use of experiments to confirm hypotheses believed to be mathematically true and a matter of rational necessity was adapted to include the use of experiments to establish the degree of probability of hypotheses believed to be possibly but not necessarily true.²¹⁰

209. Of the vast literature on the philosophical implications of the contributions of Galileo (1564-1642) and Descartes (1596-1650), the following relatively recent studies are pertinent to the present discussion: MAURICE CLAVELIN, *THE NATURAL PHILOSOPHY OF GALILEO: ESSAYS ON THE ORIGINS AND FORMATION OF CLASSICAL MECHANICS* (A.J. Pomerans trans., 1974); *NEW PERSPECTIVES ON GALILEO* (Robert E. Butts & Joseph C. Pitt eds., 1978); WILLIAM A. WALLACE, *PRELUDE TO GALILEO: ESSAYS ON MEDIEVAL AND SIXTEENTH-CENTURY SOURCES OF GALILEO'S THOUGHT* (1981); DESMOND M. CLARKE, *DESCARTES' PHILOSOPHY OF SCIENCE* (1982).

210. See BARBARA J. SHAPIRO, *PROBABILITY AND CERTAINTY IN SEVENTEENTH-CENTURY ENGLAND: A STUDY OF THE RELATIONSHIPS BETWEEN NATURAL SCIENCE, RELIGION, HISTORY, LAW, AND LITERATURE* (1983). I am grateful to Professor Shapiro for her illumination of this subject in personal conversation and correspondence. She shows that in the 30 to 50 years after Bacon's death, experimental scientists in the Royal Society abandoned his idea that the inductive method could yield certain knowledge and adopted a probabilistic view. Cf. STEVEN SHAPIN & SIMON SCHAFFER, *LEVIATHAN AND THE AIR PUMP: HOBBS, BOYLE, AND THE EXPERIMENTAL LIFE* (1985). Relying partly on Shapiro's work, Shapin and Schaffer state that

[b]y the adoption of a probabilistic view of knowledge one could attain to an *appropriate* certainty and aim to secure *legitimate* assent to knowledge-claims. The quest for necessary and universal assent to physical propositions was seen as inappropriate and illegitimate. It belonged to a 'dogmatic' enterprise, and dogmatism was seen not only as a failure but as dangerous to genuine knowledge.

Id. at 24.

Shapiro indicates that English scientific writers of the mid to late seventeenth century divided knowledge into two types, perfect or divine knowledge, inaccessible to human beings, and human knowledge, which would always and necessarily be imperfect and which consisted of several grades from the less to the more reliable. She states:

God's complete and perfect knowledge, attaining a level of absolute, infallible certainty, was placed above and beyond the three or four human categories. Opinion or probability was placed below them. The highest level of human knowledge attained a 'conditional infallible certainty' compelling assent and consisted of the propositions of mathematics and certain axioms of metaphysics, both of which could be logically demonstrated. The lowest level of human

This last point is important for an understanding of the legal revolution of the seventeenth century, since the historical jurisprudence of Matthew Hale and his colleagues had close links with the empirical method used by contemporaries working in the natural sciences but was essentially in conflict with the mathematical method espoused by Galileo and Descartes. Indeed, the dispute between Hale and Hobbes was essentially a dispute about these two methods. Hobbes, a disciple of both Galileo and Bacon as well as an acquaintance and admirer of Descartes, attacked the “unphilosophical”—we would say today, the unscientific—character of the common law and of the claims of its supporters. Hale’s argument, on the other hand, was based on an empirical method similar in some important respects to that advocated by Robert Boyle and other leading natural scientists of his time. Thus the new English jurisprudence was closely linked to the empiricism of the scientific revolution, but was hostile to the mathematical method and to Platonism generally. Indeed, it retained much of the Aristotelian outlook and much of the casuistry—the “case method”—of the scholastics.

It is sometimes supposed that the empirical method of the common lawyers has little or nothing to do with the empirical method of natural scientists, since the latter is based on the principle of hypothesis and falsification whereas the former, while deriving general rules from examination of decisions in individual analogous cases, does not treat the rules as hypotheses but rather as authoritative statements to be adhered to even if they subsequently prove unsatisfactory. This view of law, however, looks only at the form of legal rules and disregards their substance, that is, their purposes and their consequences; hence it neglects the process by which legal rules are modified as their validity is tested in new applications. There are, to be sure, crucial differences between the process of analysis of the facts of reported cases in the courts in order to determine the rules implicit in the judicial decisions and, on the other hand, the process of analysis of the facts of experiments in the natural sciences in order to test hypotheses concerning the causes and effects of physical occurrences. Nevertheless, there are also certain important similarities between the two processes, especially in their underlying philosophical implications.

knowledge attained moral certainty, and consisted of religious belief and much of our common conclusions about human affairs, including history and judicial decisions. The middle level consisted of immediate sense data which appeared to some to rise above the level of moral certainty.

Shapiro, *supra*, at 28. Perhaps because of their focus on the English experience, the books of Shapiro and of Shapin and Schaffer both tend to neglect the persistence of the Galilean-Cartesian identification of scientific knowledge with certainty, especially in what Thomas Kuhn has called the “classical sciences” of astronomy, optics, statics, and other fields that could be reduced to mathematics, as contrasted with such fields as chemistry, experimental physics, magnetism, and electricity, which Kuhn calls “the Baconian sciences.” See THOMAS S. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 31-65 (1977).

The philosophical implications of the experimental method in the natural sciences were the subject of a series of polemical debates between one of the great seventeenth-century practitioners of that method, Robert Boyle, and none other than—once again—“the Philosopher” Thomas Hobbes.²¹¹ Philosophy, Hobbes wrote (today we would say “science”), is “such knowledge of effects or appearances as we acquire by true ratiocination from the knowledge we have first of their causes or generation: And again, of such causes or generations as may be from knowing first their effects.”²¹² Since the aim of philosophy, Hobbes argued, is the highest degree of certainty that can be obtained, therefore fallible sensory knowledge cannot constitute its foundations. Sense and memory, he wrote in opposition to Boyle, constitute knowledge, but because they are not given by reason “they are not philosophy.”²¹³ Experience is “nothing but memory.”²¹⁴ No general truths can be derived from it. Hobbes therefore denied that Boyle’s invention of an air-pump designed to create an artificial vacuum, and his subsequent use of the invention to test hypotheses concerning the motion of light, could in themselves contribute to the kind of certainty that constitutes “philosophy.” On the contrary, as Boyle himself admitted, they could only generate probable truth.

Boyle and his supporters (including his friend Matthew Hale) did not regard this as a regrettable retreat from more ambitious goals. On the contrary, they regarded the quest for absolute certainty as both a failed and a dangerous project—failed because all scientific knowledge, they contended, is probabilistic, and dangerous because the quest for absolute certainty leads to a dogmatism that tolerates no dissent.

But if the truths derived from the experimental method are always probable and never certain, how is the validity of an experiment to be proved? Boyle’s answer was that its validity depends on its verification by other members of the scientific community. Witnesses of the experiment must be multiplied. If the experience of it can be extended to many persons, and in principle to all, then the result may be treated as a fact, that is, as a truth having the highest degree of probability. Thus Boyle anticipated the social theory of scientific knowledge that has been widely expounded in the latter part of the twentieth century: that scientific truth is that which is accepted as truth by the scientific community.²¹⁵

211. This debate is analyzed in depth in SHAPIN & SCHAFFER, *supra* note 210. The following are quotations and paraphrases of the arguments of Hobbes and Boyle.

212. *Id.* at 107.

213. *Id.* at 108.

214. *Id.*

215. See ROBERT K. MERTON, *THE SOCIOLOGY OF SCIENCE* (1973) [hereinafter MERTON, *SOCIOLOGY OF SCIENCE*]; see also ROBERT K. MERTON, *SCIENCE, TECHNOLOGY & SOCIETY IN SEVENTEENTH CENTURY ENGLAND* (1970) [hereinafter MERTON, *SCIENCE, TECHNOLOGY & SOCIETY*]. Merton, who is a pioneer in the discipline called sociology of knowledge, does not expressly state that what he calls “certified scientific knowledge” is ultimately what the scientific community determines it to be; nevertheless, that proposition is assumed by him throughout his work. See MERTON, *SOCIOLOGY OF SCIENCE*, *supra*, at 267-78. He writes

Boyle also made it a requirement of the experimental method that its practitioners should avoid introducing speculations concerning first causes. Natural philosophers, he wrote, can legitimately disagree about the causes of natural effects. Here again his enemy was Hobbes, for whom dissent—disunity—was the greatest evil.

It is no accident that Hale sided with Boyle in this debate, and that he viewed Boyle's philosophy of natural science as having a close affinity with his own philosophy of law. For Hale, the validity of legal principles, like the validity of the principles of natural science, depended upon repetition and verification by the community of trained practitioners. The common lawyers' "artificial reason" itself represented a kind of empiricism, different from but parallel to the experimental empiricism of the natural scientists.²¹⁶

It should not be supposed that empiricism, in these broad senses, was new in the seventeenth century, either in law or in the natural sciences. In law, the Western legal tradition originated in the late eleventh and twelfth centuries in the empirical examination of the mass of customs and laws of the different polities of Europe—ecclesiastical, royal, tribal, feudal, urban, mercantile—and the attempt to reconcile conflicts among them. In its methodology, the new legal science that accompanied the emergence of new systems of law fulfilled all the requirements of a modern science: it sought to be (1) an integrated body of knowledge, (2) in which particular occurrences of phenomena were to be systematically explained, (3) in terms of general principles or truths ("laws"), (4) knowledge of which (that is, of both the phenomena and the general principles) was to be obtained by a combination of observation, hypothesis, verification, and to the greatest extent possible, experimentation. In addition, (5) the method of investigation and systematization was to be appropriate to the subject matter. Hence it was not the same method of investigation and systematization as those that later came to be used for other sciences, including various natural sciences.²¹⁷ Nevertheless, the methodology developed for legal science had an important influence on the development in the thirteenth century of the sciences of optics, sound, heat, astronomy, and other natural

that scientific inquiry presupposes an interplay between culture and science, and that there exists an "interdependence" between scientific knowledge and "institutional" developments in the fields of "economy, politics, religion, military, and so on." MERTON, *SCIENCE, TECHNOLOGY & SOCIETY*, *supra*, at ix-x; see also *PURITANISM AND THE RISE OF MODERN SCIENCE* (I. Bernard Cohen ed., 1990) (retrospective on the contribution of Robert K. Merton to the sociology of knowledge).

That scientific knowledge—"truth"—is not achieved either by individual reason or by divine or other authoritative will—"revelation"—but by satisfaction of criteria established by the relevant scientific communities is also the underlying premise of Thomas Kuhn's important conception of scientific revolutions in which scientific communities create new scientific "paradigms." See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). See SHAPIRO, *supra* note 210, at 15-73, and SHAPIN & SCHAFFER, *supra* note 210, at 69-79, for excellent discussions of the seventeenth-century origins of this distinctively twentieth-century approach to scientific knowledge.

216. Cf. SHAPIRO, *supra* note 210, at 172.

217. The methodological criteria, the value criteria, and the sociological criteria of a science, in the modern Western sense of that term, are analyzed in BERMAN, *supra* note 5, at 151-61.

phenomena by such great natural scientists as Robert Grosseteste and Roger Bacon, who not only classified and systematized the results of their researches but also used experiments to test hypotheses based on observation.²¹⁸ Finally, the corporate character and the ongoing historical character of the search for knowledge were defining features of Western science—Western scholarship—from the time of the founding of the first European universities.²¹⁹

What was new in the seventeenth century—throughout Europe—was, first, an explosion in the science of mathematics, which enabled natural scientists to create a new mathematical framework of explanation of physical phenomena; second, the invention of a whole new arsenal of instruments with which to carry out experiments that would confirm the certitude of insights gained from mathematical measurements; and third, the emergence of an accompanying Galilean-Cartesian philosophy of mathematical truth—anti-empirical, anti-sensory, anti-Aristotelian—which made it possible to study the universe as a physical mechanism. By applying wholly different criteria of truth to the physical sciences, as contrasted with the human and the divine (especially law and theology), the new emphasis on mathematical certitude threatened to create the first serious schism in what had previously been thought to be the unity of scientific knowledge.

In England this threat was met in several ways. Despite Hobbes, the science, or philosophy, of the common law remained a science, a philosophy, albeit with its own subject matter and its own method. Despite Bacon, legal science could not achieve certainty, whether by inductive or by deductive logic. Yet it remained an empirical science in the sense that Boyle expounded, that is, its general principles were based on the empirical results of past experience, especially the experience of the community of professional lawyers who had participated in its “experiments” over the centuries. And at the same time the English common law could, for the first time, be made as coherent and as systematic—in that sense, as scientific—as the Roman law and the canon law had been made, in England and elsewhere, in previous centuries.

Above all, the “philosophical” or “scientific” character of English law could be maintained by interpreting it in terms of what Galileo and Bacon and Hobbes had said lacked any philosophical or scientific content whatsoever, namely, history. That for many centuries law in the West had developed historically, with each generation consciously building on the results of its predecessors, was, of course, a well-known fact. Prior to the seventeenth century, however, it had not been a theory. Coke, Selden, Hale, and others ascribed a philosophical dimension to the history of the English common law.

218. See authorities cited in *id.* at 586, n.73.

219. See *id.* at 161-64; see also TOBY E. HUFF, *THE RISE OF EARLY MODERN SCIENCE: ISLAM, CHINA, AND THE WEST* (1993).

They asserted the normative character of historical experience.²²⁰ They put custom and precedent on a level with equity and legislation as sources of law. They raised historical jurisprudence to an equal place alongside natural law theory and legal positivism.

VI. EPILOGUE

To trace, even cursorily, the influence of Coke, Selden, and Hale on the legal thought of subsequent generations and centuries, it is useful to begin by distinguishing two aspects of their jurisprudence. One aspect was their theory of the nature and functions of law in the large sense, that is, legal institutions and legal systems generally. It was their understanding—more fully developed in Hale than in Selden, and more fully developed in Selden than in Coke—that law in this large sense has both a moral character (its purpose is to do legal justice) and a political character (its purpose is to maintain legal order), but it also has an historical character (its purpose is to preserve and develop the legal traditions of the people whose law it is). It was at least implicit in their writings that these three purposes, or aspects, of law should be integrated and, more particularly, that conflicts which inevitably arise between the moral and political purposes of law can and should be resolved in the context of legal history. Law, they might have said, is the balancing of morality and politics in the light of history; it is the balancing of justice and order in the light of experience.²²¹

Another aspect of their jurisprudence was its concept of the nature and functions not of law in general but of English law in particular. Indeed, their

220. Some recent studies emphasizing the importance of tradition and precedent in Anglo-American legal thought have nevertheless neglected or denied the philosophical character of historical jurisprudence. Robert W. Gordon, for instance, while showing the value of historical scholarship to the analysis and resolution of legal problems, reduces the work of Matthew Hale to “adaptationism” (Gordon’s word), which permits incremental growth in the law to meet new social needs while at the same time retaining the received wisdom that the law embodies. See Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017, 1028-36 (1981). This is, of course, an accurate observation, but it fails to consider the central feature of Hale’s thought, namely, the normative character of historical experience. Similarly, Anthony Kronman in his article *Precedent and Tradition*, 99 *YALE L.J.* 1029 (1990), advances a “traditionalist” attitude which would conserve the achievements of past generations, yet he, too, treats precedent and tradition as having only “prudential” value, rather than a normative or legally binding character. The Burkean contract among the generations, Kronman asserts, is only “metaphorically” a contract. *Id.* at 1067. Historical jurisprudence seeks to transcend this sharp separation of an essentially utilitarian ethic from morally and legally binding obligation in determining the applicability of historical experience to contemporary legal problems. In his important recent book *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993), Kronman, drawing partly on Alexander Bickel and partly on Karl Llewellyn (especially in Llewellyn’s post-realist writings), develops further the “prudentialist” argument that legal practice can only be revitalized by a return to “the connected notions of craft, habit, and experience.” *Id.* at 217.

221. Cf. Berman, *Integrative Jurisprudence*, *supra* note 1, at 797-801. This “trinitarian” view of law is strikingly parallel to the view of social life that seems to have prevailed among seventeenth-century English writers. F. Smith Fussner states that it can be said “with certainty” that “most seventeenth-century [English] writers thought of politics, morality, and tradition (*alias* history) as forming a kind of trinity.” FUSSENER, *supra* note 113, at xvi.

emphasis on the historical character of law required such a particularization, since the universal characteristics of legal morality and legal politics are manifested in quite different ways in different countries with different legal histories. For Hale, as for Coke and Selden, a mathematical logic such as that of Bacon and Hobbes was wholly inappropriate when applied to the making, interpreting, and applying of the English common law. Bacon and Hobbes were entirely hostile to what Coke called the "artificial reason" of the law; Bacon would have systematized English law on the basis of traditional maxims of justice,²²² while Hobbes would have left it to the sovereign to declare what justice is and how it should be effectuated. Hale, on the contrary, accepted the judgment of the history of his time with respect to the supremacy of the rapidly evolving common law over its rivals and he sought to systematize the common law in historical terms, with emphasis on authoritative statements of customary law and synthesis of judicial precedents.

The Embodiment of Historical Jurisprudence in the Doctrine of Precedent and the Normative Character of Custom. With the publication of private reports of judicial decisions, the term "precedent" had come to be attached to such decisions, and courts began to cite them in their opinions. It has been said that the first known use of the word was in the report of a 1557 case, in which the court was said to have given a decision "notwithstanding two presidents."²²³ Prior to Coke, these "presidents" were largely concerned with procedural matters, and only rarely did judges compare in detail the facts of the cases that came before them with the facts of earlier analogous cases.²²⁴ Often a rule of law declared by a court in a previous case would be called a precedent, without regard to the particular facts to which the rule was addressed. Moreover, no distinction was made at first between a legal principle or rule that was considered necessary to the decision of the case in which it was declared and a legal principle or rule that was declared by a court without regard to its necessary connection with the facts. Only in 1673 did this distinction receive clear recognition, when Chief Justice Vaughan—Hale's successor—stated that "[a]n opinion given in court, if not necessary to the judgment, . . . is no judicial opinion, nor more than a gratis dictum."²²⁵ Without such a distinction between what came to be called the "holding" of the case and mere "dictum," or "obiter dictum," there can be no doctrine of

222. Cf. Kocher, *supra* note 54, and accompanying text.

223. See BERMAN & GRENIER, *supra* note 200, at 587.

224. For the earlier reporters, notably Dyer and Plowden, the cases selected were primarily examples of decisions on the pleadings; indeed, sixteenth-century English lawyers spoke of judicial precedents in connection with *mos iudiciorum*, "the custom of the judges," meaning their practice in deciding procedural issues. For Coke, in contrast, the cases selected were examples of decisions on substantive law as well. However, he reported general principles stated by the courts, making little distinction between those which were the basis of the decision and those which were mere dictum. See Plucknett, *supra* note 18 at 212.

225. *Bole v. Horton*, 124 Eng. Rep. 1113, 1124 (K.B. 1673); see also T. Ellis Lewis, *The History of Judicial Precedent IV*, 48 L.Q. REV. 230, 243 (1932).

precedent in the modern sense. And that distinction could not be made before full reports of the relevant facts of cases came to be published. It was, in fact, the publication of *Coke's Reports*, more than any previous collection of cases, that made the development of the modern English doctrine of precedent possible—though Coke himself used the word “precedent” only loosely.

So long as English (and American) courts have considered themselves to be bound by the holdings of previous analogous cases—whether lines of such cases, as in the late seventeenth, eighteenth, and early nineteenth centuries, or individual past decisions, as in the late nineteenth century—historical jurisprudence in the more limited sense has been implicit in English (and American) law. In other words, the English doctrine of precedent has embodied the theory that in English law historical experience has a normative character. The same may be said of the resort to established custom as a source of law: to the extent that the official law of English (or American) courts and legislatures is considered to be rooted in the unofficial long-standing practices and understandings of the community, its traditional usages and its historic sense of rights and duties, or what may be called its legal consciousness, then the legacy of Coke and Selden and Hale survives.

Blackstone and Burke: The Defense of Tradition Against the New Rationalism. Their jurisprudence in the larger sense—that is, in its applicability not only to a particular legal system but to law in general, in all societies—was ultimately subjected to serious attack. Nevertheless, it prevailed in England for over a century virtually without challenge. Its more articulate English exponents in the late eighteenth century were William Blackstone and Edmund Burke, both of whom, like Hale and Selden, and to a lesser extent Coke, were far more cosmopolitan—far less insular—in their legal philosophy, as distinguished from their historiography, than is generally recognized.

Blackstone's genius lay in his ability to present a detailed yet comprehensive analysis of the English legal system—as a system—in political and philosophical and historical terms. In this he consciously built on the writings of Hale.²²⁶ Like Hale, he was not a systematic political theorist or a systematic philosopher or a systematic historian but a learned lawyer. Nevertheless, he brought to his contemporaries and to subsequent generations of learned persons, both lawyers and nonlawyers, Hale's integrative jurisprudence secreted in the interstices of his powerful portrait of English

226. In his own *Analysis of the Laws of England* (Oxford, Clarendon Press 1756), which served as an outline and introduction to his more famous *Commentaries on the Laws of England* (Oxford, Clarendon Press 1765), Blackstone stated that he was following Hale's *Analysis of the Laws of England*, first published in 1713, since it was “the most natural and scientific . . . as well as the most comprehensive [of any of] the schemes hitherto made public for digesting the laws of England.” WILLIAM BLACKSTONE, *AN ANALYSIS OF THE LAWS OF ENGLAND* (3d ed. 1771), quoted in John W. Cairns, *Blackstone, an English Institutionist: Legal Literature and the Rise of the Nation State*, 4 OXFORD J. LEGAL STUD. 318, 340 (1984).

legal institutions.²²⁷ He was, indeed, unlike Hale, guilty of glorifying English law as superior to all other legal systems—"the perfection of reason," he called it.²²⁸ On the other hand, he recognized that many features of English law could not be justified in terms of reason, and that others could not be justified in political terms, and still others could not be justified in historical terms, but that nevertheless they were all to be judged in those terms, whether taken separately or in combination with each other.²²⁹

Blackstone's legal philosophy, like Hale's, was applicable not only to English law but to all legal systems, insofar as he distinguished between those legal principles that have universal validity and those that are "indifferent" universally but are suitable to particular cultures. In this Blackstone was not only heir to Hale (and Hooker before him, and Melanchthon before Hooker),²³⁰ but was also under the strong influence of Montesquieu's *L'Esprit des lois*, published in 1748, seventeen years before the first edition of Blackstone's *Commentaries on the Laws of England*. Montesquieu had written that human laws are social phenomena that vary in different countries depending on their particular history, geography, climate, local customs, national spirit, and other such factors. Blackstone, like Montesquieu, had continually in mind the specific institutional background that distinguished his own legal system from others.²³¹ In that sense, he, like Montesquieu, may be

227. Blackstone's influence in America was perhaps even greater than in England. Edmund Burke stated in 1775 that as many copies of the *Commentaries* had been sold in the American colonies as in England. DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 202 (1958). Blackstone's *Commentaries* continued into the twentieth century to be the basic law text studied by prospective American lawyers, and was the text for a required first-year course in at least one American law school, Wake Forest, until 1936. Blackstone's importance is stressed in Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569 (1976).

228. 2 WILLIAM BLACKSTONE, *COMMENTARIES* *70; see Robert Willman, *Blackstone and the 'Theoretical Perfection' of English Law in the Reign of Charles II*, 26 HIST. J. 39, 52-53 (1983).

229. Blackstone refers quite often to defects in English law. He refers to rules "'that the goods of the wife do, instantly upon marriage, become the property and right of the husband'; that all dead must be buried in woollen garments; that lineal ancestors are barred from inheriting from their descendants; and a host of other such 'regulations' that have been 'censured and declaimed against, as absurd and derogating from the maxims of equity and natural justice'." Willman, *supra* note 228, at 53 (quoting 1 *COMMENTARIES* *55, *58; 2 *id.* at *210).

230. For a discussion of Blackstone's use of the term "things indifferent" and its relationship to Hooker's theology, see Willman, *supra* note 228, at 54 n.70. Philip Melanchthon used the word "adiaphora" to distinguish theological and liturgical doctrines that are discretionary from those that are required. See generally A. Stelzenberger, *Adiaphora*, in 1 *REALLEXICON FÜR ANTIKE UND CHRISTENTUM* 84 (Theodor Klausur ed., 1950) A similar distinction, stressed by Blackstone, following Hale, is made in criminal law between things that are *mala in se* and things that are *mala prohibita*. See Willman, *supra* note 228, at 53-54.

231. See 1 *COMMENTARIES* *5; 4 *id.* at *26. Willman writes that Blackstone "had learned from Montesquieu that laws differ from one society to another because these have different natures. As they develop according to their own climates, geographies, and historical pasts, the development of each may be equally natural . . ." Willman, *supra* note 228, at 51; cf. Posner, *supra* note 227, at 571:

[W]hat is distinctive and important in Blackstone's method is a view of law which embeds it firmly in the social and political conditions of its time, which sees law responding to the changing needs and circumstances of the social environment, and which considers the process and institutions of legal change to be as much a part of "the law" as specific substantive doctrines, procedures, and remedies. Law is presented by Blackstone not as a speculative

counted as a pioneer in social theory. Indeed, historical jurisprudence is often said to be a precursor of the twentieth century discipline of sociology of law.

Blackstone's work was much admired by his younger contemporary Edmund Burke,²³² a lawyer by training and a statesman by profession, who in the 1780's and early 1790's translated the insights of Hale's integrative jurisprudence into a political philosophy often characterized as "conservatism."²³³ Burke's eloquent statement of the nature of a people as a partnership of generations dead, living, and yet unborn, and his warnings against the dangers of subjecting the inherited wisdom of the species to the rational calculations of the individual—are too well known to warrant a summary here. For our purposes it is important to note two points. The first is that Burke's political philosophy was derived directly from Hale's legal philosophy, in which law was viewed in terms of an ongoing historical tradition that both transcends and combines moral and political elements.²³⁴

abstraction or a collection of rules but as a functioning social system, in somewhat the same manner that Adam Smith was to present the economy of England . . . in the *Wealth of Nations* a few years later.

232. Burke wrote two unsigned reviews of Blackstone's *Commentaries*, in which Burke "praised them as consummately written, uniting the historian and politician with the lawyer." WILLIAM BLACKSTONE, *THE SOVEREIGNTY OF LAW* at xxvii (Gareth Jones ed., 1973).

233. See generally BRUCE FROHNNEN, *VIRTUE AND THE PROMISE OF CONSERVATISM: THE LEGACY OF BURKE AND TOCQUEVILLE* (1993).

234. Burke stated:

Our Constitution is a prescriptive constitution . . . whose sole authority is, that it has existed time out of mind. . . . It is a presumption in favor of any settled scheme of government against any untried project. . . . Because a nation is not an idea only of local extent and individual momentary aggregation, but it is an idea of continuity which extends in time as well as in numbers and in space. And this is a choice not of one day or one set of people, not a tumultuary and giddy choice; it is a deliberate election of ages and of generations; it is a constitution made by what is ten thousand times better than choice; it is made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time. . . . The individual is foolish; the multitude, for the moment, is foolish, when they act without deliberation; but the species is wise, and, when time is given to it, as a species, it almost always acts right.

Edmund Burke, Speech on a Motion Made in the House of Commons, May 7, 1782, for a Committee To Inquire into the State of the Representation of the Commons in Parliament (May 7, 1782), in 7 *THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE* 89, 94-95 (Boston, Little, Brown, & Co. 3d ed., 1869).

As J.G.A. Pocock indicates, Burke was indebted to Hale for these insights: "Every word he uses may be paralleled from the traditional doctrines of the common lawyers . . . [C]ommon-law thought, as Burke could have found it in Hale and was (wherever he learned it) expounding it here, contained an explicitly formulated theory of conservative traditionalism." J.G.A. POCOCK, *Burke and the Ancient Constitution*, in *POLITICS, LANGUAGE, AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* 227 (1971) [hereinafter POCOCK, *POLITICS*]. In this article Pocock corrects his earlier attribution to Coke, Selden, Hale, and the common lawyers generally, of a belief in the unchanging character of the common law, but he is still preoccupied with the constitution's "immemorial" nature. See generally POCOCK, *ANCIENT CONSTITUTION*, *supra* note 27, at 30-69. This is all right if "immemorial" means that it was the constitution that made the nation in the first place, and therefore, the nation has no right to change it. It is not all right if it suggests that there were not, in the past, decisive changes in constitutional history to be remembered. Hale and Burke—and Blackstone—remembered very clearly the revolutionary changes of the seventeenth century, when the "ancient common law" was first given its modern significance.

Pocock also calls attention to Burke's blending of the political and the legal in the metaphors he uses to express political ideas. Pocock states:

But if we seek for the historical genesis of [Burke's political philosophy], may it not lie in the chain of association formed by the words "entail," "family settlement," "mortmain,"

In Peter Teachout's trenchant phrase, this time-sense "transforms us from transients into trustees."²³⁵ The second point is that Burke's philosophy was directed primarily against new theories that had emerged with the so-called Enlightenment, or Age of Reason, and that ultimately found expression in the French Revolution.²³⁶ These included, on the philosophical level, theories of rationalism and individualism and utilitarianism; on the political level, theories of democracy and of public opinion as the source of governmental legitimacy; on the constitutional and legal level, the primacy of legislation as a source of law and the priority of the rights of man over traditional legal rights and duties.

Savigny and the Disintegration of Jurisprudence in the Nineteenth and Twentieth Centuries. It was the revolt against tradition, in the name of reason, that shattered the triune integrative jurisprudence of the seventeenth and early eighteenth century, which was rooted, in turn, in Western legal thought as it had developed since the late eleventh and twelfth centuries. Burke's response to this challenge was to defend the historical dimension of politics and law against the new rationalism and individualism and utilitarianism, and to emphasize not only the historical roots but also the historical tasks of aristocracy, of public spirit, and of the traditional values embodied in the common law. By his defense of the old order, he provided a basis for what became in the nineteenth century "the historical school" of legal philosophy, in which the historical jurisprudence that had originated with Coke and Selden and Hale (among others) became separated from the political and moral theories—positivism and natural law—with which they had originally been integrated.

"incorporation". . . "In this choice of inheritance," Burke says, "we have given to our frame of polity the image of a relation in blood." That is, we have made the state a family; but have we not done so by constituting it a family in the sense in which a family is a relation in law? By entailing our inheritance of liberties we have established a family settlement, based upon a mortmain; and it is when this is done, not in virtue of the tie of blood solely, that the family becomes an immortal corporation. We have made the state not only a family, but a trust; not so much a biological unity, or the image of one, as an undying *persona ficta*, which secures our liberties by vesting the possession of them in an immortal continuity. And all this has been done by the simple device—the most superb of all legal fictions—of identifying the principles of political liberty with the principles of our law of landed property.

POCOCK, *POLITICS*, *supra*, at 211-12.

235. Peter Teachout, "Complete Achievement": *Integrity of Vision and Performance in Berman's Jurisprudence*, 42 *EMORY L.J.* 497, 513 (1993).

236. The term "Enlightenment" has been much abused by scholars writing since the end of World War II. The French Deists who worked and wrote in the generation or so before the Revolution are often considered to have formed the essence of the Enlightenment, but in fact the French vocabulary of the time had no word meaning "Enlightenment." French authors such as Voltaire and Diderot saw themselves as *lumières*, "lights," who were brightening an otherwise dark age. Alternatively, they considered themselves *philosophes*, "philosophers." The same period in England was sometimes referred to by contemporaries as the Age of Reason. Since World War II, however, many historians have applied the single term "Enlightenment" indiscriminately to the intellectual developments occurring throughout Europe, and even in the American colonies, stretching back into the seventeenth and even earlier centuries. See Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 *YALE J.L. & HUMAN.* 311, 311-13 (1992).

The founder of the so-called historical school, Friedrich Carl von Savigny, did not cite Burke in his scholarly writings but was undoubtedly influenced by Burke's political philosophy, which was well known and greatly appreciated in Germany at the time. Like Burke, Savigny considered law an integral part of the common consciousness of the nation, organically connected with "the mind of the people" (*Volksgeist*). Law, he wrote, "is developed first by custom and by popular belief, then by juristic activity—everywhere, therefore, by internal, silently operating powers, not by the arbitrary will of a legislator."²³⁷ By "the mind of the people,"²³⁸ Savigny meant the ideas and values that were reflected in its historically developing traditions, including its legal traditions. Like Burke, Savigny fought the new rationalism that located the ultimate source of law in public opinion and the will of the legislature. He emphasized instead the older Germanic (*germanische*) tradition of popular participation in lawmaking and adjudication as well as the more modern German (*deutsche*) tradition of professional scholarly interpretation and systematization of the *jus commune*, the (European) common law, which had been developed over the centuries by learned jurists on the basis of the ancient texts of the Roman law of Justinian and the canon law of the Church. Indeed, the Roman law of Savigny may be viewed in terms quite similar to Coke's "artificial reason"—only with Savigny it was primarily the customary reason of the legal scholars rather than the customary reason of the judges and barristers.

There was a difference, however, between the historical jurisprudence of Savigny and Burke, on the one hand, and that of Coke and Selden and Hale, on the other. Savigny and Burke opposed history, tradition, custom, precedent, and the like, to reason and politics—to natural law theory and positivism. They had to, because in their time both natural law theory and positivism had been invoked against history, tradition, custom, and precedent. Integrative jurisprudence had been shattered, with the result that the historical school, as Savigny's followers called it, was identified by its critics simply with blind historicism and romanticism.

This is not the place to recount the fate of the historical school in the nineteenth-century battle for primacy among the three classical components of an integrative jurisprudence. For a time, at least, new breeds of historicists held their own against new breeds of positivists and new breeds of naturalists. In the twentieth century, however, throughout the West, leading exponents of

237. SAVIGNY, *VOCATION OF OUR AGE*, *supra* note 161, at 30 (translation in text is that of the author).

238. Savigny's *Volksgeist* is usually translated "spirit of the people," but in other contexts the word *Geist* is often translated as "mind." The translation of *Volk* is also not a simple matter. It means "people" in the singular, the nation, whereas in English "people" is usually a plural noun. "Spirit of the people" sounds more abstract and more mystical in English than *Volksgeist* in the original German, or *l'esprit de la nation* in French (which Montesquieu listed as one of the factors that determines the character of a nation's law).

positivism became triumphant and declared natural law theory to be illusory and historical jurisprudence to be dead. Nevertheless, in the legislatures and courts and executive agencies of nearly all countries, laws and judgments and regulations that manifested the policy, or will, of those that made them were also interpreted in the light of their conformity to natural justice, including reason and conscience, and to historical traditions, including custom and precedent.

Most contemporary legal philosophers, on the other hand, seem committed to the Hobbesian view that historical experience constitutes only unreliable data from which no philosophical conclusions can be drawn and which give rise to no legal obligation. In Holmes' famous words, "historic continuity with the past is not a duty, it is only a necessity."²³⁹ Today the terms of the debate have shifted. Continuity with the past is seen neither as a duty nor even as a necessity but only as either a virtue or a vice. This shift reflects the great upheavals that have taken place in Western civilization in the twentieth century and the accompanying crisis of the 900-year-old Western legal tradition.²⁴⁰ In extricating ourselves from this situation, the study of the origins of historical jurisprudence in the English Revolution of the seventeenth century may have special significance.

239. OLIVER WENDELL HOLMES, JR., *Learning and Science*, in COLLECTED LEGAL PAPERS 138, 139 (1920).

240. See BERMAN, *supra* note 5, at 33-41.