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THOMAS HOBBS AND THE LAW*

J.H. Hexter†

Sometime between 1662 and 1675, somewhere between the ages of 74 and 87, the English philosopher Thomas Hobbes wrote his *Dialogue Between a Philosopher and a Student of the Common Laws of England*.¹ It is a rather misbegotten effort. It is not at all clear whether the *Dialogue* is an unfinished book or a very nearly finished one, the sort of thing, after all, that one can ordinarily tell about a well-wrought book or a well-wrought fragment of a book.² To leave matters in such disarray is not at all characteristic of Hobbes. In most of his books he uses an early page or two to tell the reader just what to expect, what not to expect and why.³ But then windy, inept and unpersuasive books are not

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¹ T. HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* (J. Cropsey ed. 1971) [hereinafter cited as *DIALOGUE*].

² On this point, the work's most recent editor, Joseph Cropsey, is only willing "to suggest provisionally that the substance of the *Dialogue* is not grossly incompatible with the termination of the work on the theme of Parliament, as it now in fact closes." Cropsey, *Introduction to DIALOGUE*, *supra* note 1, at 9-10. This is the sort of suggestion that one rarely has to make in the case of books properly and seemingly put together. Cropsey is perhaps over-inclined to find significant changes in Hobbes' thought manifested in the *DIALOGUE*. Thus he considers Hobbes' rather grudging concession about the way the King of England actually made law during the Restoration a muted "view . . . of a collaborative regime—king, Lords, and Commons." *Id.* at 48. It is evident enough, however, that this collaboration is merely at the King's will and that he could lawfully abolish it.

³ See T. HOBBS, *THE ELEMENTS OF LAW, NATURAL AND POLITIC*, at xiv-xvi (F. Tönnies ed. 1889) [hereinafter cited as *ELEMENTS*]; T. HOBBS, *DE CIVE OR THE CITIZEN* 1-18 (S. Lamprecht ed. 1949) [hereinafter cited as *DE CIVE*]; T. HOBBS, *LEVIATHAN, OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL* 5-6 (M. Oakshott ed. 1946) [hereinafter cited as *LEVIATHAN*].

characteristic of Hobbes either. Yet the *Dialogue* is a windy, inept and unpersuasive attack on the common law and its practitioners—the barristers at the bar, and the judges on the bench. In this long diatribe, Hobbes makes assertions about the laws of England that are singularly irrelevant to the actuality. He claims, for example, that Chancery rightfully has appellate jurisdiction in error over all the common law courts,⁴ that royal proclamations have the binding force of statute,⁵ that it is proper for the King personally to sit as judge on the bench of any of his courts.⁶ Hobbes indulges in long and boring erudite disquisitions on such antiquities and arcana as the origin of the term “chancery”⁷ and the etymology of the word “felony.”⁸ Hobbes’ sole apparent purpose is to insult the learning of Sir Edward Coke, the great commentator on the common law, dead and buried for more than thirty years. Hobbes spends an inordinate amount of the *Dialogue* engrossed in a ritual exorcism of the great Sir Edward, uttering shrill shrieks of contempt almost every time he mentions Coke’s name, which for a reader not attuned to intellectual shrillness is too often.⁹ Unfortunately for the force of Hobbes’ recurrent diatribe, he all too frequently misstates the particular argument of Coke that he is attacking¹⁰ or misunderstands Coke’s point altogether.¹¹

In fact Hobbes does not have a philosophic temper suited to the dialogue form. Plato had enough of the exploring inquirer about him to write dialogues in which there was both dialectic tension between the participants and shared discovery of ideas. In Hobbes’ *Dialogue* the common lawyer has three roles; none lends itself to the type of creative conflict that the Platonic dialectic sometimes achieved. First, the lawyer is a source of information to the Philosopher on details of the law—provisions of statutes, customs of the courts, and views of common lawyers on the law. Second, he is a straight man for the Philosopher, feeding him remarks that allow him to get off telling ripostes. And third, he is

⁴ *DIALOGUE*, *supra* note 1, at 86-87.

⁵ *Id.* at 71.

⁶ *Id.* at 88-89.

⁷ *Id.* at 91-93.

⁸ *Id.* at 110-12.

⁹ *See, e.g., id.* at 135, 136, 143, 148.

¹⁰ *See id.* at 107 & n.16.

¹¹ *See, e.g., id.* at 96 (“I wonder why Sir *Edw. Coke* should cite [an expired statute] . . . unless he did it on purpose to diminish (as he endeavors to do throughout his *Institutes*) the Kings Authority”) (emphasis in original).

an echo, remarking at the end of several particularly harsh assaults by the Philosopher that he has felt similarly all along, but has hesitated to say so for fear of the wrath of his professional colleagues. It is all too clear in the *Dialogue* that Hobbes has foolishly stacked the deck so that the Philosopher always wins but never encounters the kind of tough opposition the common lawyers were actually capable of putting up; his opposition is never more than a clumsy canvas-back stooge.

So in the *Dialogue*, his wordy and unpersuasive attack on the Common Law and its practitioners, that ordinarily clear-headed man, Thomas Hobbes, stumbled angrily and ineptly on and on. To engage him that strongly, to reduce him to intellectual spluttering, he must have found something about the law and the lawyers that, as we would say today, was threatening, that imperiled something that he held most dear. Now there is little doubt about what Hobbes held most dear: the philosophy of Thomas Hobbes and the belief that Thomas Hobbes was the best and most important philosopher to come along since Plato and Aristotle—or perhaps since time began. And if Hobbes believed that the common law—and the things men like Sir Edward Coke thought about it—threatened Hobbes' philosophy and his exalted self-estimate, he was right.

Hobbes was the creator of a system of philosophy, one of the few systems that was an exception to Whitehead's rule: all philosophy since Plato's time are but footnotes to Plato. Hobbes' system of philosophy was not systematic in the sense that it made a statement about the substance of all things knowable in an Aristotelian-Baconian fashion. Rather, it dealt in an integral way with three major interrelated philosophical problems: the nature of things and their movements; the nature of man alone and his desires; the nature of man in society and his reason.

It was not the systematic character of his philosophy that was closest to Hobbes' heart. He vigorously pursued the creation of such a system off and on for two decades, roughly from sometime in the 1630s to sometime in the 1650s.¹² But his vigor was not matched by persistence. To deal with the exigencies of matters in

¹² In this estimate I accept the argument of J.N. Watkins that a manuscript by Hobbes in the Harleian collection (B. L., Harleian Ms. 6796, fols. 297-308), published by Ferdinand Tönnies as an appendix to the *Elements*, antedates the latter work. See Watkins, *Philosophy and Politics in Hobbes* in *HOBBS STUDIES* 239-42 (K. Brown ed. 1965). Clearly the manuscript was intended as a preliminary sketch of the elements of natural philosophy.

his view more pressing than the rounding out of a philosophical system, he was ready to postpone the perfecting of his work. His sense of priorities led him to compose two treatises on moral and political man—*The Elements of Law* and *Leviathan*—and one on political man alone—*De Cive*—before he published his work on the movements of things in nature.¹³

Hobbes thus shifted his intellectual course because, just as he began to apply himself to his philosophic task, the whole frame of civil society in England suffered a terrifying tremor. In 1642 that long tremor eventuated in a catastrophic collapse of civil order that lasted for seven years. The structure of politics was temporarily stabilized in 1649 only by means of the masked dictatorship of a conquering army and its general. To most men of active mind in those days the call to think hard about the minimal conditions of civil order and how to attain them must have rung loud and strong. It was especially strong to Hobbes; in him it struck a sounding board tuned by a special circumstance to respond powerfully to the threat of political anarchy. That circumstance was his perception of his place in the major intellectual transformation of his time, the transformation that in our day we identify as the Scientific Revolution.

In 1655 Hobbes summarized in *De Corpore* what he saw as the three seminal intellectual events that brought about the Scientific Revolution and heralded a new era of the human spirit. Out of the murk of ageless human ignorance,

Galileus in our time . . . was the first that opened to us the gate of natural philosophy universal, which is the knowledge of the nature of *motion*. So that neither can the age of natural philosophy be reckoned higher than to him . . . [T]he science of *man's body* . . . was first discovered with admirable sagacity by . . . Doctor Harvey. . . . [T]hese, astronomy and natural philosophy . . . have, for so little time, been extraordinarily advanced . . . Natural Philosophy is therefore but young; but Civil Philosophy yet much younger, as being no older . . . than my . . . *De Cive*.¹⁴

¹³ Hobbes wrote the *Elements of Law* in or before 1640, *De Cive* in 1642, *Leviathan* by 1651. He seems to have delayed finishing his *De Corpore* until years after he had written *De Cive*, which he considered the third and final part of his summa, which was also to include *De Homine*. He specifically mentioned England's political crisis as a justification for turning to *De Cive*, out of order, in 1642. DE CIVE, *supra* note 3, at 14-15.

¹⁴ T. HOBBS, *Epistle Dedicatory to William Earl of Devonshire*, in ELEMENTS OF PHILOSOPHY, reprinted in 1 THE ENGLISH WORKS OF THOMAS HOBBS at viii-ix (W. Molesworth ed. 1840) [hereinafter cited as ENGLISH WORKS].

So Hobbes saw his new philosophy of politics as the last step toward the perfection of a bright new way of knowing, superior to all the dull feeble old ways and sure to displace them, as Galileo's new science of motion was to displace Aristotle's, as Harvey's new science of the human body was to displace Galen's. The agonies of the English political order, which first coincided with and then extended beyond the years during which Hobbes was originating and amplifying his theory of the state, provided him with an on-going horrid confirmation of the correctness of his civil philosophy.

Not that Hobbes had much faith in such experiential confirmation. Nor, indeed, that he needed it. He had better grounds than experience for his assurance that his civil philosophy opened a new path to truth through the wilderness of error. He knew that the path was right because it ran parallel to the one that Galileo had taken to the truth about motion of inert bodies, to the one that Harvey had taken to the truth about the movements of the heart and blood. His theory of state was right, Hobbes believed, because his method of arriving at it was right; it was the method of Galileo and Harvey. Hobbes sought to make his method clear in the dedicatory epistles to his first two completed works, *The Elements of Law* and *De Cive*. Taking the arguments of those two letters together with a little help from *Behemoth*,¹⁵ we get a result something like this:

What men hold for learning proceeds from two parts of their nature: mathematical from reason, dogmatical from passion. The former learning goes on free from dispute because it deals with figures and external motions only; dogmatic learning, however, is immersed in doubt and dispute because it concerns men's internal motions or passions.¹⁶ For men to live as they have, with all that concerns them immersed in uncertainty and dispute is a terrible thing, but there is a solution: to apply to man not the dogmatical learning that passion fosters but the reason of mathematical learning. "[W]hatsoever things they are in which this present age doth differ from the rude simpleness of antiquity, we must acknowledge to be a debt which we owe merely to geometry."¹⁷ To bring

¹⁵ T. HOBBES, *BEHEMOTH: THE HISTORY OF THE CAUSES OF THE CIVIL WARS OF ENGLAND* [hereinafter cited as *BEHEMOTH*], in VI *ENGLISH WORKS*, *supra* note 14, at 161.

¹⁶ *ELEMENTS*, *supra* note 3, at xv.

¹⁷ *DE CIVE*, *supra* note 3, at 3.

learning about civil matters up to the level of mathematical learning, we must reason about man and his passions as geometers do about figures and their forms so that we may know "the nature of human actions as distinctly" as we know "the nature of quantity in geometrical figures."¹⁸ To bring this about, "[t]o reduce this doctrine to the rules and infallibility of reason, there is no way, but first to put such principles down for a foundation, as passion not mistrusting, may not seek to displace, and afterward to build thereon the truth of cases in the law of nature . . . by degrees, till the whole be inexpugnable."¹⁹ Thus Hobbes would begin with axioms so clear that none would deny them and then reason from them in so sure, so "geometric" a way that the political conclusions he derived would be invincible, certain conclusions rigorously drawn from indubitable premises.

Hitherto among all the writers on moral philosophy, not one had found the correct starting place or used, as Hobbes put it, "an idoneous principle of tractation;"²⁰ that is, no one had treated moral philosophy in accord with a proper and fitting rule. The problem for the philosopher is to find "a certain clue of reason," a clear and distinct idea or two, and to reason from them *more geometrico*, for only thus will he achieve certainty. Since he reasoned on the foundation of a few clear and distinct ideas, Hobbes thereby erected, he believed, a philosophy of the civil state that ended not with the interminable debate on that subject already in progress for two millenia, but with certainty. One such idea was that before there is a civil state every man has the natural right to do what he believes will save himself from violence at the hands of others. From the exercise of this right flows contention "and from that contention all kind of calamities must unavoidably ensue," a war of each against each.²¹ The second idea was that the first law of nature informs every man's reason, that for his preservation he "ought to endeavor peace." Reasoning *more geometrico* from these two clear and distinct ideas, all the rest follows. Since in the state of nature, in which every man has a right to do as he will, none achieves or ever can achieve peace, by the law of nature all men ought to be ready to surrender their

¹⁸ *Id.*

¹⁹ ELEMENTS, *supra* note 3, at xv.

²⁰ DE CIVE, *supra* note 3, at 4.

²¹ *Id.* at 5. Earlier versions of the justly famous chapter 13 of *Leviathan*, describing the horrors of the state of nature are in *Elements*, part 1, chapter 19, and *De Cive*, chapter 1.

liberty if it will enable them to escape the horrors of that state. The civil state comes into being at the instant that, by mutual agreement or by conquest, men surrender all their natural self-destructive right to a sovereign, who then alone has the right to do what he will. His subjects receive back from the sovereign so much right or liberty as he chooses to allow them. They thereby enter into a civil state and enjoy the benefit of the peace that the sovereign provides and their complete submission alone makes possible. What the sovereign commands is law; whatever his command, it assigns to each subject what is due to each. That is, he gives each subject justice, his due, for justice is whatever the sovereign commands, injustice a deviation from that command.

Between the late 1630s and 1642 then, Hobbes set out not only his substantive political philosophy but also the method which assured him that he had arrived at a new and, for the first time in history, a true account of every man's rights and duties. For the rest of his life he did not falter in his faith in either the substance or the method of his philosophy. He reaffirmed that faith in *Behemoth*, a work of his last years:

You may perhaps think a man has need of nothing else to know the duty he owes to his governor, and what right he has to order him, but a good natural wit; but it is otherwise. For it is a science, and built upon sure and clear principles, and to be learned by deep and careful study, or from masters that have deeply studied it [and] who . . . could find out those evident principles, and derive from them the necessary rules of justice and the necessary connexion of justice and peace?²²

And who could find those rules? Who, indeed, but Thomas Hobbes? No wonder the common lawyers threw Thomas Hobbes into a spluttering rage. They denied that he knew the rules. They denied that his evident principles were more evident or binding on the reason than a number of other principles. They denied that his rules of justice were logically necessary or politically and morally sound. They denied that the common law was merely the will of the sovereign.

In the very first section of the *Dialogue*, "Of the Law of Reason," Hobbes identified this point of unresolvable conflict between himself and the lawyers.²³ Since in his view the law of England is the command of the royal sovereign, and nothing but

²² BEHEMOTH, *supra* note 15, at 362.

²³ DIALOGUE, *supra* note 1, at 53-57.

that, the place to find law is the statute book where the present commands of England's sovereign king are collected. Moreover, since the duty of every subject is to obey all the commands of the sovereign that apply to him, his appropriate use of reason with respect to law consists in studying the statutes to learn what the sovereign has commanded, that he may better obey. As with the king's subjects, so with the king's judges. Their duty is simply to use their natural reason to understand what the words of the statutes mean, surely no great matter; a thing, says Hobbes casually, that men bright enough to be judges should readily be able to do with a month or two of study.²⁴ Then they will be ready to impose due penalties on the unjust, that is, those who disobey. Justice will be done, each receiving his due.

Hobbes' words were a gauntlet thrown down at the feet of the common lawyers. To leave no doubt as to his intention to insult, both in *Leviathan*²⁵ and in the *Dialogue*²⁶ he quoted from Sir Edward Coke a passage that epitomized all that Hobbes found objectionable in the pretensions of men of law. Nothing that is contrary to reason is lawful, said Coke:

Nihil quod est contra rationem est licitum; for reason is the life of the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason; for, *Nemo nascitur artifex*. This legall reason *est summa ratio*. And therefore if all the reason that is dispersed into so many severall heads, were united into one, yet could he not make such a law as the law in *England* is; because many successions of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this realme, as the old rule may be justly verified of it, *Neminem oportet esse sapientiore[m] legibus*: no man out of his own private reason, ought to be wiser than the law, which is the perfection of reason.²⁷

Hobbes rejected the whole of Coke's statement: the law may call for much study as do all arts, said Hobbes, but "that the Reason which is the Life of the Law should be not Natural, but Artificial I cannot conceive."²⁸ Coke's claim that "the law hath been fined by

²⁴ *Id.* at 56.

²⁵ *LEVIATHAN*, *supra* note 3, at 176.

²⁶ *DIALOGUE*, *supra* note 1, at 54-55.

²⁷ E. COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* *97b.

²⁸ *DIALOGUE*, *supra* note 1, at 55.

grave and learned men," the professors of the law, is manifestly untrue, since the law is whatever the King chooses to command, nothing more, nothing less. That in making law the King deploys his natural reason is to be desired and assumed but not to be required by his subjects or any human authority. Left unstated by Hobbes was the grounds for his summary dismissal of the claims of the artificial reason of the common law. As Coke and all its other eulogists said, long experience was the principle validator of that reason. In Hobbes' view, experience by its very nature fell pitifully short of providing the certainty needed to assure men of what they entered civil society to gain—peace.

Hobbes, perhaps unknowingly, was replaying a famous scene of some six decades past between James I and Coke, the Chief Justice of the Court of Common Pleas. In 1607, with prompting from the Archbishop of Canterbury, James had suggested that "the King may take what causes he shall please to determine from the determination of the Judges, and may determine them himself." Coke had responded that "the King in his own person cannot adjudge any case . . . concerning his inheritance . . . but this ought to be determined and adjudged in some Court of Justice according to the law and custom of England."

[T]he 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 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: 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 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*.²⁹

"For the King should not be under man but under God and the law." Or as all the chief judges of the high courts were officially to affirm three years later, "the King hath no prerogative, but that which the law of the land allows him."³⁰

²⁹ Prohibitions Del Roy, 12 Coke 63, 63-65, 77 Eng. Rep. 1342, 1342-43 (1608).

³⁰ Proclamations, 12 Coke 74, 76, 77 Eng. Rep. 1352, 1354 (1611).

Thus, thirty years before Hobbes had discovered his new science of politics, the judges of England had rejected its primary substantive conclusion—that in England the King was sovereign above the law and therefore had arbitrary right to make and unmake law at his will. At the same time that the judges had rejected the substance of Hobbes' politics, they had repudiated his new scientific method of relying on natural reason. Denying the viability of natural reason, the path from Hobbes' general premises to his conclusion about the law, they raised between the two a wall of the law called artificial reason.

A few years after Hobbes wrote the *Dialogue*, Matthew Hale, a learned judge and legal scholar, addressed himself to it.³¹ Through his critique he aimed to show that Hobbes was wrong about sovereignty and reason of law. For our purposes we want to follow Hale's argument only on the second point.

Reason, says Hale, is a word used in three ways. It can be applied, objectively, we might say, to entities in the world outside us—geometric figures, the heavenly bodies, the animal kingdom, rhetoric, a body of law. So applied it refers to the orderliness or coherence of the entity in question, that is, its reason or rationality. In that sense we may intelligibly refer to the internal relations of the parts or members of the entity as rational, as the motions of the planets in the solar system are, as the circulatory system is. Second, subjectively we might say, we may use the word reason to refer to the faculty or capacity of men to think coherently and acquire knowledge, a faculty which although common to men is not equally shared among them. Third, reason is understood, "complexedly when the reasonable facultie is in Conjunction with the reasonable Subject, and habituated to it by Use and Exercise."³² Given equality in the natural faculty of reason in a group of men, it is evident that the man who is better practiced in the reason or coherence or system of geometry, or astronomy, or law will be a better geometer, or astronomer, or lawyer, than men who are less practiced. This is because the practiced man has acquired a superior artificial reason.

³¹ M. HALE, REFLECTIONS BY THE LTD. CHIEFE JUSTICE HALE ON MR. HOBBS HIS DIALOGUE OF THE LAWE (Harleian Ms.), printed in 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 500 (1924). It is perhaps a symptom of their difference in outlook (and of Hobbes' mistake) that Hale gave almost equal space to "Law in General and the Laws of Reason" and to "Of Sovereigne Power," while in the *Dialogue* Hobbes allows only one-fifth of the space to "Of the Law of Reason" that he allots to "Of Sovereigne Power."

³² HALE, *supra* note 31, at 501.

Hale observed that there is no area "of So greate a difficulty for the Faculty of reason to guide it Selfe and come to any Sted-diness as that of Laws, for the regulation and Ordering of Civill Societies and for the measureing of right and wrong."³³ Although "the Cōmon Notion of Just and fitt" is shared by "all men of reason,"³⁴ there is no common consent about particulars. In such matters, Plato and Aristotle differ, the laws of different states differ, and men with just claims to be men of reason disagree with one another, each able to shatter the arguments of others but not to sustain his own. So, while it is notorious that men widely experienced in human affairs and daily doings make good judges, men of great reason and general learning in moral philosophy "are most Cōmonly the worst Judges that can be, because they are transported from the Ordinary Measures of right and wrong by their over fine Speculacons . . . above the Cōmon Staple of humane Conversations."³⁵ When judges have no other rule to guide and control their judgment than their own reason, they will incline to be corrupt and partial. In particular matters, because of the instability of natural reason, they will end in jangling contradiction.

Fortunately judges do have support more stable than the natural reason of the individual. They have a body of doctrine drawn from the painful lifelong studies of many students of the law, the fruit of their reflection and reasoning on a host of particular cases, a body coherent and consistent despite its complexity. This is the reason of the common law, the work of the practitioners who plead in the courts, of the judges who make decisions there, and of the Parliaments that—with the advice given by those learned in the law—rectify those parts of the law that need modification.

Thus the corporate, deliberate reason of law prevents the excesses that natural reason, turned loose on the rules by which men live, would perpetrate. It spares both rules and men from "the unknowne arbitrary, uncertaine Judgement of the uncertaine reason of particular Persons."³⁶ The common law in its fundamental assumptions and requirements frees men from the reasonable fears they would have if each particular case were decided

³³ *Id.* at 502.

³⁴ *Id.*

³⁵ *Id.* at 503.

³⁶ *Id.*

according to the natural reason of each judge. It reduces that terrible uncertainty of individual reason by requiring that the judges be learned in the law of the land and aware of judgments in preceding like cases. It requires those who profess the law to respect the body of precedents established, refined, and corrected over time by judges of like learning, and a like devotion to seeing justice done, as near as may be, through the common law. The reason of the common law is founded on the experience of the hundreds and thousands of men who over many generations have studied it in all its complexity and with a due concern to maintain for the common good its internal coherence, congruity and certainty. These men, however sharp their wits, have learned to bend their natural reason in deference to the reason of the law in which is imbedded the best reasoning of generations of students and judges, tried by time over the centuries. For, Hale concludes:

. . . Long Experience makes more discoveries touching conveniences or Inconveniences of Laws then is possible for the wisest Council of Men at first to foresee. . . . [T]hose amendments and Supplements that through the various Experiences of wise and knowing men have been applied to any Law must needs be better suited to the Convenience of Laws, then the best Invention of the most pregnant wits not aided by Such a Series and tract of Experience.³⁷

This is Hale's answer to Hobbes on the issue of the reality and value of reason of law. Reason of law not only exists, says Hale, it affects the whole of what we today might call the rest of social reality, or of what Montesquieu would have called the spirit of the laws. Its roots lie in experience.

It seems to me that in terms of rational demonstration, the Hobbes-Hale debate reached an impasse. Given Hobbes' assumptions about the nature of man, deductive reasoning leads, ineluctably perhaps, to his conclusion that in order to insure the peace that men are bound to seek, laws must be the commands of the sovereign. To all such laws, they who have bound themselves together as parts of the great Leviathan owe obedience. Or at least it leads so near to Hobbes' conclusion that Locke and Rousseau had to cheat a little to evade it. By the same token, from his long service as a judge in England's highest courts, Hale knew that there was more to the common law than ever got into Hobbes' *Dialogue*, or even into the statute books. The expanse of the com-

³⁷ *Id.* at 504 (footnote omitted).

mon law resulted from the reflection of judge after judge, on case after case, helped in such reflection by lawyer after lawyer, each lawyer making the most reasonable case he could on one side of an issue, and all bringing to each case their knowledge and long experience of the law. The common law was thus an enormous, patterned, always changing yet most stable mosaic, the whole of which lay beyond the grasp of any one man's reason, yet all parts of which were congruent and coherent with all the other parts. They were kept so by the continuous application to them by practitioners and judges of the artificial reason of law, that is of all the complex yet understandable things they knew about the law by long consideration and study of it, including their awareness that for the welfare and security of those subject to the law, it must be intelligible and certain.

The difference between Hobbes and Hale represents in a particular instance a divergence that penetrates to the very roots of man's perception of social reality and the way to know it. Hobbes and Hale confront one another with utterly irreconcilable views of how to go about finding the truth concerning men and their ways. Hobbes' way is deductive, generalizing, mechanical and mathematical in aspiration if not in form, seeking to achieve by those traits a certainty which is in no other way attainable. Men, reduced from their apparent intricacy to the essential simplicity of their true nature, their passions and their reason, are calculable atoms, the consequences of whose movements in a determined universe can be computed with something close to the certainty that Galileo achieved in computing the rate of movement of bodies in free fall. What we see in Hobbes then is an early, perhaps the very first, attempt to apply systematically to man the method of investigation that had but a few decades earlier won its first conclusive triumphs in the study of nature. Hobbes may have been the first powerful mind in the history of thought to be seized by the dazzling vision of a unified science capable of dealing mathematically with the physical world and man, and of achieving the same certainty, or nearly so, about the latter as about the former.³⁸

³⁸ Hobbes' aspiration toward and belief in the possibility of attaining a certainty in moral philosophy equivalent to that in natural philosophy separated him from all his predecessors, including Plato, Aristotle, and the scholastics. His own sense of the heightened certainty attained in natural philosophy through application of the methods of astronomers and physiologists makes his aspirations for political philosophy all the more exalted.

Over the past three centuries that vision has suffered periods of attenuation. The Romantic philosophers of the early nineteenth century preferred a less stark, more woolly vision of politics. In the twentieth century, in the hands of men with arbitrary sovereign power beyond Hobbes' dream, the attempt to mold the human creature to fit the conclusions of one human science or another has gotten itself something of a bad name by bringing dreary death to thousands and millions of human beings—men, women and children—before firing squads, through starvation and freezing in arctic cold, in re-education centers, in gas chambers. And yet, consistently pursued, the attempt to develop sciences of man on a model approximating that of the natural sciences, to elaborate structures of "natural laws" to account for recurrent aspects of human behavior has apparently won considerable tested success in two fields at least—economics and linguistics.

And what of the kind of knowing about man that Sir Matthew Hale, and, with a less alert consciousness of what he was doing, Sir Edward Coke stood for? To describe that mode of knowing effectively and to put an acceptable general name to it is more difficult than to do so in the case of Hobbes. Still, I think it can be argued that Matthew Hale was a proponent of a primarily historical mode of knowing about man. He may have been the first to espouse consciously an historical mode of knowing *over against* a mode that was consciously rooted in the new natural sciences and that used them as its universal model in method. Indeed Hale could have had few predecessors, since Hobbes was the first to universalize the scientific mode, and most of Hobbes' early opponents were too busy being shocked by his conclusions to pay much heed to his method.

The precise nature of the claim to knowing about humankind imbedded in Hale's discussion of reason of law is not easy to pull free of its context and to state in terms wholly unambiguous and non-contradictory, that is, to state as a set of axioms and of legitimate inferences from them. With respect to the claims of those who set considerable store by ways of knowing *modo historico*, this difficulty has persisted to this day.³⁹ It is at least arguable

³⁹ Hale did little of the overclaiming that became an unpleasant and ultimately debilitating disorder of the historical sciences in the late nineteenth century: that, as was then said, all sciences were dependent on history since all have had their development in a series of particular historical contexts. It is the sort of claim that philosophers have taught me to characterize as trivially true.

that it will persist forever, if those whom we will call for short "the historians" refuse to let themselves be pushed into defining their claims within the boundaries set by the rhetoric of the natural sciences. Despite this difficulty, the substance of the main claims Hale made about the historical mode of knowing can, without great violence to his general thinking, be derived from what he says about reason of law, that is, about the right method for thinking coherently about a corpus of human social experiences that has its own objective coherence.⁴⁰ In our present day vocabulary this is what Hale seems to assert:

1. Reason gains access to a body of related social data historically constituted mainly by long and extensive immersion in it; that is by long study of particulars and of their multiple relations to other particulars.

2. The characteristic of mind most useful in such study is not analytical deductive efficiency but erudite experienced alertness.

3. To interpret men's intentions expressed in their laws or in any other source, it is necessary to know what the words those men used meant to them. And that requires knowing the historical context of those words not only within a given document but beyond it. It is precisely scholars possessed of erudite experienced alertness who are most capable of effecting the entry into the minds of men of other times and other climes, a necessity if one would discern their meanings, aims, and intentions.

4. There is, of course, some overlap between the reason of the natural sciences and the reason of the historical sciences. Historical scientists frequently deduce likely consequences of a historical event and verify or falsify their understanding of the event by checking on whether the consequences in fact followed. And natural scientists familiarize themselves with a new scientific field by immersing themselves in its "literature" to get the feel of it. Nevertheless even the most scientifically oriented historical scientist operates at levels of deduction, mathematization and abstraction that are primitive compared with those employed in the advanced natural sciences. Many historical scientists attain eminence

⁴⁰ In what follows I may occasionally use the phrase "historical sciences" and "historical scientists." This is not with the purpose of assimilating the disciplines so named to Big *Ess* Science, that is, to the natural sciences. It is with the opposite purpose, that of distinguishing them from the natural sciences as ways of knowing, while at the same time asserting that they *are* ways of knowing, and for the entities they seek to know, appropriate ways of knowing.

and excellence in their fields of study without using numeric techniques more advanced than those that a competent sixth grader can manage.

5. Most important of all, Hale and the historical sciences he foreshadowed restore time in its human dimension as a key element in the scientific study of man. In that study, up to the early sixteenth century, as John Pocock has shown, dealings with experience, change, contingency and history—the offsprings of time—varied from ambivalent and hesitant to negligible.⁴¹ No earlier philosopher, however, had more systematically and successfully denied temporality a significance in the essential order of things than Hobbes did.

In Hobbes' political philosophy, there is no process; there are only two fixed conditions—states of being linked by a transforming instant. There is the state of nature in which men live in a state of war and constant dread of sudden death; there is the instant of magical transformation, the instant of the covenant, in which men surrender to a sovereign all their natural right to do what they will; there is the civil state in which men do whatever the sovereign bids them and live under his civil law in peace.⁴² Since all men live under sovereigns, their civil history marks only the stupid slide of one polity or another away from peace and sovereignty towards civil war and the state of nature.⁴³

For Hobbes these truths owed nothing to an examination of the record of the past, to a study of the bewildering and intricate remains of the passage of men through time, to such prudence as the experience of daily life or studious investigation of man's past doings is said to impart. In Hobbes' view such experience did not end in the agreement of minds attentive to the truth, as Galileo's findings did, and as his own would have but for a mischance. Men's minds had so long been numbed by a foolish trust in history—that is, experience—and in the false philosophy of the universities that they resisted scientific truth about man. Neither of the latter ways of knowing, the ways of the lawyers and the divines, rest on foundations that afford scientific certainty.

⁴¹ J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT* (1975).

⁴² On the caution called for in speaking of the ahistoricity of Hobbes' outlook, see the shrewd remarks of J.G.A. Pocock, in *Time, History and Eschatology in the Thought of Thomas Hobbes*, in *POLITICS, LANGUAGE AND TIME* 148 (1971).

⁴³ That is what *Behemoth* is about, and almost all that it is about. It is not a coherent account of a historical period of rapid change; it is a chronologically ordered series of cautionary tales about what terrible things happen to society when people default on their one paramount political obligation—their duty to do what the sovereign commands.

On that premise Hale perfectly agreed with Hobbes. Reasoning about law by lawyers and judges did not yield the certainty that reasoning about figures yielded geometers; the historical sciences do not reach the level of demonstrative certainty attainable in the natural sciences.⁴⁴ From that premise, however, Hale proceeded to conclusions 180 degrees at variance to Hobbes'. To Hobbes this shared premise pointed directly to the conclusion that since the present unscientific way of reasoning about civil society did not provide certainty, it was time to abandon that so-called artificial—or as we would say, historical—reason of the law for scientific reasoning that did provide it. Then questions of law would be efficiently and promptly settled. For Hale, the lower level of certainty was a consequence not of the reason of law but of the intricacies of particular human actions that law as a historical science had to reason about. The laws of a land were what they were because of particular historical circumstances.⁴⁵ To understand them as well as possible, intrinsically and in relation to each other, was not the work of mathematical reasoning but of historical insight. If no single human mind could perfectly achieve such insight, that was not the fault of the reason of law by which it proceeded, but resulted from the very nature of human affairs. Concerning the law, by a joint effort extending over the centuries, men of law attained as much certainty as is attainable in the historical universe of human affairs. Hobbes' mistake, then—the

⁴⁴ "[I]t is not possible for men to come to the Same Certainty, evidence and Demonstration touching [laws for the regulation and ordering of civil societies] as may be expected in Mathematicall Sciences . . ." HALE, *supra* note 31, at 502. There is a language problem here. It is not evident that the historical sciences should have as their objective the statement of the *kind* of certainty that is the objective of the natural science of physics and that is approximated by it. It is evident that the historical sciences *start out* at levels of certainty in the domain of common sense that are inaccessible to the natural science of meteorology or indeed any natural science. My effort to describe some of the differences between the historical and the natural sciences in J. HEXTER, *THE HISTORY PRIMER* (1971) may have just muddled the issues. Still, it would probably be useful to clear up the role of the level of certainty in certifying a science as a natural science.

⁴⁵ [W]ith relation to Lawes from a Cōmunitie, tho Cōmon Notion of Just and fit are common to all men of reason, Yett when Persons come to particular application of those Cōmon Notions to particular Instances and occasions wee shall rarely find a Cōmon Consent or agreemt between men . . .

. . . .

. . . [T]hat Men might understand by what rule and measure to live & possess . . . hath been ye prime reason, that the wiser Sort of the world have in all ages agreed upon Some certaine Lawes and rules and methods of administration of Cōmon Justice . . .

HALE, *supra* note 31, at 502-03.

mistake, too, of his followers who try to import the natural science model into the historical or human sciences—is simply that they have gotten into the wrong universe: the universe of human affairs and historic time in which their sharpest tools go dull, in which their best efforts can only quarry a small chip or two out of vast blocks of granite-like evidence.

One final question. If the common lawyers presented so serious a threat to the theoretical structure Hobbes treasured, why was he so long in confronting the threat? In the *Leviathan* he had already taken casual note of the intellectual defects of Coke's views on reason of law and briefly, yet effectively in his own eyes, dealt with them.⁴⁶ Why then the racketty full-scale attack in the *Dialogue* fifteen or twenty years later? Hobbes does not give us his reasons for the delay. One can only venture an inference as to what happened.

Perhaps it went like this. The decades of the 1640's and the 1650's had been a political nightmare for the English. They had suffered two civil wars with the usual destruction and bloodshed. They had seen their rightful king brought to the scaffold and beheaded. They had been subjected to the rule of Commonwealth men with no mandate to rule beyond the readiness of the victorious New Model Army to obey them. They had been subjected to the naked power of the commander of that army, Oliver Cromwell. On his death they had seen sovereign power slide like a greased pig out of the arms of one group after another that tried to seize it as their native land reeled back toward civil war, anarchy, the state of nature. And all through, they had dinned in their ears justifications of rebellion grounded on the claim that some law of God or nature stood over the sovereign and made disobedience to his commands legitimate.

Well might Thomas Hobbes have believed in 1661 that his fellow countrymen had learned their lesson; that, weary of the incitement to rebellion of self-proclaimed men of religion, weary of the rebellious marching of self-proclaimed armies of saints, they would be ready to submit completely to the will of their undisputed sovereign, Charles II, by grace of God, King of England. Beyond the recent experiences of Englishmen, which suggested that they ought to think Hobbes' way, were their concrete actions at the Restoration which suggested that they actually did think his way. Their hatred of Commonwealthmen, their passionate avow-

⁴⁶ LEVIATHAN, *supra* note 3, at 176.

als of loyalty to the King, their espousal of the doctrine of non-resistance—all these added up to a surge of will to civil peace and an acceptance of the obligation to obey the sovereign that should have made Englishmen ready to accept the new political science of Hobbes.

But were they really ready? No, they were not, and it seems to me that by the time he wrote the *Dialogue*, Hobbes knew they were not. They were not ready because of something that had happened to their minds in the preceding half century. In effect, during that time one of the several standard circuits of political response that Elizabethan Englishmen carried around in their heads had been both highly sensitized and heavily reinforced so that a relatively minor impulse would set the circuit going and the surge of power toward it would damp down all the rest of the political circuitry that moved Englishmen politically.⁴⁷

The political supercircuit that Englishmen carried around in their heads by the 1660's was the one that, in their minds, inseparably linked the common law through the rule of law, reason of law, and due process to the notion of due inheritance. By then Englishmen had it firmly in mind that the common law not only was the sole secure safeguard of their property, but that the law itself was also an essential element in that property, the most precious legacy that their ancestors passed on to them. There was no way that any large number of Englishmen would accept the view that the common law was nothing but the command of the sovereign, existing only by his will or sufferance. To them the law was the body of rules, ancient yet modern, within whose bounds they were free men. The law was indeed the King's, made by *his* Parliaments, administered in *his* courts, declared by *his* judges. The law, however, was also *theirs*, the firm foundation of *their* liberties, the safeguard of *their* property, the ultimate warranty to *them* of all that was *their* own, and, if it was effectively to be those things, necessarily binding on the ruler as well as the ruled.

By the 1660's Englishmen had the political experience and thereby developed the political instincts that enabled them to sniff out and set themselves against all measures that delivered their liberties into the discretion of the executive. Executive suspension of laws, executive tampering with the tenure of judges, a military force at the free disposal of the king, executive delay in showing

⁴⁷ A recent example of an event tripping a circuit like that described in the text with consequences as there described was the Saturday Night Massacre of October 20, 1973.

cause for the arrest of men imprisoned, executive intrusion of certain men into military, civil and ecclesiastical offices from which they in particular were barred by law—any such actions or arrangements brought on first a quick antagonistic response from the section of the population most immediately affected by it, and then hasty retraction by the government from its overextended position. In one instance, from 1685 to 1688, the executive did not retract but acted as if it were indeed a Hobbesian sovereign. At that point the deeply imprinted intuitions of Englishmen about liberty and the rule of law, their political supercircuit, took over completely. They covered their abandonment of non-resistance with the diaphanous fiction of James II's abdication, and demonstrated—to the astonishment, no doubt, of any Hobbesian onlookers—that English subjects could dispose of their sovereign with far less threat to the public peace than support for a sovereign who ruled as if he was not under the law would cause. Indeed, regardless of its significance in theory, the Glorious Revolution, so called, of 1688, unmistakably demonstrated that the English sovereign was under a law so fundamental that it was beyond the power of any ruler of the land permanently to alter it.

This brings us to a persistent and minor perplexity about the past 150 years of the history of Britain. In jurisprudential perspective the land has been ruled at least that long by a sovereign Parliament cut to the specifications of Thomas Hobbes. Parliament is a sovereign with no juridical bounds whatever to its power, a sovereign whose corporate words are law, whatever words it chooses to speak. Yet in no land has the sovereign more assiduously and consistently maintained fundamental laws ensuring the liberty of the citizen or subject. No one knows what would happen if Britain's sovereign Parliament assiduously and consistently with full right set about abrogating those fundamental laws. No one knows because the sovereign Parliament has never set about abrogating those laws in Britain. Perhaps it has never wanted to; perhaps it has never dared to; but in any case, it never has. In fact, in a world wildly changed since the 1600's, the supercircuit that got into the collective political consciousness of Englishmen then has dominated it ever since. Whatever jurisprudential theory says, we know, as Coke did, that in England the sovereign is not under man but under the law, in 1980 as in 1607, and possibly even more so. Despite appearances, by 1670, Coke had won in the world of English politics; Hobbes had lost. And when he wrote the *Dialogue* Hobbes may have suspected as much.