THOMAS HOBBES AND THE COMMON LAW

By ENID CAMPBELL*

"Truly I never read weaker reasoning in any author of the law of England, than in Sir Edward Coke's Institutes, how well so ever he could plead."[1]

Thomas Hobbes of Malmesbury[2] is usually regarded as notable chiefly for his contribution to social and political philosophy and only incidentally for his contribution to juristic thought.[3] He was not a professional lawyer and unlike his intellectual successor, Bentham, never so much as received a formal legal education. It would, however, be a mistake to suppose that Hobbes' influence on legal thought, both in England and abroad, was negligible. In his own time he was reviled by the common lawyers for his unsparing and incisive criticisms of the common law, particularly as it was represented by Sir Edward Coke, and his attacks on their object of veneration served to provoke several of the professional lawyers, including Sir Matthew Hale, to answer "wicked Mr.

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*LL.B. (Tas.), B.Ec. (Tas.), Fellow of Duke University Commonwealth Studies Center, Durham, North Carolina, U.S.A.

1 **A Dialogue between a Philosopher and a Student of the Common Laws of England**, 6 E.W. 144. Reference to Hobbes' works are to Sir William Molesworth's **The English Works of Thomas Hobbes** (London, 1839-45). The abbreviation E.W. refers to this source.

2 Born 1588, died 1679. For accounts of Hobbes' life and work, see George Croom Robertson, **Hobbes** (Edinburgh and London, 1886); Sir Leslie Stephen, **Hobbes** (English Men of Letters Series; London, 1904), John Laird, **Hobbes** (Leaders of Philosophy Series; London, 1934). Contemporary biographical notes include John Aubrey's **Brief Lives** (edited by Andrew Clark), (Oxford, 1898), several Latin pieces reproduced in Volume I of the Molesworth edition of **Opera Latina**, and short autobiographies written by Hobbes in verse and prose. (See "The Autobiographies of Thomas Hobbes" (1939), 48 **Mind** (N.S.) 403-5). The editions of Hobbes' works up to 1775 and all collections of his works are listed in Hugh MacDonald and Mary Hargreaves, **Thomas Hobbes A Bibliography** (The Bibliographical Society, London, 1952).

3 Little has been published dealing exclusively with Hobbes' juristic thought. Apart from occasional references to his theory of sovereignty and conception of law in standard works on jurisprudence, the principal commentaries on Hobbes' contribution to legal thought are James E. G. de Montmorency's essay in **Great Jurists of the World** (edited by Sir John MacDonnell and Edward Manson), (Boston, 1914), 195-219; Huntington Cairns, "Hobbes' Theory of Law" (1946), 4 **Seminar**, 58-83, reprinted in Cairns, **Legal Philosophy from Plato to Hegel** (Baltimore, 1949), 246-71. Howard Warrender's **The Political Philosophy of Hobbes. His Theory of Obligation** (Oxford, 1957) contains much to recommend it to the student of legal philosophy, and Richard Peters, **Hobbes** (Pelican Philosophy Series; Harmondsworth, Middlesex, 1956) has a short section which gives a concise account of Hobbes' legal theory.

Hobbes" with reasoned defenses of the common law.[4] In the seventeenth and eighteenth centuries Hobbes' impact was of a negative kind but with the advent of the Utilitarians in the early nineteenth century his thought was resurrected and accorded a central place in the philosophy of state and law.[5] Although Bentham seldom explicitly acknowledges his debt to Hobbes there is a marked degree of correspondence between his and Hobbes' views. With Austin the similarities are more outstanding[6] and Sir James Fitzjames Stephen is never reluctant to express his enthusiastic approval of the excellence of Hobbes' criticism of Coke and of criminal law.[7]

An analysis of Hobbes' influence on the Utilitarians and the Analytical jurists is a task of considerable magnitude, and for this reason I propose to limit this article to a segment of Hobbes' legal thought, namely, to his

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[4] Hobbes' lawyer critics included Edward Hyde, first Earl of Clarendon, John Whitehall, a barrister of the Inner Temple, and a grandson of Sir Edward Coke, Roger Coke. Sir William Holdsworth has said that "Clarendon belongs to the general history of England rather than to legal history" (6 **History of English Law,** 524), for although he was at one time Lord Chancellor, his prominence rests upon his activities as a politician rather than as a lawyer or judge. Clarendon's **Brief View and Survey of the Dangerous and Pernicious Errors to Church and State, in Mr. Hobbes Book entitled Leviathan** (Oxford, 1676), represents the point of view of a conservative statesman and his criticisms of Hobbes have more relevance to politics than to the theory of law. John Whitehall spoke as a representative of the legal profession and was quick to defend the supremacy of the common law against Hobbes' will theory. Whitehall's tract, **The Leviathan Found Out: or the Answer to Mr. Hobbes's Leviathan, In that which my Lord of Clarendon hath past over** (London, 1679), is a forceful and highly critical work and fully demonstrates the kind of opposition Hobbes incited amongst the lawyers.

Both Clarendon's and Whitehall's tracts are discussed in John Bowle's illuminating book, **Hobbes and His Critics: A Study in Seventeenth Century Constitutionalism** (London, 1951). John Laird's earlier work on Hobbes has a compedious section on the critics (op. cit., 247-57).

Roger Coke was the author of several works of an anti-Hobbes nature. The most notable of these was his **Justice Vindicated from the false focus put upon it by T. White, Thomas Hobbes and Hugo Grotius . . .** (London, 1660).

From the point of view of the development of legal thought in England, Sir Matthew Hale's **Reflections on Hobbes' Dialogue** is the most important. This was first published from the Harleian MS together with notes by Sir Frederick Pollock and Sir William Holdsworth in (1921), 37 L.Q.R., 274-303, and has been reprinted as Appendix III in volume 5 of Holdsworth's **History of English Law,** 499-513.

[5] See Sir Leslie Stephen, **Hobbes,** 207; Sir Paul Vinogradoff, **Outlines of Historical Jurisprudence,** vol. 1 (London, 1920), 114; John Laird, **Hobbes,** 286-9; John Plamenatz, **The English Utilitarians** (Oxford, 1949), 10-16; John Bowle, **Hobbes and His Critics,** 7, 8, 43, 44; Peraz Zagorin, **A History of Political Thought in the English Revolution** (London, 1954), 165.

It is significant that the person responsible for collecting Hobbes' works, Sir William Molesworth (1810-1855), was himself associated with the philosophic radicals. See vol. XIII **Dictionary of National Biography,** 570-2.

[6] Sir Henry Maine would even go so far as to say that Austin's originality resides only in his elaboration upon the legal theory of Hobbes. (See **Lectures on the Early History of Institutions** (New York, 1888), 354, 355, 356). Similarly, Sir Paul Vinogradoff opined of Austin: "He did not contribute any new ideas to the creed laid down by Hobbes and Bentham, but elaborated their ideas on jurisprudence in a more systemmatic and technical form." (op. cit., 115-6).

[7] See Stephen's **A History of the Criminal Law of England,** vol. II (London, 1883), 206, n 1, and his essay on "Hobbes's Minor Works" in **Horae Sabbaticae,** 2nd series (London, 1892), 46-9.

opinions about the common law and the relation of those opinions to the views of some of his predecessors and contemporaries. Since his attitude to the common law forms an integral part of his complete theory of law, it will be necessary to express briefly his ideas about the nature of the state, sovereignty and law, but only so far as explanation of the specific matters examined here requires.

THE BACKGROUND

Hobbes lived and wrote in one of the most troubled periods in English history and it is generally agreed that these circumstances together with his own timid nature had much to do with his conclusions about the basic impulses of man, the purpose of the state and the end of law. The seventeenth century witnessed civil strife and continual disputation about the location and nature of sovereign power; it was a century in which the revolution of thought occasioned by the Renaissance and the Reformation had its most vital impact in England. The law of England, as F.W. Maitland has pointed out, had not remained immune from this influence, and in the final quarter of the sixteenth century, the reaction against the medievalism and Catholicism of the common law manifested itself in a revival of the more orderly and sophisticated civil law, and the emergence of new jurisdictions outside the common law system.[8]

The common law had demonstrated itself resistant to change, jealous of rivals and sensitive to criticism, yet if it was to survive the challenge of the new jurisdictions and of a new conception of state and government, it was apparent that it too would have to undergo change. The most critical years for the common law belong to the seventeenth century. Sir William Holdworth lists the chief defects of the common law of the time as being its incumbrance "with large masses of learning which were rapidly becoming obsolete," its technicality and the great delays in the administration of justice. In substance the law was predominantly medieval and, in matters of public law, the lawyers resorted invariably to medieval sources in which the supremacy of law over the organs of state was asserted.[9] Before Hobbes there was no jurist other than Sir Francis Bacon who discerned the defects and anachronisms of the common law so clearly. The body of the legal profession during the last half of the sixteenth century and the first half of the seventeenth century viewed the common law with an attitude approaching idolatry. Their conservatism was exemplified in prolific literary activity: many of the medieval legal classics were published and new books on the common law were written which served to reinforce faith in the wisdom of generations of lawyers, while numerous scholars devoted their energies to the writing of legal history.[10]

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[8] See F. W. Maitland, "English Law and the Renaissance," in **Select Essays in Anglo-American Legal History** (Cambridge, Mass., 1907), I: 168-207; P. Vinogradoff, "Reason and Conscience in Sixteenth Century Jurisprudence" (1908), 24 L.Q.R., 373-84.

[9] 5 **History of English Law**, 412-33.

[10] Ibid., 378-412.

The contest over the nature and scope of the Royal prerogative during the reign of the Stuarts provided the occasion for definition of the philosophy of the common law and for a precise demarcation of the points of difference between that philosophy and the new philosophy of which Hobbes was an outstanding representative. The specific issue was whether the scope of the Royal prerogative was defined and limited by the common law and whether the exercise of political power was subject to a higher and unalterable law or whether it was simply a matter of the expression of the will of the sovereign through command. For the common lawyers, the common law was the rule of reason, a superior system of norms to which statutes, ordinances and all other legislative acts should conform. The rules of common law were not the arbitrarily manufactured fiats of men but were declaratory of universal principles of order discovered by those who by training and experience were best equipped for the function, *i.e.*, the common law judges. The common law was, moreover, a product of time: that a rule was truly a principle of right reason was demonstrated by its observance as a custom.[11]

The peculiar feature of the philosophy of the English common law was the insistence that discovery, interpretation and application of the rules of right reason was the monopoly of the legal profession. This had been asserted by Sir John Fortescue[12] and was affirmed by Sir Edward Coke in the *Case of Prohibitions* when he said:[13]

> "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 judgement of the law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it."

It should be borne in mind that during the first half of the seventeenth century the question of the supremacy of the common law did not necessarily involve a subordination of the law-making of Parliament to the common law. The legislative activity of Parliament was still in its infancy and a large part of its functions was exercised in its capacity as the High Court of Parliament, a law-declaring body.[14] And acting in this judicial capacity, Parliament's authority as an expounder and interpreter of the common law was no less extensive than that of the common law courts.

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[11] See R. W. and A. J. Carlyle, **A History of Medieval Political Theory in the West**, vol. 6 (Edinburgh and London, 1936), 3-12, 234-6, 326-8, 508-11; Otto Gierke, **Political Theories of the Middle Ages** (translated by F. W. Maitland) (Cambridge, 1900), 73-87; C. H. McIlwain, **The Growth of Political Thought in the West** (New York, 1932), chaps. 5 and 7; George H. Sabine, **A History of Political Theory** (revised ed., New York, 1954), chap. XI; Edward S. Corwin, "The Higher Law Background of American Constitutional Law" (1928-9), 42 **Harvard Law Review**, 145-85, 365-409.

[12] Sir John Fortescue, **De Laudibus Legum Angliae** (Amos ed., 1825), C.8.

[13] **Prohibitions del Roy** (1609), 7 Co. 63-5.

[14] C. H. McIlwain, **The High Court of Parliament and Its Supremacy** (New Haven, 1910); J. W. Gough, **Fundamental Law in English Constitutional History** (Oxford), 1955).

His *dictum* in *Dr. Bonham's Case*[15] notwithstanding, Coke's subsequent comments and active espousal of the parliamentary cause, indicates that parliamentary supremacy was not necessarily contrary to the notion of the supremacy of the common law.[16]

This, in summary, was the temper of the period in which Hobbes wrote. As one of the severest critics of Coke and other defenders of the common law, Hobbes was generally assumed to be an advocate of unlimited monarchy and authoritarian government unrestrained by a fundamental law. Though his sympathies appeared closest to the Royalists, he was never taken up by them and his inability to gain the approval and support of either faction forced him to spend most of his productive years in semi-voluntary exile in Europe. His interest in the common law was incidental to his more direct interest in moral and political philosophy, and the legal questions he chose to discuss are principally questions of public law and legal theory.

THE SOURCES OF HOBBES'S LEGAL THOUGHT

By the time Hobbes chose to write a tract dealing exclusively with the common law his principal ideas about law as a whole had been developed and delivered to the reading public.[17] In his *Dialogue between a Philosopher and a Student of the Common Laws of England* he does little more than apply these general notions as a basis for detailed criticism of some of the substantive and procedural aspects of the common law.

Credit for having directed Hobbes to the writing of the *Dialogue* is claimed by his friend, and biographer, John Aubrey, who in 1664 presented him with a copy of Sir Francis Bacon's *Elements of the Common Laws of England*.[18] According to Hobbes, the *Dialogue* was never completed[19] and the abrupt manner in which the work ends makes this a more plausible conclusion than the statement of the publisher—who, it should be noted, was never able to secure Hobbes' consent to publish the work—that it had been finished many years."[20] It seems highly probable that

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15 The now celebrated dictum reads as follows:—

> And it appears in our Books, that in many Cases, the Common Law will controll Acts of Parliament and sometimes adjudge them to be utterly void: For when an Act of Parliament is against Common Right and Reason, or repugnant, or impossible to be performed, the Common Law will controll it and adjudge such Act to be void. (1610), 8 Co. Rep. 118.

16 Edward S. Corwin, op. cit., 373-5.

17 The principal political works were **The Elements of Law, Natural and Politic** first published in 1650 in two parts and now available in a volume edited by Ferdinand Tonnies (Cambridge, 1928); **Philosophical Rudiments concerning Government and Society,** first published in Latin under the title **De Cive** (by which it is still generally known) in 1642, and published in English in 1651 (2 E.W.); and **Leviathan: Or the Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civill,** first published in 1651 (3 E.W.).

18 Aubrey's **Brief Lives,** vol. I, 341.

The Elements of the Common Law was the title given to a volume containing the first edition of Bacon's **Maxims of the Law** and a second edition of **The Use of the Law;** it was published in 1630; see vol. 14, **The Works of Francis Bacon** (ed. J. Spedding, R. L. Ellis and D. D. Heath) (Boston, 1864), 165.

19 Aubrey, op. cit., 342.

20 6 E.W. 422.

the *Dialogue* was circulated in manuscript before its publication in 1682, since Sir Matthew Hale, who wrote a short tract in reply, died in 1675.[21]

Although Hobbes came to the study of the common law in his declining years, it is apparent that he spared little in versing himself in the contents of the legal classics. In previous years he had had occasion to consult Coke's *Institutes*[22] but it was not until the writing of the *Dialogue* that the extent of his reading became clear. On some points Hobbes accepts the veracity of information and interpretation advanced by Coke, but for the most part he makes no disguise of his want of confidence in Coke's account of the origin of legal concepts and rules and in his understanding of the true nature of the common law.[23] Taken as a whole the *Dialogue* represents a compelling and closely argued critique of the most important legal treatise of the first half of the seventeenth century.

The *Institutes* aside, other legal writings which Hobbes consulted include the works of Bracton,[24] Fleta,[25] Fitzherbert,[26] Christopher St. Germain,[27] Lambard[28] and Selden.[29] One cannot determine what Hobbes thought of these authors for he mentions them briefly and usually on points of information. James E. G. de Montmorency has attempted to show that much of Hobbes' thought about the common law was derived from Edmund Plowden's *Reports* and *Quaeries*,[30] from Sel-

21 See Sir William Holdsworth, 5 **History of English Law,** 500.

22 For example, he makes several references to the **Institutes** in the **Leviathan.**

23 Although the major criticisms relate to genuine differences about the premises upon which the substantive law is founded, Hobbes even attacks Coke on his own ground. So he accuses Coke of looseness of thought in that "he seldom distinguishes when there are two divers names for one and the same thing: though one contain the other, he makes them always different" (6 E.W. 74-5), in that he makes no distinction between the transfer and the committal of power (ibid., 52), and makes a false distinction between causing the death of a man and declaring it (ibid., 75).

Coke prided himself on being a legal historian, but latter day historians have "pointed out that his history is often inaccurate, and that his law is not the true medieval law which he represented it to be" (Sir William Holdsworth, 5 **History of English Law,** 472; see 472-8 ff.). Hobbes, too, was a poor historian and Sir Henry Maine and other members of the historical school have given him as much a buffeting as they have Coke. However, Hobbes more than once criticizes Coke's history and misunderstanding of medieval authorities, as for instance in his account of the etymological derivation of felony (6E.W. 80-2) and Chancery (ibid., 55-7), and in his discussion in the Court of Common Pleas (ibid., 42-3). Coke is also accused of citing expired statutes (ibid., 61-2, 129), of misinterpreting Bracton (ibid., 86-8), of representing as law propositions which lack authority (ibid., 126, 128), and of misusing cases (ibid., 79).

It is not surprising that the keenly analytical Sir James Fitzjames Stephen found much in Hobbes' indictment of Coke with which he could agree. See II A **History of the Criminal Law of England,** 205-6; **Horae Sabbaticae,** 2nd series, 46.

24 6 E.W., 31, 39, 83, 87.

25 Ibid., 32.

26 Ibid., 39.

27 Ibid., 48.

28 Ibid., 157, 160. William Lambard, a contemporary of Hobbes was the author of several works on aspects of constitutional law and made a singular contribution to legal history in his book on Anglo-Saxon Laws. See Sir William Holdsworth, 4 **History of English Law,** 117-8; 5: 403-4.

29 6 E.W., 160.

30 **Great Jurists of the World,** 204-8.

den's *Table Talk*,[31] and from Christopher St. Germain's *Doctor and Student*.[32] There is no knowing whether Hobbes did in fact use and rely upon Plowden, but de Montmorency thinks that on this "there can be no manner of doubt."[33] The chief points of identity between the writings of Hobbes, Plowden and St. Germain in deMontmorency's opinion, are in their equation of the Law of Nature or the Law of Reason with the common law. Superficially, this observation is accurate but it overlooks firstly the special meaning which the Law of Reason had for the common lawyers, and secondly, and more importantly, the entirely new meaning which Hobbes gave to the Law of Nature or the Law of Reason, a meaning quite different from the scholastic interpretation of both Plowden and St. Germain.[34] De Montmorency's error consists in his assumption that Hobbes' conception of the Law of Nature was the same as the scholastic conception: the lie to his argument appears in his statement that:[35]

> "If Hobbes had no other claim as a jurist, he could claim that he revived for the purpose of social philosophy and juridical thought the whole medieval conception of the Law of Nature."

In the case of John Selden[36] there are at least grounds for suspecting that Hobbes may have been influenced by the Erastian and celebrated legal historian.[37] The two became acquainted soon after Hobbes sent Selden a copy of his *Leviathan*.[38] It may be supposed that during the

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[31] Ibid., 208. **Table Talk** was not published till 1689, that is, after the deaths of both Selden and Hobbes, and it was a compilation of notes of Selden's talk by his former secretary, the Rev. Richard Milward. Hobbes may have seen the MS since it was a literary custom of the time to circulate MSS among friends and acquaintances. See **Table Talk of John Selden** (ed. by Sir Frederick Pollock) (London, 1927), xi-xii, 177.

[32] Ibid., 208-12.

[33] Ibid., 207.

[34] Infra. It may be noted that Plowden was a devout Roman Catholic who for that reason cannot be supposed to have departed from the scholastic interpretation of the Law of Nature, whereas Hobbes was so unorthodox a Christian that he was accused of atheism and heresy: see Sir Leslie Stephen, op. cit., 44-5, 59-61, 67-9, 144-57.

[35] **Great Jurists of the World**, 210.

[36] 1585-1654: See vol. XVII, **Dictionary of National Biography**, 1150-62; Sir William Holdsworth, 5 **History of English Law**, 407-12.

[37] Among the matters upon which the views of Selden and Hobbes substantially corresponded, mention might be made of:

1. The principle that covenants should be observed: **Table Talk**, 36-7.
2. The contention that all jurisdictions in England existed by virtue of their having received their authority from the Crown (ibid., 60-1).
3. The principle that "a King is a thing men have made for their owne sakes for quietness sake" (ibid., 61).
4. The proposition that the obligation to obey the civil law derives from the covenant by which civil society and the sovereign is established. ("Every Law is a Contract betwixt the Prince and the people and therefore to be kept." Ibid., 69).
5. The Law of Nature is the same as divine law (ibid., 69-70).
6. Cases do not make law; neither the High Court of Parliament nor any of the King's courts, can make laws binding in future cases, and what they declare the law to be has application only to the issue in hand (ibid., 69).

[38] Aubrey's **Brief Lives**, vol. 1, 369.

course of their friendship the subject of the common law did not escape their conversations, indeed it is not improbable that the heated arguments, for which they were notorious, were sometimes prompted by Hobbes' extreme opinions about the nature and condition of the common law.[39]

The fact that Bacon's *Elements* inspired Hobbes' writing of the *Dialogue* makes it the more surprising that nowhere in the *Dialogue* does Hobbes mention either Bacon or the *Elements*. Although Hobbes was employed by Bacon during the final years of the latter's life,[40] Bacon's influence on Hobbes is usually regarded as negligible.[41] Taking their philosophical writings as a whole this conclusion may be warranted, but as far as legal theory is concerned Hobbes probably was more indebted to Bacon than to any other of his predecessors and contemporaries. Although there are some points of difference between them, there is an overwhelming preponderance of similarities between them, similarities which I shall endeavour to point out in the following pages. For the present it may be noted that both shared a contempt for Coke, both viewed the common law in a critical philosophical spirit and found it defective in divers respects. Bacon had a remarkably keen sense of the ambiguities and obscurities in the law, both statutory and judge-made, and advanced numerous proposals for reform. As a lawyer with considerable practical experience both as an advocate and as a holder of judicial office, Bacon tended to adopt a less extreme attitude towards the common law than Hobbes and, unlike him, conceded that substantive law might be created from the decision-making of judges. Perhaps Bacon's most outstanding contribution to legal theory is his collection of maxims derived by a process of induction from a vast area of disorganized legal materials. These maxims were not laws in themselves, but generalizations about the law—"laws of laws." Hobbes never tells us what he thought of Bacon's suggestions for systematization of the law or whether he approved of the idea of legal maxims; however, since Hobbes expresses criticisms about the uncertainties and anachronisms in the law, we may presume that he agreed in principle with the desirability and utility of the general overhauling of the law which Bacon advocated and attempted.[42]

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[39] See Sir Leslie Stephen, op. cit., 48-9; George Croom Robertson, op. cit., 187, n. 1.

[40] See Aubrey's **Brief Lives**, vol. 1, 331; Sir Leslie Stephen, op. cit., 12; George Croom Robertson, op. cit., 17-19.

[41] See, for example, Sir Leslie Stephen, **Hobbes**, 12-13; cf. J. E. G. de Montmorency, op. cit., 195, 203.

[42] Bacon's contribution to legal thought is expounded in such works as **Great Jurists of the World**, 144-68; Huntington Cairns, **Legal Philosophy from Plato to Hegel**, 205-45; Sir William Holdsworth, 5 **History of English Law**, 238-57, 398-9, 434-8, 485-9; Holdsworth, **Some Makers of English Law** (Cambridge, 1938), 102-110; Paul H. Kocker, "Bacon on the Science of Jurisprudence" (1957), XVIII; **Journal of the History of Ideas**, 3-26.

References to the writings of Bacon are to **The Works of Francis Bacon**, edited by J. Spedding, R. L. Ellis and D. D. Heath. This collection includes the **Letters and Life of Francis Bacon**, edited solely by Spedding. The editions referred to by the author are, in the case of volumes 9 and 14 of the **Works**, the Boston edition of 1864; for brevity in citation, these will be referred to as Spedding. With respect to the **Letters and Life . . .**, I have used the London editions of 1809 (vol. 5) and 1872 (vol. 6).

HOBBES' DEFINITION OF LAW

Foreshadowing Austin's definition of positive law Hobbes states that civil law is "the command of him or they that have the sovereign power, given to those that be his or their subjects, declaring publicly and plainly what every of them may do, and what they must forbear to do."[43]

Law so defined is to be distinguished from counsels, covenants, right and the sentences or judgments of judges. The manner in which it differs is as follows:

1. A counsel given from one man to another need not be obeyed, but if observed is done so for the simple reason that the action advised is for the subject's benefit. The counsellor speaks for the other's good only; his will is irrelevant to the advice he offers. A law derives from the will of the sovereign and the justification for obedience to law is that it is the sovereign's will. That a law be for the benefit or detriment of the subject is irrelevant.[44]

2. In civil society covenants between men do not make laws; on the contrary, laws make covenants for without them contracts would be "naked and weak," there would be no guarantee of performance and no obligation to perform. On this ground, Hobbes found Aristotle's definition of laws as precepts of right and wrong, formulated by common consent, inadequate.[45]

3. Whereas law obliges a man to do or forbear from doing, a right is "a liberty left me by the law to do any thing which the law forbids me not, and to leave undone any thing which the law commands me not."[46]

4. A sentence or judgment is a decision given upon certain facts determining an issue between two or more disputing parties. It commands and binds those parties only. A law, on the other hand, is a command addressed to individuals at large.[47]

Besides civil law, there is the Law of Nature and the law of nations.[48]

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[43] 6 E.W. 26; see also 2 E.W. 183, 3 E.W. 250-1.

[44] 3 E.W. 241, 2 E.W. 182-3.

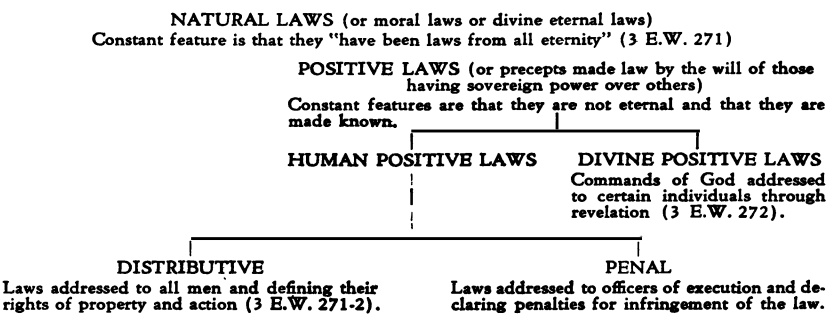
[45] 2 E.W. 21, 183-5, **Elements of Law**, Part II, chap. 10, p. 2, p 147.

[46] 2 E.W. 185-6; 3 E.W. 276.

[47] 3 E.W. 263, 270-1.

[48] **The Whole Art of Rhetoric**, 6 E.W. 447.

This division of laws Hobbes would presumably describe as a real division depending on the nature of the kinds of law involved. Elsewhere (3 E.W. 271-5) he amplified the distinction between the natural law and civil law. His classification is summarized in the following table.



Prior to the establishment of civil society there is no law but the Law of Nature. When civil society is formed the Law of Nature does not lose its relevance but becomes co-extensive with the civil law. "The Law of Nature, and the civil law, contain each other."[49] From thence the civil law becomes the sole criterion of justice and injustice.[50]

This equation of the civil law and the Law of Nature is one of the most difficult aspects of Hobbes' philosophy, but his meaning will become clearer if we pause to consider his conception of the Law of Nature. Starting from the premise that the primary impulse of man is to preserve himself against death and injury,[51] Hobbes postulates certain laws of conduct which if observed will secure the end of preservation. The most fundamental aspect of such law is "that peace is to be sought after, where it may be found; and where not, there to provide ourselves for help of war."[52] From this principle certain others follow, including the precept that the original right of all men to all things should be transferred or relinquished to a common sovereign,[53] and the precept that all contracts or covenants should be kept.[54]

Now the Laws of Nature are not laws in the same sense as civil laws, for in pre-civil society there is no obligation to obey them. They are more akin to theorems concerning the means whereby men can attain the end of self-preservation.[55] When Hobbes states that in civil society the Laws of Nature are co-extensive with the civil law he does not mean that the former become enacted as civil law; although this would be possible in the case of some of the Laws of Nature he postulates, in the case of others this would be impossible, both logically and practically. I say logically

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[49] 3 E.W. 253.

[50] 3 E.W. 251, 6 E.W. 25, 29, cf. 445. See also Bacon's **De Augmentis**, Book 8, Aphorisms 6 and 7 (9 Spedding, 313), where it is stated that there can be good and bad laws.

[51] 2 E.W. 8. See Howard Warrender, loc. cit.

[52] 2 E.W. 16, 3 E.W. 117.

[53] 2 E.W. 17, 3 E.W. 118.

[54] 2 E.W. 29-30.

[55] 4 E.W. 285, 2 E.W. 49, 3 E.W. 147. The only justification which Hobbes advances for designating the "Laws" of Nature as laws is that they can be considered as the commands of God or divine law (see, e.g., **Elements of Law**, Part II, chap. 10 7, p. 149). The subtle distinctions which St. Thomas Aquinas drew between divine law, natural law and human law are absent from Hobbes' philosophy, though, as will be mentioned later (see note 48 supra) Hobbes did propose a classification of laws.

Some of Hobbes' critics deny that his Laws of Nature can in any sense be described as laws. John H. Hallowell, for instance, maintains that they do not even rank as moral law and that their status is simply that of counsels of prudence. See Hallowell, **Main Currents in Modern Political Thought** (New York, 1953), 75. With this interpretation, this writer respectfully disagrees. Even if Hobbes' Laws of Nature are derived by reflection and reasoning upon man's impulses, the normative form in which these Laws are expressed, coupled with the fact that they are propounded by Hobbes as "a standard, a model, a pattern from which the quality of a particular action, the relevance of a certain situation and facts may be inferred" (A. P. d'Entreves, **Natural Law: An Introduction to Legal Philosophy** (London, 1951), 78-9, makes them no less norms than the civil law. The question of whether propositions are normative is, it is submitted, independent of the question of obligation to obey norms. Thus to say Hobbes' Laws of Nature are norms does not, logically, imply an obligation to obey those laws.

impossible because such Laws of Nature as those ordaining the formation of civil society and ordaining the covenant by which civil society is created—including the covenant to obey the commands of the sovereign so established—are meta-legal.[56] Those Laws of Nature pertaining to the inner realms of conscience and intention could not become enacted enforceable laws since the means of checking obedience or disobedience are lacking.[57]

If civil law is the command of the sovereign and the source of the sovereign's command is his or its will, then it might be supposed that in exercising his will the sovereign might infringe a Law of Nature. In such a case there would be no redress against him, for the civil law is co-extensive with the Law of Nature. Hobbes covers this contingency by saying that the sovereign is obliged by the Laws of Nature and is ultimately responsible to God.[58] He, too, is bound to pursue the end of self-preservation; his commands should embody and reflect the theorems which are supposed to secure this ideal for himself and for his subjects. Where he has not enacted a Law of Nature as civil law he is *presumed* to have the intention that the unenacted Laws of Nature should be his civil laws.[59] Civil law can thus be divided into written and unwritten law. To qualify as law, norms must be known: written laws are known by their publication, unwritten laws by right reasoning.[60]

This division of civil laws into written and unwritten, both of which proceed from the will of the sovereign and are supposed to give binding force to the Laws of Nature, leads us to a consideration of Hobbes' treatment of the common law.

THE COMMON LAW AND THE FUNCTION OF JUDGES

Hobbes records one of his infrequent agreements with Coke when he acknowledges "that reason is the life of the law, nay the common law itself is nothing else but reason" and that "Equity is a certain perfect reason, that interpreteth and amendeth the law written, itself being unwritten, and consisteth in nothing else but reason."[61] What in their respective interpretations was right reason and who had the better faculty of discovering and declaring it, were matters in which Hobbes and Coke did not agree.

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[56] Howard Warrender, op. cit., 146-50.

[57] Ibid., p. 150-1.

[58] Ibid., 154-8, 178-9, 180-8.

[59] "The will of another, cannot be understood, but by his own word, or act, or by conjecture taken from his scope and purpose; which in the person of the commonwealth, is supposed always consonant to equity and reason." (3 E.W 259).

See also 2 E.W. 191, 194; 6 E.W. 26.

[60] "For whatever men are to take knowledge of for law, not upon other men's words, but everyone from his own reason, must be such as is agreeable to the reason of all men; which no law can be, but the law of nature." (3 E.W. 258).

[61] 6 E.W. 4, 6. Cf. Bacon's **Reading on the Statute of Uses** (14 Spedding, 415) where he declares that "common law is common reason."

To Coke the reason which was the soul of the law[62] was "an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason."[63] Furthermore this legal reason was *summa ratio*. The common law consisted of a gradually unfolding system of norms declared and applied by judges, faithfully transmitted to succeeding generations in reports and commentaries and by the teaching of lawyers in the Inns of Court.[64] Hobbes took great exception to this claim by Coke of a superior species of reason shared only by the common lawyers. While he conceded that knowledge of the law was obtained by long study and experience he could see no basis for distinguishing the artificial reason of the lawyers from the natural reason of laymen, and made so bold as to suggest that given time to acquire a knowledge of the laws he would be equally fitted to act as a judge as a lawyer.[65]

When Hobbes records his agreement with Coke's identification of the common law with the dictates of right reason but hastens to add that what he means by right reason is something of which *all* men are capable and not artificial reason gained by long study and experience, he does not use reason in the same sense as the philosophers of the scholastic tradition. To understand the peculiar meaning which Hobbes gave to reason,

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62 1 **Institutes** 138.

63 6 E.W. 4. See also 3 E.W. 256, 6 E.W. 14-15, 38.

64 The salient feature of this view of the common law was that law was given, not made, that it was revealed through time and declared and interpreted by the wisdom of a specially trained class. Furthermore, in the common law, the actual and the ideal were one, for which reason, deliberate alteration was to be avoided. J. N. Figgis has epitomised this attitude in the following way:

> "The Common Law is pictured invested with a halo of dignity peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God in the heart of man. As yet men are not clear that an Act of Parliament can do more than declare the Common Law. It is the Common Law which men set up as an object of worship. They regard it as the symbol of ordered life and disciplined activities, which are to replace the license and violence of evil times now passed away. . . . The Common Law is the perfect ideal of law; for it is natural reason developed and expounded by a collective wisdom of many generations." (**Divine Right of Kings** (2nd ed., Cambridge, 1914), 228-30).

Coke's speeches, legal writings and the notes in his **Reports** afford ample illustrations of the characteristics of which Figgis speaks. The historicism of the common lawyers of the seventeenth century has been a persistent feature in English jurisprudence and although its representatives in the nineteenth century modified the uncritical bias exemplified by their predecessors, the writings of Edmund Burke testify that the mystical reverence for an historically determined legal system had not altogether expired. See especially Burke's **Tract on the Popery Laws**, c. 3, part 1 in VI, **The Works of Edmund Burke** (Boston, 1865), 322-3.

65 See 6 E.W. 5-6. The philosopher in the **Dialogue** contends

> "That the law hath been fined by grave and learned men, meaning of the professors of law, is manifestly untrue; for all the laws of England have been made by the kings of England, consulting with the nobility and commons in parliament, of which not one in twenty was a learned lawyer." (6 E.W. 5).

For the same reason as Hobbes believed a philosopher would make as good a judge as a lawyer, he thought bishops would serve equally well as Chancellors, and perhaps better for they are usually

> "the most able and rational men, and obliged by their profession to study equity, because it is the law of God." (6 E.W. 66, cf. Coke, **Fourth Part of the Institutes of the Laws of England**, 79).

it is necessary to consider some of the fundamental notions and premises of his philosophy as a whole, and emphasize the points at which he departs from classical-scholastic philosophy.

With the schoolmen, Hobbes acknowledges that reason is the faculty which distinguishes man from animals, but whereas the Aristotelian version of scholastic philosophy drew a distinction between theoretical and practical reason and would attribute to some individuals a superior quality of practical reason which would qualify them better than others for the exercise of political authority, Hobbes regarded reason as a singular faculty equally distributed amongst men.[66] In his system reason is the faculty of ascertaining causes and effects, not actual causes or final causes, but hypothetical efficient causes. Hence, reason is the faculty of logical thought by which men are able to demonstrate how certain events are generated by reference to their hypothetical efficient causes.[67] It refers also to the process whereby human beings spell out the implications and relationships between the general names appropriated to thoughts, *i.e.*, it refers to the making of analytic propositions.[68]

Opposed to reason are the passions, the most effective of which is the desire for self-preservation.[69] Although reason is an inborn faculty or part of man's original nature—as also are the passions—reason is not of itself a sufficient motive for action and is slave to the passions. While it is reason which compels men to covenant civil society into being, reason is "ignited" by the desire for self-preservation.[70] Self-preservation being the end of man, the function of reason is to supply the individual with knowledge of the consequences of contemplated actions, thereby enabling him to employ the best possible means of attaining his end. For Hobbes, the supreme good, indeed, the only good, is self-preservation and every action conducive to that end is also good and right.

The principles of right action are the Laws of Nature: they require no transcendental source or sanction (although, as an afterthought, Hobbes chooses to equate them with divine laws), for the end of self-preservation is part of the existenial man, concerning only his life on earth, known without revelation and discoverable by the exercise of reason. Such a conception of the Law of Nature is vastly different from the scholastic

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66 **De Homine**, cap. 10, art. 3.

67 See Howard Warrender, op. cit., 241.

68 "**Reason** . . . is nothing but reckoning, that is adding and subtracting, of the consequences of general names agreed upon for the **marking** and **signifying** of our thoughts." (3 E.W. 30).

Reason, in the context of Hobbes' writings, is to be distinguished from prudence and deliberation. Prudence is based upon memory and experience of past experiences which give rise to expectations. Deliberation is closely akin to reason in that it involves the computation of consequences, but whereas reason pertains to generals, deliberation pertains to particulars. See Howard Warrender, op. cit., 269.

69 The primacy of the desire for self-preservation derives from the conditioning of the satisfaction of all other human appetites or passions upon the preservation of the individual body. See Leo Strauss, **The Political Philosophy of Hobbes** (Oxford, 1936), 15. The derivation of self-preservation as the fundamental principle is in itself the product of reason. Ibid.

70 In Strauss' words, it is "passion which brings man to reason"— the fear of violent death. Op. cit., 18.

conception wherein the source of natural norms was found in a transcendent and divine order and knowledge of those norms in a combination of reason and revelation. According to this notion of the Law of Nature, there was a difference between the eternal and the ideal on the one hand, and the earthly and the actual, on the other. Nevertheless there was a relationship between the two spheres in that part of the eternal and the ideal had reference to the earthly and actual. Through revelation God had disclosed His will to man thereby making His commands binding upon all human creatures. By the exercise of His reason, man could discover further principles which God intended should govern relations between men: this was the natural law. Although Hobbes did not deny the validity of revealed divine law he could not subscribe to the scholastic view that the natural law was the reason of God discovered through the exercise of human reason. For him the earthly and transcendent spheres were quite distinct and the ideal attainable on earth could be discovered only through observation and reflection upon the physical potentialities and dispositions of men. With the exception of the law given by God to Moses, men could not ever hope or even dare to pierce, by reason alone, the mystery of transcendence, and thereby ascertain God's intentions as to how men should arrange their temporal affairs.

Hobbes finds, however, that although men can through reason discover how they should act to attain the end of self-preservation, there is no guarantee that they will act in accordance with the principles of right action. Reason, he says, is impotent and something more is required to make it effective. In this respect, he thought Aristotle had been short-sighted.[71] Furthermore, account had to be taken of the fact that men tended to err in their reasoning[72] and that the Laws of Nature could not be prescribed with such particularity as to cover the manifold of actual human situations.

The formula Hobbes prescribed for resolving this predicament was the establishment of civil society governed by a common sovereign whose reason would be deemed "perfect" and accorded pre-eminence over the reason of his subjects.[73] As summarized by Leo Strauss,[74] the argument runs as follows:

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71 Leo Strauss, op. cit., 80-1.

72 In other words, men tended to arrive at different conclusions as to the laws of right reason. Selden had much the same opinion as Hobbes, as is demonstrated in his reputed statement that

> "When the Schoolmen talk of **Recta Ratio** in Moralls, either they understand Reason as 'tis govern'd by a Comand from above, or els they say no more than a woman, when shee sayes a thing is soe, that is her reason p(er) swades her it is soe." (**Table Talk**, 116).

73 See Leo Strauss, op. cit., chap. VI, 79-107.

74 Ibid., 159. See also Hobbes, **Elements of Law**, 149-50, 3 E.W. 19, 6 E.W. 22. The passage which Strauss cites from the **Elements** (§8, p. 150) asserts that there is no such thing to be found or known as **rerum natura** and that "right reason is non existent." What Hobbes meant here was not that there could be no Law of Nature discoverable by the exercise of the reasoning faculty but that in pre-civil society, the Law of Nature did not oblige individuals and that it was ineffective as an activating principle of action.

"Because all men are equally 'reasonable,' the reason of one or more individuals must arbitrarily be made the standard reason as artificial substitute for the lacking natural superiority of reason in one or more."

From thence, that which the sovereign commands shall be considered in accordance with right reason as the Law of Nature. The Law of Nature and the civil law are co-extensive. In the sovereign resides not only the supreme power to command but the exclusive right of judicature. He may delegate his authority to his agents, for example, his judges, but the actions of his agents are always the actions of the sovereign. Since, in the exercise of judicial power the sovereign is said to act according to right reason, whether that right reason be expressed as written or unwritten law, his judges likewise are said to adjudicate according to right reason. Hence the common law is to be equated with right reason.

Before taking up the problem of some of the inconsistencies in Hobbes' treatment of the relationship between the Law of Nature and civil law in political society, it is necessary to turn to an examination of the common lawyers' idea of the Law of Nature and its relation to the common law. It has been stated earlier that generally speaking the common law during the Middle Ages was rationalised by reference to scholastic philosophy. This assertion can only be accepted with the reservation that it has never been firmly established and that the great historians of English legal thought have tended to shie away from the question of relating the theoretical premises of the common law to any systematic philosophy.

Sir Frederick Pollock has pointed out that the Law of Nature, by that name, seldom appeared in the literature of the common law, and attributes its absence to its identification with the Canon Law, and the general unpopularity of ecclesiastical courts and jurisprudence in England.[75] He dismisses such avowed interpreters and supporters of the medieval natural law tradition as Sir John Fortescue by saying that their references to natural law were made for purposes other than the rationalisation of the common law. Similarly the invocation of the Law of Nature by common lawyers in the period following the disintegration of the spiritual courts is to be explained by the fact that after the Reformation, the Law of Nature lost its previous connotations and became an innocuous expression which could be employed to adorn legal argument.[76] Even if the references to the Law of Nature in the writings of the common lawyers were designed for no other purpose than to give the stamp of orthodoxy to their reasoning, it must be remembered that the treatises circulating

[75] "The History of the Law of Nature," **Essays in the Law** (London, 1922), 53. See also Christopher St. Germain, **The Doctor and the Student** (ed. William Muchall) (Cincinnati, 1874), Dialogue I, chap. 5, p. 12.

[76] Ibid., 57-8. It is noteworthy that Pollock attaches little significance to such cases as **Sharington v. Strotton** (**Plowden's Reports**, 298) and **Calvin's Case** (1609), 7 Co. Rep. 1), both of which featured copious citations of the Law of Nature. According to him, these cases "were highly exceptional, of the first impression, and argued throughout on general principle" (ibid., 57). Furthermore, they threw no light "on the usual habit of mind of English lawyers" (ibid.). De Montmorency mentions further examples from **Plowden's Reports** in which the Law of Nature is invoked by counsel and judges (**Great Jurists of the World**, 205-6).

in Hobbes' time would give the lay-reader no cause for disbelieving the sincerity with which their authors allied the common law with the postulates of scholastic philosophy.

In Christopher St. Germain's *Doctor and Student*,[77] a work which Hobbes obviously consulted, there appears a very clear statement of the relationship between the common law and the Law of Nature (or what the common lawyers preferred to call, the Law of Reason), and the position taken by St. Germain represents the traditional medieval notion of subordinating all human laws to transcendentally given norms. For example he speaks of the Law of Reason as "written in the heart of every man . . . teaching him what is to be done, and what is to be fled."[78] He describes the law of England as having six sources—the Law of Reason, the Law of God, customs of the realm, maxims, particular customs and statutes—and of these sources there are two, the Law of Reason and the Law of God, which together constitute a higher law to which all other forms of law must conform or else they are not, properly speaking, laws obliging the subject to obedience.[79]

Hobbes, as we have said, denied the existence of any such system of superior norms against which the positive laws of civil society were to be tested. But it was not only on this basis that he criticized the common law. Indeed, his principal contention against the justification advanced by the lawyers for the superiority of the common law, was that they did not in reality possess any superior or special reasoning faculties which fitted them to assume a monopoly over the business of law-making, pleading and adjudication.[80] Furthermore, there are reasons for believing that the common lawyers were little troubled by Hobbes' refutation of the traditional idea of the Law of Nature and were more agitated by his suggestion that lawyers' reason was nothing more nor less than common reason. This suspicion is confirmed by Sir Matthew Hale's spirited rejoinder to Hobbes' *Dialogue*.

Hale distinguishes three types of reason:[81] (1) subjective reason which is the faculty of perceiving "the Congruity, Connexion and fitt Depen-

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77 Loc. cit.

78 Ibid., Dialogue I, chap. 2, p. 5; see also 6-7.

79 Ibid., 11.

80 Even during Hobbes' lifetime the strong guild spirit and tradition in the legal profession which had developed in the Middle Ages had not weakened to any great extent. Although the golden age of the Inns of Court may have passed, the united front presented by the lawyers in the face of the constitutional struggles of the seventeenth century demonstrated that the resilience of the ancient corporate spirit was still something to be reckoned with. Sir Ernest Barker places considerable emphasis on this factor in his account of the English response to the new absolutism accompanying the rise of the modern state. He says, for instance, that:

> "The legal profession, pivoted on the Bar, and on barristers who had long been organized in their own voluntary Inns of Court, was largly an autonomous profession, engaged (along with judges who had themselves been barristers in their day) in developing rules of law and methods of legal procedure on its own professional lines, and confronting the King and his ministers with the collective weight of its professional opinion." (**Principles of Social and Political Theory** (Oxford, 1951), 25-6).

81 "Reflections by the Lord Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe," in Sir William Holdsworth, 5 **History of English Law**, 500-1.

dence of one thing upon the other";[82] (2) the faculty of reasonable nature which fits man for the function of gaining knowledge or of achieving ends;[83] and (3) applied reason,[84] which is the product of the application of the faculty of reasonable nature to a particular subject matter. Subjective reason includes the faculty for discovering a rational order external to man but of which man is a part, since the subjects to which this type of reason may be addressed may have a reason of their own. The faculty of reasonable nature inheres in all men but it assumes different forms, so that men are by their very nature variously equipped to undertake the multitudinous occupations in life. The faculty of applied reason is peculiar to individuals who have been trained and are experienced in certain skills and professions such as medicine and law.

In a sense, what Hale propounds as species of reason can be assimilated with the Aristotelean distinction between theoretical and practical reason. Thus on the one hand he could admit that knowledge of the principles of the right order of human action given in a rational world order is possible. For example, he says that:

> "in Moralls though the objects thereof are more obscure, and not soe open to a distinct and Cleare Discoverie, yett there is a Certaine Reasonableness and Congruitie, and Intrinsick Connexion and Consequence of one thing from another antecedent to any Artificiall Systeme of Moralls or Institution of Laws."

On the other hand, Hale, like Aristotle, realized that more was needed beside knowledge of these principles to ensure that they did in fact operate in the life of the community. The skepticism which led Hobbes to the belief that cognition of the Law of Nature (as he propounded it) was impotent to propel men towards the end implicit in the Law of Nature, led Hale to the conclusion that civil society stood in need of the certainty and order associated with the artificial reason of lawyers.

> "In Moralls and Especially with relation to Lawes for a Communitie, tho the Comon Notion of Just and fitt are comon to all men of reason, yett when Persons come to particular application of those Comon Notions to Instances and occaisions wee shall rarely find a Comon Consent or agreemt, between men tho' of greate reason, and that reason Improved by greate Study and Learning, wittness the great disagreemt between Plato and Aristotle Men of great reason in the frameing of their Laws and Comonwealth, the greate difference in most of the States and Kingdomes in ye world in their Laws administrations and measures of right and wrong, when they come to particulars."[87]

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82 Ibid., 500.

83 Ibid., 501.

84 Hale does not use the phrase "applied reason," but I think it is an apt description and certainly more compendious than Hale's description, i.e., "the reasonable facultie . . . in Conjunction wth the reasonable Subject, and habituated to it by Use and Exercise" ibid., 501).

85 Ibid., 501-2.

86 Ibid., 501.

87 Ibid., 502-3.

What Hale desired above all was particularity in the specification of norms of conduct and certainty. He admitted that determinate and certain laws might sometimes be arbitrary in their application, but said this was less an evil than the arbitrariness of the Law of Reason.[88] However, to avoid the inconveniences of certain and particular laws, the framing of those laws should be entrusted to men of experience, namely, to the men of law. The law in short is to be

> "the Production of long and Iterated Experience wch, tho' itt be commonly called the mistress of Fooles, yett certainly itt is the wisest Expedient among mankind, and discovers those defects and Supplys whch no witt of Man could either at once forsee or aptly remedye."[89]

Hale can hardly be represented as the epitome of common law scholars which Hobbes opposed for he was not uncritical of the state of the law and contributed much to awaken the profession from its self-satisfied lethargy.[90] Moveover, he had broken loose of the type of thinking exemplified in the *Doctor and Student* and veered towards Hobbes' position in denying the effectiveness of the law of right reason as the principle for ordering human action in society. His one claim to identification with Coke and other devotees to the spirit of the common law was his faith in the wisdom of the legal profession and the efficacy of the common law as the accumulated doctrine of generations past and present. Whereas Hobbes placed his confidence in the ability of logic to spell out legal norms from the more abstract norms of legislation and the Law of Nature, Hale placed his trust in the prudential faculties of trained lawyers and would accord to the deliberations of judges the status of positive laws.

This artificial reason is analogous to (if not identical with) the practical wisdom of which Aristotle speaks in the *Nichomachean Ethics*.[90a] It is there contrasted with scientific or theoretical wisdom—meaning knowledge of the unalterable, the universal and eternal, knowledge of necessary truths —and is taken to signify prudence or common sense as applied to human affairs. The man of practical wisdom needs not only knowledge of general principles, but familiarity with particularities and this familiarity comes only from practical experience. Practical wisdom is exhibited when men of prudence deliberate about human conduct; excellence in deliberation is attained when the means considered necessary for the attainment of an end are appropriate to that end, and the end in view is good.

Now, if in Hobbes' opinion lawyers are to be denied the possession of the faculty of artificial or practical reason (or wisdom), are there any arguments for making the business of the law the preserve of a particular profession and for according an authoritative status to the deliberations of lawyers? Hobbes' answers to these questions can be answered by

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88 Ibid., 503-4.

89 Ibid., 505.

90 For Hale's contributions to legal thought and law reform see Sir William Holdsworth, 6 **History of English Law**, 574-97; **Some Makers of English Law**, 134-45; G. Hurst, "Sir Matthew Hale" (1954), 70 L.Q.R., 342-52.

90a See Book 6 ff.

examining his observations concerning the functions of judges, the authority of their pronouncements and the qualities required of a good judge.

The function of judges who, being appointed by the King, are agents of the King is to adjudicate according to his will which is expressed in his commands, or written laws, and in his unwritten laws, which are the unenacted Laws of Nature.[91] In the performance of his appointed duties "the judge doth no more but consider whether the demand of the party, be consonant to natural reason, and equity; and the sentence he giveth is therefore the interpretation of the Law of Nature."[92] But since judges may err in their interpretation of the Law of Nature, their judgments ought not to be regarded as authoritative utterances which bind in the future. In Hobbes' words, [93]

> "Though the sentence of the judge, be a law to the party pleading, yet it is no law to any judge, that shall succeed him in that office."

C. K. Allen has remarked of this passage that it would probably "have been accepted by most lawyers" of the day,[94] but it should be borne in mind that Hobbes was dealing only with the immutable Law of Nature in relation to precedents and was not speaking about the authority of precedents in matters not pertaining to the Law of Nature.[95] While both Coke and Chief Justice Vaughan attempted to clarify and systemmatise the principle of *stare decisis*, the seventeenth century can hardly be regarded as one in which a doctrine of precedent had been stabilized. Citations of previous cases and of commentaries are not infrequent and on points of practice and procedure precedents are followed rigorously.[96] However, as Coke was to observe later, there was a tendency to cite cases indiscriminately and the system of reporting was not yet sufficiently good to guarantee the accuracy of the reports.[97] Coke's own reports were designed in part as a model for others to follow, but unfortunately he was succeeded by a generation of crude imitators. For the rest of the seventeenth century "the whole theory and practice of precedent was in a highly fluctuating condition."[98]

Although Hobbes disclaimed that there was any special kind of reason which was the preserve of lawyers he conceded that the practice of

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91 "In all courts of justice, the sovereign (which is the person of the commonwealth) is he that judgeth" (3 E.W. 256-7). See also 3 E.W. 165-6, 228-30; 6 E.W. 23.

92 3 E.W. 263.

93 Ibid., 266. See 263-6 ff. These remarks of Hobbes on the use of precedents can be compared with Bacon's aphorisms concerning the use of examples. Bacon's attitude was that examples should only be regarded as rules of prudence; they should "be used for advice, not for rules and orders. Wherefore let them be so employed as to turn the authority of the past to the use of the present." See **De Augmentis**, Book 8, Aphorism 31 (9 Spedding, 320).

94 **Law in the Making** (3rd ed., Oxford, 1939), 199.

95 Ibid., 200.

96 Ibid., 194.

97 Ibid., 196.

98 Ibid., 198.

adjudication according to the principles of right reason was an art and demanded certain qualities in those who were appointed as judges. The prerequisites were firstly:

> "A *right understanding* of that principal law of nature called *equity*; which depending not on the reading of other men's writings, but on the goodness of a man's own natural reason, and meditation, is presumed to be in those most, that have had most leisure, and had the most inclination to meditate thereon"[99]

Secondly, the judge should have "*contempt of unnecessary riches,*[100] *and preferments*"; thirdly, he should free himself of passions,[101] and fourthly he required *patience to hear; diligent attention in hearing; and memory to retain, digest and apply what he hath heard.*[102]

Several of the Laws of Nature have particular application to judges, for example, the principles that a man should not be a judge in his own cause;[105] that no man should be a judge if he expects to receive rewards from the parties coming before him;[104] that no contracts should be made with judges to secure favourable decisions.[105] In this connection note should be made of the meaning Hobbes gives to equity. He does not use the expression to signify any special body of substantive law or to the jurisprudence of particular courts. Rather, it refers to some of the Laws of nature which have special application in the disposition of controversies. In *De Cive*, equity is defined as a precept ordaining equality of treatment to the disputants.[106] In *The Whole Art of Rhetoric* Hobbes makes equity even broader and indistinguishable from the law of right reason.

> "From *equity* proceed those actions, which though the written law commandeth not, yet, being interpreted reasonably and supplied, seems to require at our hands.
>
> "Actions of *equity* are such as these: Not too rigorously to punish errors, mischances, or injuries. To pardon the faults that adhere to mankind. And not to consider the *law*, so much as the *law maker's mind*; and not the *words*, so much as the meaning of the law. And not to regard so much the fact, as the intention of the doer; nor part of the fact, but the whole; nor what the doer *is*, but what he *has been* always or for the most part. And to remember better the good received than the ill."[107]

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99 3 E.W. 269.
100 Ibid.
101 Ibid.
102 Ibid.
103 2 E.W. 42.
104 Ibid.
105 Ibid., 43.
106 Ibid., 40.
107 6 E.W. 446. Both Bacon and Selden spoke of equity in the narrow sense of the jurisprudence of the Court of Chancery. To Selden there was little in equity to commend it; it was nothing but the Chancellor's conscience and as such varied from Chancellor to Chancellor:

> "Tis all one as if they should make ye Standard for ye measure wee call A foot, to be ye Chancellors foot; what an uncertain measure would this be; One Chancellor ha's a long foot another A short foot a third an indifferent foot; tis ye same thing in ye Chancellors Conscience." (**Table Talk,** 43).

In the light of this interpretation of equity, it is not difficult to understand why Hobbes should not see any justification for the administration of equity in a separate jurisdiction.

OF STATUTES AND THEIR INTERPRETATIONS

Like Bacon, Hobbes contended that the written law prevailed over the unwritten. To the suggestion "*that the common Law, hath no controller but the parliament,*"[108] he responded by saying that since Parliament was assembled and dissolved by the King the supreme power rested with the King in Parliament, it was not that the commands of Parliament were superior to the common law, but that the commands of the King acting alone or with the advice and consent of the Lords and Commons were supreme.[109]

When Hobbes speaks of the written law he includes not only statutes but all other legislative forms. He is particularly insistent that the written law, especially if it does not reproduce the Law of Nature, be published, for it is only in this way that it becomes known and hence binding on the subject.[110] In addition it must be apparent that the law proceeded from the will of the sovereign, that is, there must be reference to the author of the command and of his authority.[111] Verification of these matters is afforded by such means as entry of laws in public registers and affixation of public seals.[112]

Judges have the function of interpreting written laws.[113] The meaning of statutes cannot indeed be discovered without interpretation.

> "For the significations of almost all words, are either in themselves, or in the metaphorical use of them, ambiguous; and may be drawn in argument, to make many senses."[114]

In interpreting the written law a judge should look to the legislator's intention, and since the legislator is presumed to intend equity the judge is justified in interpreting the law in a manner which is consistent with the principles of right reason.[115]

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108 3 E.W. 255. See also Bacon, **De Augmentis**, Book 8, Aphorism 44 (9 Spedding, 323).

109 Ibid.

110 For whatsoever law is not written, or some way published by him that makes it law, can be known no way, but by the reason of him that is to obey it; and is therefore also a law not only civil, but natural.
3 E.W. 258. See also 2 E.W. 191, 194; 3 E.W. 257-9; 6 E.W. 26; Howard Warrender, op. cit., 80-1, 256.

111 3 E.W. 259-60; Howard Warrender, op. cit., 81-5.

112 Ibid., 260-1.

113 Ibid., 261-3.

114 Ibid., 267. See also 6 E.W. 64, 66 and cf. Bacon, **De Augmentis**, Book 8, Aphorism 66 (9 Spedding, 331).

115 3 E.W. 267-8.
But because a judge was obliged to interpret the written law in accordance with equity or right reason, it did not mean that he could declare a law contrary to the Law of Reason a nullity. In this respect Hobbes departed from the then current theory that the courts might declare an enactment void for repugnancy to the higher law, whether that higher law be identified with the law of God or the common law. See C. H. McIlwain, **The High Court of Parliament . . .**; C. K. Allen, **Law in the Making**, 365-79; J. W. Gough, **Fundamental Law in English Constitutional History.**

Generally speaking, Hobbes seems to have preferred written laws to unwritten and ideally would have preferred to restrict the function of judges to the interpretation of written laws according to the dictates of equity. With Bacon he would probably have agreed that "that is the best law which leaves the least to the discretion of the judge."[116]

CUSTOM AND COMMENTARIES ON THE LAW

Custom *per se* does not, according to Hobbes, make law, nor can judges make it so by declaring it to be reasonable. The sovereign alone can convert customs into law, but if a custom is reasonable it is part of the Law of Nature which in turn is part of the civil law.[117] In such cases "it is not the custom, but the equity that makes it law."[118] Bacon was less extreme than Hobbes in this matter, for although he conceded that custom was "a kind of law,"[119] he emphasized that custom did not without some authoritative sanction become law. "Let reason," he says "be esteemed prolific and custom barren. Custom must not make cases."[120]

Similarly in relation to the status of the commentaries of learned authors on the law, Bacon's views are more moderate than Hobbes, though both agree in denying that the opinions of writers can be law properly so-called.[121] Hobbes, as has been noted, was most distressed at the inaccuracies in Coke's *Institutes* and for Coke's passing off as law that which was little more than his own inference or invention. Bacon saw advantages in commentaries and text-books in the learning and dissemination of the law but in the interest of certainty of the law advocated limitation upon their citation in court.

> "For by them the meaning of laws is distracted, the judge is perplexed, the proceedings are made endless, and the advocate himself, as he cannot peruse and master so many books, takes refuge in abridgements."[122]

He suggested that "one good commentary, and a few classic authors" (or selections therefrom) should be received as authentic sources and interpretation of the law, but for the rest they should neither be cited in court nor received as authorities.

CONCLUSION

Hobbes the philosopher and Hobbes the jurist are one; and just as the philosophy of Hobbes marks the beginnings of a man-centred, utilitarian era in philosophical thought growing out of disillusionment with the effectiveness of scholasticism as an instrument of social control, so also his theory of the nature and function of law represents a rejection of that

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116 De Augmentis, Book 8, Aphorism 46 (9 Spedding, 324).

117 3 E.W. 252-3, 271; 6 E.W. 62-3.

118 6 E.W. 63.

119 De Augmentis, Book 8, Aphorism 21 (9 Spedding, 317).

120 Ibid., Aphorism 11 (9 Spedding, 315).

121 3 E.W. 255; Bacon, De Augmentis, Book 8, Aphorism 77 (9 Spedding, 335).

122 De Augmentis, Book 8, Aphorism 77.

peculiar version of scholasticism evolved by the common lawyers. Hobbes belongs to the age of Galileo, Bacon, Descartes and Spinoza, an age of speculative genius in which the mystery of transcendance was disavowed and in which the possibilities of knowledge and achievement of all things did not seem too remote.

Inspired, no doubt, by the example of Bacon before him, Hobbes, the ageing philosopher, gave his attention to the common law of England, not only as a body of particular norms but as a theory of law. If he lacked experience in the practical affairs of political life and was wanting in the common sense which the lawyers prided themselves in possessing, he did not lack the ability to subject the theoretical basis of the common law and its rules and doctrines to the acid test of rigorous logical analysis. Taking the principle of self-preservation as his "basic norm," Hobbes proceeded to demonstrate the necessity for civil society, for a determinate human superior, for civil law conceived as the command of the sovereign. Judges were agents of the sovereign and their pronouncements were the pronouncements of the sovereign. Since the sovereign was obliged by the Law of Nature, he could be imputed with the intention of translating the Laws of Nature into positive law. That being so, judges, who were expected to act according to the sovereign's intentions, should apply the Law of Nature where necessary, including in this connection the interpretation of legislative enactments.

Although there was a Law of Nature which men might discover by the exercise of their reason, it was a body of norms built upon one fundamental premise, the principle of self-preservation, and depended in no way upon a transcendental sanction. But men, being as they were, were prone to commit errors in reasoning. This being the case Hobbes felt it inadvisable for judges to have the authority of making their errors in reasoning binding upon future generations. Hence precedents should not bind. Though sovereigns too might err, their commands should be regarded as binding till revoked; their commands were to be superior to the pronouncements of judges, to the opinions of scholars and to customs.

The storm of protest which Hobbes' writings evoked from the common lawyers cannot be attributable to his denial of the binding force of precedents, or to his assertion that custom *per se* does not make law, or even to his statement that the common law is nothing but right reason. It has been noted that the common law in the early part of the seventeenth century had no rigid doctrine of *stare decisis*, that customs had to receive the stamp of reasonableness before deserving the rank of law and that the *doyen* of the common lawyers, Coke, himself spoke of the common law as the law of right reason. The truth of the matter is that Hobbes made so bold as to assert the supremacy of legislation over case-law, as to locate sovereignty in the monarch rather than in parliament or in the law, and that he presumed to remove the veil of mystery from the art which the common lawyers professed and practised. Since the Middle Ages the lawyers had been a closely united guild and the audacity of a

layman, such as Hobbes, in suggesting that experience and professional training were all for nought, could not but arouse resentment.[123]

Even if Hobbes' political and legal philosophy had not been resurrected from the obscurity and contempt which was its fate in the eighteenth century and reinstated by the Utilitarians of the nineteenth century, it would be a mistake to suppose that the law of England was not affected by him. Sir William Holdsworth has, for instance, said of the *Dialogue* that it was "the first comprehensive reasoned criticism" of English law, and it is not unlikely that Sir Matthew Hale's subsequent critical works may have been the outcome of the promptings of Hobbes for law reform. But even if Hobbes did succeed in hastening a reappraisal of substantive and procedural law in England, it would seem that he had little success either in inducing the common lawyers to adopt his legal philosophy or in provoking them to contradict it with a re-affirmation of scholastic legal theory. If at any time in the development of English legal thought the lawyers thought it necessary to have a philosophical basis for the legal system that time had certainly passed by the seventeenth century. In the sixteenth century Christopher St. Germain had indeed produced a work which sought to reconcile the common law with the philosophy of the schoolmen, but in view of the noticeable absence of deep concern amongst lawyers for the abstract principles expounded by St. Germain, one is led to the conclusion that speculation about the nature and purpose of law was not considered a lawyer-like business.

The observations of the most prominent English legal historians confirms the suspicions that Hobbes' legal critics were indifferent to his pronouncements about the definition of law, the end of law and about his analysis of sovereignty. Where the lawyers did draw issue was on Hobbes conclusions about affairs of the moment, such as the location of sovereignty in the King, the idea that the craft and science of law needed little more than an education in logic and rhetoric, and the suggestion that the extent of the Royal prerogative was not limited and defined by law. Maitland once remarked that the common law "has sound instincts, and muddles along . . . towards convenient conclusions."[124]. Holdsworth announced with seeming pride, that "English lawyers are not, and never have been, ready to receive and use as the basis of their reasoning the theories of legal and political philosophers"[125] and attributed their aversion to theoretical speculation to their preoccupation with the "infinitely complex" facts of life and the inadequacy of any one theory to fit all situations. Hence, he says:[126]

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123 See note 80 supra.

124 F.W. Maitland, 3, **Collected Papers** (ed. H. A. L. Fisher, Cambridge, 1911), 319.

125 Sir William Holdsworth, **Some Lessons from Our Legal History** (New York, 1928), 109.

126 Ibid., 128. See also 104-6.

> ". . . our common lawyers have been content to go from precedent to precedent, and to build up gradually rules to fit each case, with the result that they have used a mixture of logic, of experience, and of legal and political theory, to evolve their principles."

If one had to select any one theorist whose philosophy corresponded most closely to the mental attitude of the common lawyers, choice would inevitably fall upon Edmund Burke.

The question, however, remains of whether there might be a need to go beyond the simple faith in the system of the common law as an instrument of social control which by its method alone is adequate to achieve human goals. We know that in some areas the common law has demonstrated considerable flexibility and that in others change has had to come about by legislation. We know also that the common lawyers have not in practice shown themselves averse to bringing about deliberate changes and have not always been content to see the law grow from within, precedent by precedent. But when in reflecting upon the law the lawyer concludes that laws require revision, what are his criteria of judgment? Bentham and his disciples approached the problem of law reform with clear defined moral precepts in mind. In the case of Hobbes we have an outstanding example of the application of the dual ideals of logical consistency and self-preservation to the problem of legal criticism.

The end of law, said Hobbes, was the "preservation of all mankind."[127] Given certain institutional arrangements it was the function of lawmakers to devise laws conducive to this end. There were some precepts — the Laws of Nature — discoverable by reason, which, if observed, would achieve for the individual the goal of self-preservation. Otherwise, the content of laws was a matter of indifference and so long as they were not inconsistent with the Laws of Nature and were internally consistent they would not warrant criticism. But Hobbes asserted that the Law of Nature and civil law were co-extensive and that the intention of the sovereign was to be presumed to be to command in accordance with right reason. On what ground, therefore, can anyone evaluate the civil law?

Hobbes himself embarked upon a detailed criticism of particular aspects of the law of England without apparently realizing the inconsistency with his previously stated opinion. Furthermore, he states that the sovereign may in fact transgress the Laws of Nature, and where the sovereign commands what is contrary to the end of man, *i.e.*, self-preservation, the subject is not obliged to obey him. It is impossible to resolve the apparent incompatibility between these aspects of Hobbes' thought although it is not difficult to suggest reasons why the conflict should have come about. They key, it is submitted, lies in the pre-eminence which Hobbes attributes to the right of self-preservation: it is the *raison d' etre* of civil society, of the establishment of a sovereign and for the creation

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127 6 E.W. 9; cf. Bacon, De Augmentis, Book 8, Aphorism 5 (9 Spedding, 313).

of civil laws. In most circumstances it is safe to assume that the sovereign will act for the benefit of his subjects and with the end of self-preservation in view; hence, it is *convenient* to identify the prescriptions and intentions of the sovereign with the Law of Reason. When, however, the individual's interest in his own preservation and well-being is exposed to clear and present danger, his obligation to obey the civil law ceases: in other words, the validating condition for his obligation to obey disappears.[128]

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[128] 6 E.W. 9; cf. Bacon, **De Augmentis**, Book 8, Aphorism 5 (9 Spedding, 313); "The end and scope which laws should have in veiw, and to which they should direct their decrees and sanctions, is no other than the happiness of the citizens."

Perhaps the most comprehensive analysis of the relationship between the Law of Nature and civil law as Hobbes saw it is that of Howard Warrender (loc. cit.). Although Warrender speaks of Hobbes' equation of the Law of Nature and civil law as "seriously incomplete and in need of qualification" (op. cit., 167), he nevertheless produces convincing arguments in support of the proposition that the end of self-preservation and the instrumental Laws of Nature have, in civil society, a status and operation, which make them in one sense a species of higher law. The reader is referred particularly to Chapter VII, "The Laws of Nature and the Civil Law."