# Matthew Hale's *Other* Contribution: Science as a Metaphor in the Development of Common Law Method

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*Whoever has emerged victious participates to this dav in the triumphal procession in which the present rulers step over those who are Iving prostrate.*

*Walter Benjamin*[2]

This article examines how Matthew Hale viewed the role of a judge in the English Common Law system.[3] Hale played a crucial role in development

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[1] The idea for this paper grew from work originally completed in the Law School at Monash University under the supervision of Professor C G Weeramantary, who is now a Judge on the International Court of Justice, and later pursued in the British Museum. I also wish to thank Professor E P Ellinger and Ms J A Wallace for their encouragement and assistance. The original work was dedicated to Eleanor V Raff.

[2] "Wer immer bis zu diesem Tage den Sieg davontrug, der marschiert mit in dem Triumphzug, der die heute Herrschenden über die dahinführt, die heute am Boden liegen", Walter Benjamin, "Uber den Begriff der Geschichte" (1950) 61 *Neue Rundschau* 560, 563. Quoted from Zohn's translation in Walter Benjamin *Illustrations* (ed H Arendt) (trans H Zohn) Schocken Books, New York, 1968, pp 253, 256.

[3] Maija Jansson reopened consideration of these issues in M Jansson, "Matthew Hales on Judges and Judging" (1988) 9 *Journal of Legal History* 201. Much recent debate about Matthew Hale has revolved around the theme of whether he was a misogynist, judged by evidence surrounding his views on marital immunity against prosecution for rape and his judgment of the witchcraft trial *R v Cullender and Duny* (1665) 6 *Howell's State Trials* 647; see G Geis, "Lord Hale, Witches and Rape" (1978) 5 *British Journal of Law & Society* 26; D Lanham, "Hale, Misogyny and Rape" (1983) 7 *Criminal Law Journal* 148; G Geis, "Revisiting Lord Hale, Misogyny, Witchcraft and Rape" (1986) 10 *Criminal Law Journal* 319; M Allen, "Farewell to Hale?" (1991) 135 *The Solicitors Journal* 352; W Prest, "Hale as Husband" (1993) 14 *Journal of Legal History* 142, and W S Holdsworth, "Sir

of the Common Law into a legal system which met the demands of a rapidly changing economy and society, a legal system with great similarities in method to the modern Common Law. To examine Hale's views of judicial method in the English legal system, this article particularly concentrates on the view of Natural Law which guided his ideas about the role of the Common Law in seventeenth century jurisprudence and, in turn, how his influence promoted the durability of the Common Law as the basis of a national legal system in the face of demands for more radical change.

These issues are particularly relevant to a consideration of the historical nature of English law in a wider European context, at a time when the future of ever closer legal integration in the European Union is being considered - a phenomenon observed with great interest in Europe[4] and around the Common Law world. Hale's grandeur in English legal history lies in the part he played in the development of core elements of the Common Law system which distinguish it from the continental Civil Law systems. This is clearer when placed in wider European theory of the development of modern westem legal systems. Rather than signifying the Common Law system as unique and incapable of integration, Hale's work further reveals the Civil Law systems as sources of inspiration for English jurists.

Max Weber and Jurgen Habermas are in basic agreement that the development of modern Natural Law within a positivised, legalised and formalised legal system is a revolutionary event essential for establishing depoliticised realms in society where purposive-rational action can

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Matthew Hale" (1923) 39 *Law Quarterly Review* 402, 407. With respect to the topic and all authors involved in the debate, this article does not pursue that theme. One might observe that there are historiographical difficulties in dealing with the issue outside the wider social contexty of witchcraft persecution between 1580 and 1712. To the Reformation and Enlightenment legislation dealing with witchcraft (33 *Hen VIII* c 8; 1 *Edw VI* c 12 (repeal); 1 *Jac 1* c 12) also belongs the legislation of 14563 made by Elizabeth I: 5 *Eliz* c 16. The other towering jurists of the epoch (Ellesmere, Bacon and Coke) were also involved in at least one witchcraft trial without apparently questioning the possibility of the accusation: *R v Turner* (1616) 2 *Howell's State Trials* 930 and *R v Somerset* (1616) 2 *Howell's State Trials* 951.

4 See R Zimmerman, "Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit" (1992) 47 *Juristenzeitung* 8 and L Moccia, "English Law Attitudes to the Civil Law" (1981) 2 *Journal of Legal History* 157. For more general history of the development of European legal method see H J Berman, "The Origins of Western Legal Science" (1977) 90 *Harvard Law Review* 894, H J Berman, *Law and Revolution - The Formation of the Western Legal Tradition*, Harvard University Press, 1983 and G Gorla & L Moccia, "A Revisiting of the Comparison between Continental Law and English Law (16th-19th Century)" (1981) 2 *Journal of Legal History* 143.

successfully operate, and therefore critical to the emergence of capitalism.[5] This process is generally embraced by *rationalisation* of a traditional legal system, a process which has interested Habermas for many years as a key aspect of his theoretical view.[6] Habermas seems to acknowledg[7] Locke's Natural Law conception of freedom is irreconcilable with classical Natural Law:

> ... *the end of Law* is not to abolish or restrain, but to preserve and enlarge Freedom: For in all the states of created beings capable of Laws, *where there is no Law, there is no Freedom.* For *Liberty* is to be free from restraint and violence from others which cannot be where there is Law: But Freedom is not, as we are told, *A Liberty for every Man to do what he lists*:(For who could be free, when every other Mans Humour might domineer over him?) But a *Liberty* to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another but freely follow his own.[8]

This "free disposing of his Property according to his own Will, within the compass of that Law ..."[9] is at the basis of *modern Natural Law.* Locke (1632-1704) was largely a contemporary of Hale (1609-1676).

To identify key issues in the emergence of modern Natural Law one should consider the rationalisation process in more detail. Habermas has broken down the Weberian concept of rationalisation into two interrelated tendencies. First, the institutionalisation of economic growth and an ensuing extension of means-ends rationality to ever more sectors of life. So, traditional structures were increasingly subordinated to sub-systems of purposive-rational action. Second, and consequently, the traditional forms of legitimation of power broke down. Traditional world views were no longer unquestionable

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5 J Habermas, "Rationalisierung des Rechts und Gegenwartsdiagnose" in *Theorie des kommunikativen Handelns*, Suhrkamp, Vol 1, Frankfurt am Main, 1981, pp 322-66 or, "Max Weber on Rationalisation of Law" in *The Theory of Communicative Action*, trans T McCarthy, Vol 1, Heinemann, London, 1984, p 242. Disagreement over the conception of "value-rational" is not immediately relevant.

6 For an excellent overview see J Twwedy and A Hunt, "The Future of the Welfare State and Social Rights: Reflections on Habermas" (1994) 21 *Journal of Law and Society* 288.

7 J Habermas, "Natural Law and Revolution" in *Theory and Practice*, trans J Viertel, Beacon Press, Boston, 1973, p 93.

8 John Locke, *Second Treatise of Government*, VI, p 57.

9 Locke, above, n 8, VI, p 59.

tradition and became subjective or individuated (secularised) beliefs and ethics.[10] In the early modern period:

> Modern physics gave rise to a philosophical approach that interpreted nature and society according to a model borrowed from the natural sciences and induced, so to speak, the mechanistic world view of the seventeenth century. The reconstruction of classical natural law was carried out in this framework. This modern natural law was the basis of bourgeois revolutions of the seventeenth, eighteenth and nineteenth centuries, through which the old legitimations of the power structure were fnally destroyed.[11]

Fragile traditional legitimations were replaced by new legitimations. The new legitimation:

> ... emerge from the critique of the dogmatism of traditional interpretations of the world and claim a scientific character. Yet they retain legitimating functions, thereby keeping actual power relations inaccessible to analysis and to public consciousness. It was in this way that ideologies in the restricted sense first came into being. *They replace traditional legitimations of power by appearing in the mantle of modern science* ...[12]

Discerning this point in history is not so easy when there was no apparently relevant violent revolution, as in France or the United States, or revolutionary self-understanding, as there clearly was in France.[13] Habermas has provided two further clues. First, systematisation of the administration of justice promoted systematisation of the character of law. That is:

> Not only the application of law but the enactment of law became increasingly bound to formal procedures and thereby to the specialised mind of jurists. This situation promoted the systematization of legal propositions, the coherence of legal doctrine, that is to say, the

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[10] T McCarthy, *The Critical Theory of Jürgen Habermas,* Massachusetts Institute of Technology Press, 1978, p 37.

[11] J Habermas, "Technolgoy and Science as 'Ideology'" in *Toward a Rational Society* (trans J Shapiro) Heinemann, London, 1971, pp 99-100 or, *Technik und Wissenschaft als <Ideologie>*, Sunhrkamp, Frankfurt am Main, 1968, pp 72-3.

[12] Habermas, above, n 11 [my emphasis]. Habermas' expression, "... mit dem Anspruch der modernen Wissenschaft auftreten ..." does not carry quite the imagery of the *mantle of modern science.*

[13] See generally J Habermas, above, n 11, p 7.

> rationalization of law according to internal, purely formal criteria of analytic conceptual structure, deductive rigor, principled explanation and justiLcation, and the like. This tendency can be observed already in late medieval faculties of law; with legal positivism, it is completely established ... This formal structuring of the law, the unrestricted application of formal-operational thought to the professional practical knowledge of legal specialists, is certainly an interesting state of affairs. *But the fact that this tendency appears very unevenly in the legal developments of different nations (more pronouncedly in countries within a tradition of Roman law), makes one sceptical regarding any proposal to look for the growth of rationality in modern law primarily in its internal systematization.*[14]

A more secure point at which to seek a relevant "growth in rationality" is therefore "... disenchantment of the religious worldview and the decentration of world understanding ..." which "... are the presuppositions for a transformation of sacred legal concepts carried out from the hypothetical perspective of legal associates who are in principle free and equal."[15] This second clue from Habermas links with his earlier point: "... a radical reinterpretation of Stoic-Christian Natural Law ..." was necessary, and this had been undertaken in England from the time of Thomas Hobbes (1588-1679). The Christian presuppositions in Locke's doctrines could have perpetuated persistent interpretations of them within a classical tradition.[16]

After revisiting Hale's cultural and legal *milieu,* I shall view four of Hale's unpublished manuscripts[17] - *Scheme For Laws Of England,*[18] *Transcript of Rough Draft,*[19] *Reflections on Mr Hobbs, His Dialogue Of The Law,*[20] and *Some Chapters Touching The Law of Nature.*[21]

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[14] Habermas, above, n 11, Vol I, p 347-8, quoted from McCarthy's translation at Vol I, p 256 [my emphasis].

[15] Habermas, above, n 11, Vol 1, p 348, quoted from McCarthy's translation at Vol I, pp 256-7.

[16] Habermas, above, n 11, p 92.

[17] There are referred to in the bibliography of Hale's works appended by Burnett to his biography of Hale: G Burnett, *The Life And Death Of Sir Matthew Hale*, William Shrowsbery Bible, Duke Lane, 1682 (Facsimile edition, Rothman's Reprints Inc, New Jersey, 1972).

[18] MS BM Hargrave 494, 13.

[19] MS BM Additional 18235, 133.

[20] MS BM Additional 18235, 2. One other manuscript of this document held in the British Museum, Harleian MS 711 ff 418-39, was published by W S Holdsworth in "Sir Matthew Hale on Hobbes: An Unpublished MS" (1921) 37 *Law Quarterley Review* 274, 286-303.

[21] MS BM Additional 18235, 41.

## Hale and 17th Century Science

That Matthew Hale's lifetime spanned one of the most turbulent periods of English history is basic but deserves review in connection with the theme of this work. In the political and religious contexts of Hale's time it does seem remarkable, an orphaned Puritan who had considered trailing a pike in the army of William of Orange[22] not only "emerged unscathed" from the Interregnum as Jansson noted,[23] but also rose to become Chief Baron of the Exchequer, Chief Justice of the King's Bench and a special concern of Charles II.[24]

Interconnections between the political and religious turbulence of Hale's time and the intellectual turbulence attending the dissemination of the *new science* of the Enlightenment have been observed,[25] and Hale was involved to varying extents in these movements. In particular, Hale advocated a scientific footing for English law - somcwhat in the footsteps of Francis Bacon. Bctwcen 1560 and 1640 England grew from a scientifically backward country to one of the most advanced in Europe. This scientific advancement was generally the work of craftsmen writing in the vernacular. They assumed the necessity of progressively testing theories by observation and experiment: they were empirically minded.

These scientists were generally linked to Protestantism and working under the patronage of merchants such as the East India Company. This conjunction is well illustrated by Sir Thomas Gresham's founding of both the Royal Exchange and Gresham College. The College was to be controlled by merchants, and while fostering physic, geometry and astronomy, its Professor of Divinity was to employ his time in the sound handling of controversies "especially against the common adversary of the Church of Rome". Gresham College became a centre of scientific studies under Henry Briggs (1561-1631)

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22 Burnett, above, n 17 at 6.

23 Jansson, above, n 3 at 201.

24 Holsworth, above, n 3 at 402, 404.

25 See generally, C Hill, *Intellectual Origins of the English Revolution*, Oxford University Press, 1965, chp II; cf G Eley & W Hunt, *Reviving the English Revolution - Reflections and Elaborations on the Work of Christopher Hill*, Verso, London, 1988. See also B J Shapiro, "Law and Science in Seventeenth Century England" (1969) 21 *Stanford Law Review* 727; B J Shapiro & R G Frank, *Eglish Scientific Virtuosi in the 16th and 17th Centuries*, University of California, Los Angeles, 1979; and B J Shapiro, *Probability and Certainty in Seventeenth Century England - A Study of the Relationships between Natural Science, Religion, History, Law and Literature*, Princeton University Press, Princeton, 1983.

who popularised the use of decimals. Briggs was a "sever Presbyterian" who actively co-operated with the Puritan party at Cambridge. Briggs also popularised Napier's Logarithms. Napier thought the Pope was the Anti-Christ. Wright, a friend of Briggs, translated Napier's work and dedicated it to the East India Company which encouraged the translation. Clearly there was a benefit for navigation.

Scientific papers were written in English, printed cheaply and went into many editions. Most centres of the *new learning* in London gave free public lectures. While at Lincoln's Inn, Matthew Hale became "well versed" in medicine, anatomy, surgery and mathematics. The influence of the posthumous publication of Bacon's *Novam Organum* in 1620, and the philosophical framework which it gave to science, was apparently incalculable.[26] The Puritan theology of the individual's confrontation with God became a preoccupation with the individual alone. With Descarte the Universe became mechanically objective.[27] God was already a great mathematician.[28] This century of Enlightenment progressed on into the theories and discoveries of William Harvey, Robert Boyle and Newton. Comets were explained, the universe became infinite, miracles were discredited and superstition eradicated. God was less likely to intervene in daily life and before a reasoned theology retreated to the last frontiers of nature - the subjective intellect and the hereafter. The circle was joined and science created an atmosphere favourable to science. This did not create clearly delineated divisions between early scientists, atheism, Protestantism or Catholicism. Bacon's philosophical basis for science was after all a means of relieving man's estate on Earth or restoring Paradise, and Bacon had translated seven Psalms.[29]

Hale engaged in the study of science and wrote several volumes on scientific topics. Nevertheless, "[a]lthough these volumes show an awareness of the current scientific literature and controversies, they were somewhat old-fashioned and failed to make a serious contribution to the development of scientific thought".[30] Regardless of his competence as a scientist, Hale's involvement clearly admitted him to circles in which, on one hand, craftsmen were demonstrating that station in life was not necessarily an obstacle to

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[26] J P Kenyon, *Stuart England*, Hammonsworth/Penguin, 1978, p 186.

[27] Kenyon, above, n 26, p 187.

[28] So described to Queen Elizabeth I by Dekker in 1599: C Hill, above, n 25, p 63.

[29] C Hill, *The English Bible and the Seventeenth Century*, Allen Lane/Penguin, London, 1993, p 359.

[30] Shapiro, above, n 25 at 741-2.

technical innovation, and on the other, that science was becoming "... widely recognized to be part of that general culture that a gentleman was expected to posscss".[31] The seventeenth century aristocracy was interested in science. William Cavendish, Duke of Newcastle, whose family descended from old nobility and was related by marriage to Charles Stuart, knew Descartes. His children were tutored in mathematics by Thomas Hobbes.[32]

These different dimensions of Hale's engagement in scientific circles Icad us to scrutinise his use of science in his legal writing. Was Hale employing scientific method, such as it was, to systematise fundamentally and reform English law as Shapiro concluded?[33] Or, was Hale employing scientific metaphors within, and to justify, a current legal paradigm still resting on a theologically conceived Natural Law?[34]

## Hale and 17th Century Tensions About the Role of Common Law

> [Hale] did look upon Equity as a part of the Common-Law, and one of the grounds of it; and therefore as near as he could, he did always reduce it to certain Rules and Principles, that men might Study it as a Science, and not think the Administration of it had anything arbitrary in it.[35]

> As great a Lawyer as [Hale] was, he would never suffer the strictness of Law to prevail against Conscience; as great a Chancellor as he was, he would make use of all the Niceties and Subtilties in Law, when it tended to support Right and Equity.[36]

Hale was, no doubt, well acquainted with the struggle for a~thority between common law and equity waged between Sir Edward Coke, as Chief Justice of the King's Bench, and the Lord Chancellor, Baron Ellcsmere. Coke's apparent misuse of authorities was a factor in his dismissal from the bench on 10 November 1616. In 1615 Ellesmere wrote of Coke:

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31 Shapiro, above, n 30 at 734.

32 See G Trease, *Portrait of a Cavalier - William Cavendish Frist Duke of Newcastle*, Macmillan, London, 1979.

33 Shapiro, above, n 25 at 727.

34 John Donne's use of astronomical and geometrical metaphors in *A Valediction: Forbidding Mourning* (1633) provides some analogy.

35 Burnett, above, n 17, p 106.

36 Burnett, above, n 17, p 106.

> It is to be observed throughout all his bookes, That he hath as it were purposely Laboured to derogate much from the Rights of the Church and dignitye of churchmen, and to disesteeme and weaken the power of ye King in the ancient vse of his Prorogative.[37]

This was echoed by Thomas Hobbes in 1681.[38] Coke nevertheless had Puritan sympathies.[39] He sought to place the common law on an intellectual level appropriate to the Renaissance:

> Reason, is the life of the law, nay, the common law itself 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 natural reason; ..[40]

Coke interpreted Littleton with latitude to construct a view of the common law that appealed widely in his day, and so arranged old fragments into a general constitutional view of the workings of a *legal system.* Central in that view was, of course, the common law:

> The common law hath no controller in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remains still, as Littleton (sect. 170) saith ... Particular customs are to be proved.[41]

Coke would not tolerate maxims of common law to be overtly disregarded to accommodate an individual case. Justice could be achieved by the rigid application of certain principles because those principles were inherently just and reasonable, so their application must produce that result. This had been the trend in the later Year Books. The application of common law rules was not to be mitigated by equitable considerations. The jurisdiction of the Lord

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[37] Lord Chancellor Ellesmere (Thomas Egerton) "The Lord Chancellor Egerton's Observacions Upon Ye Lord Cookes Reportes" (1615) from text in L A Knafla, *Law and Politics in Jacobean England - The Tracts of Lord Chancellor Ellesmere*, Cambridge University Press, 1977, p 297.

[38] Thomas Hobbes, *A Dialogue Between A Philosopher And A Student Of The Common Laws Of England*, J Cropsey (ed), University of Chicago Press, Chicago, 1971, p 96.

[39] W S Holdsworth, *A History of English Law*, 3rd ed, Vol 5, Methuen, Vol 5, p 441.

[40] Co Litt f 97b.

[41] Co Litt f 344a. Section 170 of Littleton does not expressly state that the common law cannot be changed except by Parliament as Coke implies. It does implicitly acknowledge that common law stands until altered by statute, but does not address the possibility of change in other ways.

Chancellor in Equity at that time filled this void. Coke's attack on the equity jurisdiction indicates a new idealism in the rigid application of positive law.

> And it is to be observed, that it is holden for an inconvenience, that any of the maxims of the law should be broken, though a private man suffer loss: for that by infringing of a maxim, not only a general prejudice to many, but in the end a public uncertainty and confusion to all would follovi. And the rule of law is regularly true, ...[42]

By a *maxim* Coke meant not only the Latin axioms employed today but also at least succinct statements of principle. While Littleton used marim in the restricted sense,[43] Coke extended it to include principles and rules.[44]

> By Littleton (sect. 108) it appeareth how safe it is to be guided by judicial precedents, the rule being good. *Periculosum existimo, quod bonorum virorum non comprobatur exemplo.* And as usage is a good interpreter of laws, so non-usage, where there is no example, is a great intendment that the law will not bear it.[45]

The rule would not be good if the precedent itself were decided as a new invention or novelty: ironically, given his own creativity, Coke strongly admonished innovation by even learned judges.[46]

Coke's works were controversial in their day. Parts I to XI of his *Reports* were published between 1579 and 1616. Parts XII and XIII were seized along with three parts of Coke's *Institutes,* and were not published until 1656-9, at the command of Cromwell's Long Parliament after it had been sitting barely one month.[47]

Hale's effort to bridge the pre-revolution gap between common law and equity, the gulf between Coke and Ellesmere, and an array of social and historical interests, by asserting a scientific basis for both Law and Equity

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[42] Co Litt f 52b.

[43] Littleton, *Tenures*, section 3.

[44] Co Litt f 11a.

[45] Co Litt f 81b. Section 108 of Littleton simply notes that no action had been brought upon the *Statute of Merton* and then interprets the Statute for the event when one might be brought.

[46] Co Litt f 379a.

[47] See Knafla, above, n 37, pp 123-5, and Hill above, n 25, pp 244-5.

would have been attractive to all sides in the Restoration settlement. Whether that was what actually motivated Hale or not is beside the point.

## Hale and 17th Century Patronage Circles

Baron Ellesmere was a patron of both Francis Bacon (1561 - 1626) and William Vaughan.[48] Bacon apparently mentioned in 1596 that Ellesmere "doth succeed my father almost in his fatherly care and love towards me".[49] The names of Bacon, Vaughan and Hale reappear together throughout the seventeenth century. Different members of different branches of the Bacon and Vaughan families often appear together in historical records. For example, another Sir Francis Bacon (1587-1657), whose ancestors shared the same family seat as the ancestors of *the* Sir Francis Bacon, was admitted to Gray's Inn in 1607 and called to the bar in 1615. He judged Lord Maguire in 1645 for Maguire's part in the Irish Rebellion of 1641. Matthew Hale defended Maguire. In 1662 this Sir Francis Bacon's son, another Francis Bacon, also became a reader in Gray's Inn.

Another example is Nathaniel Bacon (1593-1660), who was the son of *the* Sir Francis Bacon's half-brother Edward. Nathaniel was admitted to Gray's Inn in 1611. He wrote *An Historical Discourse of the Uniformity of the Laws and Government of England,*[50] the ground work for which had been done by Selden, according to Sir John Vaughan (1603-1674). Sir John Vaughan was appointed Chief Justice of the King's Bench, and was a joint legatee with Matthew Hale of Selden's library. Burnett informs us that he and Hale were close life-long friends.[51]

## Jurisdiction and Jurisprudence in Stuart England

*The* Sir Francis Bacon succeeded Baron Ellesmere as Lord Chancellor. Bacon continued Ellesmere's dispute with Sir Edward Coke about the role of the Chancellor's jurisdiction in equity. This followed from competing conceptions of law.

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[48] Knafla, above, n 37, p 41.

[49] Crowther, *Francis Bacon - The First Statesman of Science*, Cresset, 1960, p 336.

[50] Nathaniel Bacon's work was published in two parts in 1647 and 1651. It was suppressed when reprinted in 1665. Other editions were reprinted in 1672, 1676 and 1682, one of which led to prosecution of the printer, who had to go into exile. It was finally reprinted in 1689. C Hill "Censorship and English Literature" in *The Collected Essays of Christopher Hill*, Harvester Press, Brighton, 1985, p 52.

[51] Burnett, above, n 17, p 14.

At the beginning of the century "... the Court of Chancery was actually and not merely technically, a court of conscience."[52] In *Nicholas v Dulton*[53] the defendant gave £100 to the plaintiff at the motion of the Lord Chancellor "not in respect of any right or equity which the plaintiff had ... but in respect of the plaintiff's poverty". In *Wilkev v Dagge*[54] the one reason given for relief of a forfeited mortgage was the plaintiff was a poor man, "and am credibly informed the defendants be hard dealing men, working to their advantage upon the simplicity of their poor neighbours. Wherefore I conceive it to be good equity to relieve the poor soul, and to stay all suits at the common law."

This method of dispute resolution became identified with arbitrary power. Norburie wrote soon after the fall of Bacon:

> ... the boundless power of the Chancery in not having rules and grounds written and prescribed unto it, in what cases it shall give relief and what not, is the cause of much discontent and distraction ...[55]

Ellesmere followed Edward Plowden and St German in viewing equity as a principle of the Constitution to correct existing law where it could not protide justice.[56] With hindsight we know Hale did not actually bridge the juristic gap between common law and equity in his own time, but his advocacy of a scientific basis for equity must have been a very attractive anchor in such turbulent times.

Francis Bacon regarded law as a science. His *Augmentis Scientiarum* was published in 1623. It contained *Example of a Treatise on Universal Justice or the Foundations of Equity, by Aphorisms.*[57] In ninety-seven Aphorisms Bacon sought to establish fundamental rules for the proper operation of a legal system. They are highly rationalistic and generally devoid of moral judgement. Private right rests on the precedent which the doing of injury sets to others, who might repeat it, presumably also back upon the original

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[52] Holsworth, above, n 39, (Vol 5) p 337

[53] (1597) Monro 694.

[54] (1608) Monro 107.

[55] Quoted from Holsworth, above, n 39, p 336.

[56] See Knafla, above, n 37, pp 134-62.

[57] Book VIII, Chapter III in J M Robertson (ed) *The Philosophical Works of Francis Bacon*, trans & notes Ellis & Spedding, Routledge & Sons, 1905, pp 613-30.

wrongdoer. So, all agree to laws.[58] The end and scope of laws is the happiness of the citizens, who should be trained in piety and religion, sound in morality, protected by arms, guarded by laws, obedient to government, and rich and flourishing in forces and wealth. To achieve these objects, laws are the sinews and instruments.[59]

Bacon saw cases as the source of rules in a case law system. In his view ideal precedents were those of "intermediate Times" rather than ancient or modern.[60] Bacon also contemplated the problem of *vacuum* in the law. This problem, of a situation to which the law does not extend, was to be solved by reference to similar cases, employment of examples not yet grown into law, or an arbitration jurisdiction.[61] He then examined each method, and, in relation to the extension of existing laws, he went so far as to draw a distinction between an extension and a super-extension.[62] Bacon discussed retrospective laws, approving of them to catch those who evade and narrow the words or meaning of a law by fraud and cavil.[63]

Bacon was also interested in medicine. While Bacon regarded law as a science he regarded medicine to be so conjectural that in his view it was an art.[64] He considered most unfair the judgement of the quality of medical practice by measure of its success or failure, while success in other arts and sciences such as law and navigation is in the quality of pleading or skill in steering, rather than the issue of the legal cause or the fortune of the voyage. For that reason, thought Bacon, physicians have no incentive to improve their method, finding equal profit in both mediocrity and excellence.[65]

In 1629 a collection of Bacon's works[66] was published. It contained *An Offer to Our Late Sovereign King James, of a Digest to be made of The Lawes of England.* In it Bacon proposed codification and offered his services in preparation of the Digest. In this article Bacon gave no detail of what he

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58 Robertson, above, n 57, Aphorism 2.

59 Robertson, above, n 57, Aphorism 5.

60 Robertson, above, n 59, Aphorisms 23 and 24.

61 Robertson, above, n 57, Aphorism 10.

62 Robertson, above, n 57, Aphorism 18.

63 Robertson, above, n 57, Aphorism 48.

64 *De Augmentis* in Robertson, ed, above, n 44, pp 103-4.

65 Repeated in Robertson, ed, above, n 44, pp 103-4.

66 Francis Bacon, *Certaine Miscellany Works*, London, 1629 (De Capo Press Facsimilie/The English Experience), Vol 222.

proposed - he attempted persuasion by flattery. The flattery begged the King to emulate the great law-givers of the past.

> Amongst the Degrees, an Acts, of Soueaigne, or rather Heroicall Honour, the First, or Second, is the Person and merit of a *Law-giver. Princes* that gouerne well, are *Fathers* of the *People* ... So *Kings*, if they make a Portion of an Age happy by their good Gouernment, yet if they doe not make *Testaments*, (as *God Almighty* doth), whereby a Perpetuity of Good may descent to their country, they are but Mortall and Transitorie Benefactors ... But Kings, by giuing their Subjects good *Lawes*, may ...[67]

The rationalism of Bacon is in contrast to Coke's reconstructed common law, "... administered by judges who were themselves property owners and were accountable to no superior for their law-making".[68] Coke was also prepared to invoke the image of ancient law-givers, specifically Moses, as a model for the Common Law judge.[69]

James I had supported codification and it is significant in this context that, at the start of the Civil War, Sir Roger Twysden wrote:

> I did not love to have a king armed with book law against me for my life and estate.[70]

Bacon's projects ended in the course of the battle for jurisdiction between the King's Bench, led by Sir Edward Coke, and the Chancery, led by Lord Chancellor Ellesmere, which had raged for the best part of eighteen years. A major showdown occurred between Ellesmere and Coke over *Glanvill v Courtney*[71] with both respectively imprisoning and freeing Glanvill over almost two years. In the Autumn of 1615 Ellesmere wrote a tract arguing for the supremacy of his decree. On 19 March 1616 he wrote to the Privy Council and Attorney-General Bacon seeking an investigation. A judicial committee was formed and within one week found in favour of Ellesmere. In June 1616 James I made a speech in the Star Chamber confirming the supremacy of the decree. Technically Coke's interpretation had been

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[67] Bacon, above, n 66, pp 137-9.

[68] D Veall, *The Popular Movement for Law Reform 1640-1660*, Oxford/Clarendon, 1970, p 72.

[69] Hill, above, n 29, p 28.

[70] Quoted from Hill, above, n 25, p 230.

[71] (1614) 2 Croke 343.

defeated. Bacon took the matter further. Coke was taken before the Privy Council on 17 October and dismissed from the bench on 10 November 1616. Bacon wrote the brief and prepared the warrant for his release from off~ce. Coke entered the House of Commons in 1621. Bacon, then Lord Chancellor, was impeached before the House of Lords on twenty-eight counts of accepting bribes. Bacon's defence was that it was common at the time, and his decisions were not influenced. Bacon's office, integrity and proposals for law reform were discredited. Coke's rationalised common law prevailed and was raised in opposition to the arbitrary prerogatives of the King and the Chancellor's decree.

## The Interregnum

After the Civil War popular agitation for law reform became articulate. Opposition to ecclesiastical courts and arbitrary royal prerogative became a demand for general law reform and later agitation for social reform.[72] Debate took thc form of pamphlet and petition warfare between four main groups:[73] the Diggers, the Levellers, moderate reformers, and the opponents of law reform.

The Diggers were at one extreme, a group comprising mainly agricultural workers dispossessed by enclosure. They established colonies in 1649 to cultivate waste commons communally. Their leader, Winstanley, who had legal training, published *Law of Freedom in a Platform* in 1652. He argued that in a society of private ownership the Law's function was to suppress the poor, and private property causes wars, so the earth should be a common treasury. Law was to be codified into short pithy laws with no scope for judicial interpretation. There was to be an elected lay judiciary serving a year at a time, and no lawyers.

The Levellers were anxious to distance themselves from the Diggers, with rare exception. They were of the ascending class of craftsmen, lesser merchants, lesser gentry, shopkeepers' self-employed miners, soldiers, and, later, peasant proprietors. Significantly this class was providing innovation in science and technology. They supported equality of men before the law, individual rights, and with some disagreement, the extension of the voting franchise to all males except beggars and servants. In October 1647 the

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[72] E W Ives, "Social Change and the Law" in E W Ives (ed), *The English Revolution 1600-1660*, Arnold, London, 1968, p 128.

[73] See Veall, above, n 68, Chp IV.

Leveller lawyer Wildman published a pamphlet proposing the codification of law in English and this became a major thrust of the Levellers and independent reformers. They condemned uncertainty in law and inaccessibility, while constantly asserting liberty and property. In May 1643 the leaders were imprisoned and the group fragmented.

The moderate reformers appear to have held the balance of power. They were wealthier property owners, above the "middle sort". Some did not support democracy, considering government to be a matter for the landed and commercial class with the wealth and intelligence of the nation. They acknowledged law must be brqught up to the times, proposing regulation of the legal profession, definition of courts' jurisdictions, and permitting an accused person witnesses and representation. Matthew Hale has been regarded as a moderate reformer.

The opponents of law reform were generally lawyers, declaring the Common Law to be perfect. Warren suggested lawyers should assist reform for their own survival in 1649, but by 1653 was so alarmed by the radicals he denounced reformers as tradesmen. Rice Vaughan, a barrister, was of this grouping.[74] The anonymous author of *The Exact Law Giver* foreshadowed a legitimation that would take hold. The Common Law in Law French was:

> ... transcendent in its order to all humane sciences in the world ... There is no rational science in the world having so many words and terms of art whose cases, arguments and judgments are expressed and delivered in a form of speech so plain, so significant and a tongue so learned as our common laws of England.[75]

Above all, this group feared the threat to property, privileges, goods and liberty which radical reform posed.

In January 1649 Charles I was tried and executed, and the House of Lords abolished. The Rump Parliament established two law reform committees.[76] The first, composed of members of the Commons, made little progress. The second law reform committee was chaired by Matthew Hale, and represented lawyers, the army, landed gentry and merchants. Lawyers dominated with technical argument. By July 1652 it had prepared sixteen bills for moderate

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[74] He probably had some connection with Hale: see Burnett, above, n 17, p 14.

[75] Quoted from Vealle, above, n 68, pp 124-5.

[76] See Veall, above, n 75, pp 78-96.

reform. None were enacted. Lawyers debated the meaning of *incumbrance* for three months. The Rump Parliament was dissolved in April 1653.

The Barebones Parliament voted to abolish thc Court of Chancery on 5 August 1653. On 19 August amid uproar it passed a motion calling for codification, 46 votes to 38. A committee was established to draft the Code. There were protests the law, the church and property were being undermined. On 12 December some conservative members and the Speaker arrived early at the House and carried a motion to dissolve the Parliament. The dissolution was celebrated in the Temple with "great joy in making bonfires and drinking sack".[77]

A few days later Cromwell was proclaimed Protector and a written constitution was drawn up. At an election held in July 1654, at which aldermen, common councillors, some free burgesses and those country voters with above £200 property voted. The radical reformers of the Barebones Parliament were reduced to four. Moderate reformers and probably some Levellers appear to have retreated and grouped around the existing legal system. Compromise was proposed inside Parliament by Matthew Hale, member for Gloucestershire, and outside by Sheppard, a lawyer from Gloucestershire.

On Cromwell's death in September 1658 his son Richard became Protector but was forced to resign in May 1659 and the Rump Parliament was recalled. The last optimistic movement for law reform was launched, decrying lawyers and proposing cddification in a flood of pamphlets. In Parliament parties on behalf of lawyers and the clergy negotiated with the army and agreed to raise £100,000 in consideration of "being protected ... in the full enjoyment of their respective advantages and profits".[78]

Shortly, General Monk's army of occupation in Scotland marched on London. An election was held under Monk's protection and the new Parliament recalled Charles II.

## The Restoration and the Rise of Matthew Hale

On Restoration all Interregnum legislation was annulled and Law French was reintroduced as the legal language, to remain until 1731. Despitc this hard

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[77] Quoted from Veall, above, n 75, p 88.

[78] Quoted from Veall, above, n 75, p 96.

reaction vulnerable aspects of the Common Law appear to have been held in mind and a process of rationalisation began. The conception of law as a science in a new sense gained wider currency.

This conception had one critic in Thomas Hobbes, who attacked Coke's assertion that common law is pure reason,[79] and questioned the portrayal of law as a scientific system devoid of "arbitrariness":

> It is not Wisdom, but Authority that makes a law.[80]

It has been suggested Hobbes' use of Coke's term *Law of Reason* fits within Hobbes' own jurisprudence.[81] Another view could be formed that it is consistent with the *reparteé* and wit of Restoration political debate in the vein of Dryden for Hobbes to use Coke's term in ironic[82] reference to Coke, whom he was attacking.

> *Law* What makes you say, that the Study of the Law is less Rational, than the Mathematicks?
> *Phylosph* I say not that, for all study is Rational, or nothing worth; but I say that the great Masters of the *Mathematicks* do not so often err as the great Professors of the Law.[83]

Hobbes regarded law as the instrument of an absolute Monarch.

Dunng the Restoration period Matthew Hale rose to Lord Chief Baron of the Exchequer. He was the only Interregnum reformer to reach a higher position upon Restoration. Hale admired the Roman Civil Law, but considered it unfit for England.[84] He considered cases as authoritative and the source of

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79 Co Litt f 97b. See above, n 40.

80 Thomas Hobbes, *A Dialogue Between A Philsopher And A Student Of The Common Laws of England, 1681*, J Corpsey (ed), University of Chicago Press, 1971, f4/p 55. Although not published until 1681, the *Dialogue* was no doubt circulated some years beforehand: F Pollock in W S Holsworth, above, n 20, p 274. Hobbes was 54 years old when he published his first original work, and then took aother nine years to publish in English. Censorship returned for the period 1660-78; Hill, above, n 50 (Vol 1) pp 50-51.

81 E Campbell, "Thomas Hobbes and the Common Law" (1958) 1 Tas ULR 20.

82 Christopher Hill suggested that we should be readier to spot irony in 17th century writers, "... especially when dealing with hallowed common places:", Hill, above, n 50, pp 32, 57.

83 Hobbes, above, n 80, p f1.

84 Matthew Hale, *Historia Placitorum Coronaie*, P R Glazebrook (ed), Vol 1, Professional Books, 1971, pp 16 and 489.

common law. Only Parliament could change the law.[85] In 1682 Burnett's biography of Hale was published.[86] It strove to white-wash Hale's Interregnum involvement - asserting that he accepted a judicial position under Cromwell because property must be kept and justice done,[87] and that he entered Parliament, "... on design to obstruct the mad and wicked projects then on foot".[88]

Significantly, Burnett was at pains to portray Hale as a legal scientist:

> He brought all his Knowledge as much to Scientific Principles, as he possibly could, which made him neglect the Study of Tongues, for the bent of his mind lay another way. Discoursing once of this to some, they said, *They looked on the Common Law, as a Study that could not be brought into a Scheme nor formed into a Rational Science by reason of the Indigestedness of it, and the Multiplicity of the Cases in it, which rendered it very hard to be understood, or reduced into a Method*; But he said, *He was not of their mind*; and so quickly after, he drew with his own hand, a Scheme of the whole Order and Parts of it, in a large sheet of Paper, to the great satisfaction of those to whom he sent it. Upon this hint some pressed him to Compile a Body of the English Law; it could hardly ever be done by a Man who knew it better, and would with more Judgment and Industry have put it into Method; But he said, *As it was a Great and Noble Design, which would be of vast Advantage to the Nation; so it was too much for a private Man to undertake: It was not to be entred upon, but by the Command of a Prince, and with the Communicated Endeavours of some of the most Eminent of the Profession.*[89]

Hale had clearly learned from the fall of Bacon. Hale probably could have obtained "the Command of the Prince". There was, after all, a scheme of "Great and Noble Design" already devised on the Continent, and Hale had already engaged with it, despite his "neglect [of] the Study of Tongues":

> He set himself much to the Study of the *Roman* law, and liked the way of Judicature in *England* by Juries, much better than that of *Civil* Law,

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[85] Hale, above, n 84, p f1.

[86] Burnett, above, n 17.

[87] Burnett, above, n 17, p 22.

[88] Burnett, above, n 17, p 28.

[89] Burnett, above, n 17, pp 72-3.

> where so much was trusted to the *Judge*: yet he often said, that Grounds and Reasons of Law were so delivered in the *Digests*, that a man could never understand Law as a Science so well as by seeking it there, and therefore lamented much that it was so little Studied in England.[90]

We have already noted Burnett's portrayal of Hale's ambitions for a Science of Equity, so it might be certain, and at the same time a propensity for technical manipulation of common law in support of right and equity. In this depiction Hale had it both ways, in a way that would satisfy both camps in a great political struggle. Or was Hale, the legal scientist, employing ascertainable rules and at the same time moulding them in the course of their application to new disputes, perhaps almost as a scientist extends and refines knowledge with new experiments on material?

## Evidence In Manuscripts

Light is shed on Hale's employment of science in aid of his arguments for retention of the common law by the following unpublished manuscripts:

* *Scheme For Laws of England*[91]
* *Transcript of Rough Draft*[92]
* *Reflections on Mr Hobbs, His Dialogue Of The Law,*[93] and
* *Some Chapters Touching The Law of Nature.*[94]

### *Scheme For Laws Of England*[95]

The relationship is unclear between this manuscript and Hale's larger work, *The Analysis of the Law*[96], which Blackstone claimed to be the most scientific and comprehensive analysis of common law made to that time, and adopted it as the basis of the arrangement of his *Commentaries*.[97] I have

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90 Burnett, above, n 17, p 15.

91 M Hale, MS BM Hargrave 494, 13.

92 M Hale, MS BM Additional 18235, 133.

93 M Hale, MS BM Additional 18235, 2.

94 M Hale, MS BM Additional 18235, 41.

95 Hale, above, n 91.

96 M Hale, *The Analysis of the Law*, J Walthoe, London, 1713 (facsimile edition, D S Berkowitz & S E Thorne, Garland, London, 1978).

97 Holdsworth, above, n 3, p 421. See also Shapiro, above, n 25, pp 727, 729.

quoted above Burnett's report of a discussion between Hale and some others of the possibility of bringing the common law into a Scheme or forming it into a Rational Science, which concluded with Hale setting about to do just that. Whether this manuscript, *Scheme For Laws Of England,* represents the "large sheet of Paper" spontaneously produced by Hale remains a matter of speculation. It might be both were progressive drafts toward the larger work. On the other hand, although *The Analysis of the Law* was first published after Hale's death, he could well have retained it for many years as a manuscript, as he did with his *Commonplace Book*,[98] and composed the briefer Schemes as abstracts of it.

There are basic similarities between the *Scheme For Laws Of England* and *The Analysis of the Law,* but there are also basic departures. For example, Hale noted in the Preface to *The Analysis:*

> ... altho' the Laws of *England* are generally distributed into the *Common Law,* and *Statute Law,* I shall not distribute my *Analysis* according to that Method, but shall take in and include 'em both together, as constituting one *Common Bulk* or *Matter* of the Laws of *England*.[99]

In contrast, in the extracts from the *Scheme* set out below Common Law and statute law are separated, suggesting that the *Scheme* is more likely a draft in progression toward his later work in *The Analysis.*

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[98] Holdsworth, above, n 3, pp 409-10.

[99] Hale, above, n 96 at f A3.

*Laws of England. Cognisance of*

A. *Ordinary*

*Common Laws*

1. *Inra Regis*
2. *Civilis Interee*

*Rights*

*Real*
*Personal*
*Ahxt*

*Remedies*

*Places*
*Manner*

3. *Criminal*

*Kinds*
*Deducting to judgment*

*Statute Laws*

B. *Ecclestiastical ubi*

*Courts*
*Matter*

C. *Maritum*

The manuscript then proceeds to expand each of these areas into subtitles. For example:

*A. Ordinary*

*Common Laws*

*1. Inra Regis*
*Not reduced to Digest and Method*
*Prerogatives of Jurisdiction*
*Grants*
*[...etc]*

*Reduced 17 E.2 to statute*
*called Prerogative Regis*
*Stanford end of Pleas of the*
*Crown*

*2. Laws relating to Civil interest*
*ubi rights and interest*

*Rights*

*Real*
*Kinds*

*Incorporated*
*Advowsons*
*Liberties*
*Franchises*
*[... etc]*
*Corporeal*
*[... etc]*

*2. Personal*
*[... etc]*

*3. Mixt*
*[... etc]*

The *Scheme* and *The Analysis* exhibit a higher degree of legal rationality than the Treatises written with a practical intent across the centuries after Bracton, and no doubt this represents a concern for systematisation which characterises both 17th century English science and law.[100] Nevertheless the systematisation cannot be viewed as a uniquely legal scientific idea conceived by a scholar working in isolation with only the material of Renaissance common law with which to experiment. In his Preface to *The Analysis* Hale claimed to be making "... an *Essay* of Reduction of the several Titles of the *Law* into Distributions and Heads (according to an *Analytical Method)*".[101] He also made a somewhat ambiguous reference to the usefulness of the Civil Law, which we can take to mean Roman Law, in doing so:

> Nor shall I confine myself to the Method or Terms of the *Civil Law* nor of others who have given general *Schemes* and *Analysis's* of Laws; but shall use that Method, and those Words or Expressions that I shall think most conducible to the Thing I aim at.[102]

That he would not "confine" himself is clearly no disclaimer of its inspiration altogether. Hale was, as we have noted, an admirer of Roman Law after all. The Common Law system had survived a great threat to its existence from the more radical reform groups during the Interregnum period. The source of discontent was at a systemic level. Bacon had already seen potential in Roman Law method for taking English law into the Enlightenment. While the Catholic monarch personally might have seen no difficulty in accepting *Roman* Law into England, just as the same project posed no problem in Scotland, the Interregnum revolutionaries would have.[103]

The most viable reform option for the politically aware Hale was clearly to adapt the familiar national system with inspiration from Civil Law sources, just as jurists were attempting on the Continent. and for all his "neglect [of] the Study of Tongues" Hale must have been aware at least of the direction of their work. Grotius' master piece *De jure belli ac pacis* went into seven editions in English by the end of the 17th century. Heineccius' *Elementa iuris civilis* was used as a textbook in the Universities of Halle, Pavia, Bologna, Krakau and Oxford.[104] Indeed, Hale's life-long friend Sir John

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[100] Shapiro, above, n 25, pp 727, 729.

[101] Hale, above, n 96, at f A2.

[102] Hale, above, n 96 at f A3.

[103] See Moccia, above, n 4, p 160.

[104] Zimmerman, above, n 4, p 11.

Vaughan CJ quoted Grotius' "... excellent work de jure belli ac pacts ..." in *Thomas v Sorrell.*[105] Just as the authors of the Bracton Treatise had found inspiration in the Civil Law for their systematisation of Anglo-Norman law,[106] Hale could also demonstrate great scholarship through reflection upon the continental tradition. Certainly, Holdsworth had no doubts about this conclusion:

> Hale appears to have originated the idea - which he had no doubt adapted from the Institutes - of grouping the law round the rights of persons, the rights of things, wrongs and remedies. Whatever may be alleged against the scientific character of this arrangement, it does introduce into the treatment of the law some method; and Blackstone proved that it was a method round which the law of his day could be grouped.[107]

From which source of the *Institutes* this inspiration might have reached Hale is open to question - it could well have been Holland, whence more physical inspiration would come with the Glorious Revolution. Hale's thoughts of trailing a pike for William of Orange might not have been entirely abandoned. To see the likelihood of adaptation as a detraction from Hale's scholarship is really a clearer comment on tolerance of juristic insularity, rather than respect for Hale's juristic skills in undertaking a task which was also being taken elsewhere by jurists of the highest stature. Nevertheless, the point is that Hale's work on the *Scheme* and *The Analysis* was not necessarily the product of a new legal-scientific method alone. The legal rationality which the work demonstrated, and the presentation of Common Law as material amenable to improvement through scientific progress, would have assisted political acceptance in strategic circles and advanced consolidation of the Restoration settlement, of which the Common Law, and its host of "technicians", was probably the most significant beneficiary.

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[105] (1674) Vaughan 330, 338. See also H Grotius' systematising *Inleidung tot de Hollandsche Rechts-geleertheyd* written 1619-21: R W Lee (trans & ed), *The Jurisprudence of Holland*, Oxford/Clarendon 1926; and U Hubert (1636-94), *Heedensdaegse Rechtsgeleertheyt*, 1686, trans & ed P Gane, Butterworths, Durban, 1939, and Huber's earlier works.

[106] S E Thorne (trans & ed), *De Legibus et Consuetudinibus Angliae*, Vol 1, Harvard University Press/Seldon Society, 1968-1977, XIII-LII; Hyams, *Kings. Lord and Peasants in Medieval England*, Oxford/Clarendon, 1980, Chp 8; J L Barton, "The Mystery of Bracton" (1993) 14 *Journal of Legal History* 1; and see also, J F Winkler, "Roman Law in Anglo-Saxon England" (1992) 13 *Journal of Legal History* 101; T Wallinga,"Symon Vicentinus: Quaestiones in C 2.3.1" (1993) 14 *Journal of Legal History* 1; and F De Zulueta & P Stein, *The Teaching of Roman Law in Englad Around 1200*, Seldon Society, London, 1990.

[107] Holdsworth, above, n 3, p 421.

*Transcript of Rough Draft*[108]

This rough draft of Hale's manuscript *Reflections on Mr Hobbs, His Dialogue Of The Law*[109] reflects Hale's intense preoccupation with Hobbes' very first implicit allegation against the common law:

> ... the great Masters of the *Mathematicks* not so often err as the great Professors of the Law.[110]

The *Rough Draft* makes one point, and only one point, which is not carried over into the text of Hale's more complete work,[111] *Reflections on Mr Hobbs:*[112]

> The Mathematics have their various degrees of evidence, the Mathematicl hypotheses in Astronomy are more unevident than those of geometry, and these again more uncertain than those of arithmetic.[113]

Hale pursued the theme of degrees *Certainty* within mathematics itself in *Reflections on Mr Hobbs,* but from different angles.

In support of his observation, which is essentially that thc mathematician Hobbes should not cast stones, Hale drew attention to the great disputes of his day. When Hale turned to law:

> But it cannot be expected that any law can have an equal certainty or evidence with the two latter parts of the mathematics upon very many reasons.

Hale then set about enumerating his "very many reasons", but in the end could resolve upon only one:

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[108] Hale, above, n 92.

[109] Hale, above, n 93.

[110] Hobbes, quoted in full above, n 83.

[111] As Pollock noted, the final text of Hale's reply to Hobbes (Hale, above, n 80) itself has a sense of being broken off, perhaps through failing health: in Holdsowrth, above, n 20, p 274.

[112] Hale, above, n 93.

[113] Hale, above, n 92.

> 1. Though the general foundations of morals are well known and have certainty enough, yet when a man comes to particular instances and applications of them to these generals, there doth unavoidably follow much uncertainty, ....

This, he noted, follows from the great variety of circumstances. Hale concluded his draft with the at once accurate and patronising observation:

> The judgment of good men differs, for example Hobbes' book itself ...[114]

Hale's clear difficulty in settling on a good angle at which to meet Hobbes' criticism stemmed from the need, which he might well have perceived, for the Common Law to find a new foundation. The vehicle for Hobbes' challenge to the common law was a withering attack on Coke and his notion of a *Law of Reason.* Perhaps Hale saw the attack was really across a gulf between two epochs.[115] Hale's difficulty could well have stemmed from a disinclination to support the Common Law of Coke's era, and instead to justify a more ideal Common Law on Hobbes' own ground of mathematics and the sciences. There could be many reasons for Hale's abandonment of the draft, but one likely explanation is perhaps despair at the spiralling negativity into which his defence of legal method was being swept - pointing to uncertainty attending intellectual endeavour in all disciplines undermined the values of predictability which Hale himself was advancing in his efforts to transform legal method, or at least to transform the Interregnum view that it was arbitrary. In the full manuscript of *Reflections on Mr Hobbs,* Hale was able in positive tones, and with some wit, both to meet Hobbes and to advance his own intentions for a more systematised Common Law.

*Reflections on Mr Hobbs, His Dialogue Of The Law*[116]

One manuscript of Hale's answer to Hobbes' *Dialogue*[117] has been published by Holdsworth.[118] Hale's extensive manuscript reveals a great

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[114] Hale, above, n 92 at f 134.

[115] Holdsworth, above, n 20, p 277.

[116] Hale, above, n 93.

[117] Hobbes, above, n 80.

[118] Holdsworth, above, n 20, p 274. Holdsworth published the Harleian MS 711, ff 418-39 in the British Museum, observing that the other BM MSS seemed to be copies of it. Some words missing from the Holdsworth publication are in MS BM Additional, for example, in the gap between "Kingdome" and "Sloathfull" in the Holdsworth publication (at 37 LQR 301), the words "and renders men lazy", are

deal about his efforts to reconcile Natural Law with emerging scientific method and his Puritan interpretation of *The Bible* as a source of moral precepts in Icgal judgment. Hale adopted for his reply Hobbes' own order of treatment:

I. Of Laws In General and The Law of Reason[119]
II. Of Sovereign Power[120]

That Hale did not go on to deal with Hobbes' further five topics,[121] might be explained by Hale's failing health, as Pollock noted[122] or it might be the manuscript of Hobbes' *Dialogue* which Hale obtained, at least six years before publication,[123] was itself incomplete.

As my primary concern is Hale's contribution to legal method, neither Hobbes' theory of sovereignty nor Hale's reply to that theory will be examined in depth.

"I Of Laws In General and The Law of Reason"

Hale commenced by seeking to isolate three *dimensions,* or notions, of *Reason*:-

*First Dimension - the reason for something.* Hale opened this dimension with examples which would have been attractive to Hobbes the Mathematician - Reason is the connection of things, cause and effect, the reason for things, the proportion between lines, figures and superfices.

Hale noted the "reasonableness" of these relations in mathematics is antecedent to the operation of a human order, and then turned this approach to morals and law:

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included in the MS BM Additional f 45: quoted in full below at n 144. This suggests the two manuscripts could well be copies of different editions. The source abstracted for this work was MS BM Additional 18235, ff 2-48. Citation will be made to this MS ("Add") and to Holdsworth's publication ("LQR"). Quotations are from MS BM Additional.

[119] Holdsworth, above, n 118 at Add ff 1-24 LQR 286-94.

[120] Holdsworth, above, n 118, Add ff 25-47 LQR 294-303.

[121] Courts, Crimes Capital, Heresy, Praemunire and Punishments.

[122] In Holdsworth, above, n 20, p 274.

[123] Holdsworth, above, n 20, p 274.

> ... in morals though the objects thereof are more obscure and not so open to a distinct clear discovery, yet there is a certain reasonableness and congruity and intrinsique, connexion and consequence of one thing from another antecedent to any artificial system of morals [f3] or institution of laws.[124]

*Second Dimension - Reason as an intellectual process.* In this dimension, Hale described Reason, first, as the attainment of things to be known, which he termed judgement, and second, as the attainment of things to be done, in which he included skill, wisdom and prudence. Hale adopted the term *ratiocination*[125] for the gradual discovery by "internal deducing or inferring" of one thing or another.

While Reason is, Hale observed, a faculty common to all reasonable creatures, among which he included Naturalists, Physicians, Mathematicians, Lawyers, "mechanique and Plowman", there are nevertheless, degrees of quickness, and other qualities, which are observable, such as a faculty for following an analytical direction. In this sense there are apexes of skill, and thus some people are better at some things than other people.[126] Those who aspire to attain universal knowledge are usually superficial.[127]

*Third Dimension - application of the faculty of Reason to the Reason behind a Subject.* Hale considered it complex when the "reasonable faculty", the second dimension of Reason, is exercised in conjunction with a "reasonable subject", the first dimension of Reason, and frequently used and exercised in that pursuit. By this process a person is denominated as a mathematician or a lawyer, and excellence is achieved in human endeavours, such as watchmaking and surgery. Hale found a metaphor in the considerable power which is created by channelling a flow of water to drive a hammer or a mill, or by a weight descending to make a clock strike.[128]

This is the source of the specialisation which makes a person a Mathematician, a Physician, a Lawyer, or an Artificer. Equal human faculty

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[124] Hale, above, n 93 at Add ff 2-3 LQR 286.

[125] Hale's use of this term could link him just as well to the methods developed by the medieval Glossators of Roman Law as to 17th century English science, particularly considering Hale's use of theological sources: See Berman, above, n 4, (1977) pp 918-19 and 936 and Berman above, n 4, (1983) pp 140-1 and 157-8. See also Gorla and Moccia, above, n 4.

[126] Hale, above, n 93 at Add f 4 LQR 287.

[127] Hale, above, n 93, Add f 5 LQR 287.

[128] Hale, above, n 93, Add f 6 LQR 287-8.

is applied in different directions, with the result they have unequal skill in each other's science or art.

So, observed Hale pointedly, if a Mathematician runs over Hippocrates, or a Physician over Euclid:

> ... or if a man who pretends himself, and really ba well exercised in Natural Philosophy shall run over the titles or indexes of the Digest or Code, the first shall be a weak physician, the second a weak Mathematician, and the third but a weak Civilian.[129]

And there is no topic as difficult for:

> ... the Faculty of Reason to guide itself and come to any steadiness as that of laws for the regulation and ordering of civil society, and for the measuring of rights and wrong when it comes to particulars.[130]

Some may be excellent in making proofs and demonstrations in high theory and politics but still be no good at particular applications, or unable to draw laws applicable to all situations. Yet this does not restrain them from speculating about law. There are speculations and abstract notions, but in particular applications people differ. Further, the speculators are the worst judges:

> ... because they are transported from the Ordinary Measures of right and wrong by their over fine speculations theories and distinctions above the common staple of humane conversation. And this instability, uncertainty and variety in the judgements and opinions of Men - touching right and wrong, when they [fll] come to particulars; and to avoid that great uncertainty in the application of Reason by particular persons to particular instances; and to the end that Men might understand by what rule and measure to live and possess; and might not be under the arbitrary uncertain judgement of the uncertain Reason of particular persons; hath been the prime reason that the wiser sort of the world hath in all ages agreed upon some *certaine Laws and Rules and Methods of Administration of Common Justice, and these to be as particular and certain as could well be though[t] of.*[131]

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[129] Hale, above, n 93, Add f 7 LQR 288.

[130] Hale, above, n 93, Add f 8 LQR 288.

[131] Hale, above, n 93, Add ff 10-11 LQR 289 [my emphasis].

Hale then proceeded to point out the advantages of systems exhibiting maximum *particularity* and *certainty* which should be agreed upon for the administration of justice. First, they avoid the instability of a particular judge and *Certainty* through which both the judge and those to be judged are able to know. Second, the corruption of judges is avoided, and third, it avoids tangling and contradiction.[132]

Although certain and determinate law has problems in particular instances which cannot be foreseen, this is preferable to arbitrariness. Even if certain law might cure one ill, and in doing so might introduce another, just like medicine, the *Certainty* has a value in its own right.

Therefore the making, interpretation and application of laws all require foresight, judgement and experience. Although:

> ... sometimes some persons or causes may suffer by the rigour of a certain law, yet, infinite more must suffer by the inconvenience of an arbitrary and uncertain law.[133]

This problem occurs in making and in expounding laws. One must keep in mind what inconvenience might be caused by expounding the law in one way or another. This leads to different issues. One is the minute dissection of the aspects of one event from another which make the events differ, and thus bring down different moral consequences. Another issue is that many things may reasonably be approved though a party does not see the reasonableness, because the party does not see the reason for the making of the law.[134] Nevertheless, it is better to support a law that has ruled the kingdom happily for four or five hundred years than to fool around with inventions.

It is often difficult to fathom the reason of present laws, but it is not necessary to fathom the reason in settled institutions - it is sufficient that they were instituted. This also leads to *Certainty*. The institutions should be observed, and it is unreasonable and foolish for us to point at fault, just because we think we could do better, or expect a mathematical demonstration of their reasonableness. Hale advanced the law of descent to the first son as an example, and claimed there were infinite more.

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[132] Hale, above, n 93, add ff 11-12 LQR 289.

[133] Hale, above, n 93, Add f 14 LQR 290.

[134] Hale, above, n 93, Add f 16 LQR 291.

> Now if any the most refined brain under heaven would go about to enquire by speculation, or by reading [fl9] Plato or Aristotle, or by considering the Laws of the Jews, or other nations to find out how land descends in England ...[135]

Men are not born common lawyers, and bare exercise of the *Faculty of Reason* does not give one sufficient knowledge of it. Knowledge of law is gained by long study and experience.

Mathematics is more precise than law because law depends a lot on the first institutor's consent and appointment. That is, in Mathematics the numeric values are agreed from the outset. To practise mathematics one must have studied this, but it does not raise the same difficulties as a moral inquiry in which little is agreed at the outset.[136]

Lawyers are not infallible but know more about law and moral inquiry than a wit who has read books for a month, and are obviously better at it than one who has studied only philosophy or mathematics. Such people might well have been great lawyers if they had studied law. Nevertheless:

> If men of parity of reason and intellectuals have gotten the advantage of others that in natural capacities have been their equals, by reason of the advantage they have had by their education in this or that kind of learning, then certainly considering [f22] how much the nature of *the science of the law* requires much more assiduity and application to it, then other studies that persons of equal parts that hath habituated his Reason to the study of the law must needs have so much the greater advantage in his knowledge of it above others that have not made it their business by how much more the very nature kind and condition of that science requires more study and application then the study of other sciences.[137]

One issue of the greatest moment in Common Law is the maintenance of *Certainty*, that each tribunal will speak the same thing. Uniform rule is sought, as near as possible:

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[135] Hale, above, n 93, Add ff 18-19 LQR 292.

[136] Hale, above, n 93, Add f 20 LQR 293.

[137] Hale, above, n 93, Add ff 21-2 LQR 293 [my emphasis].

> ... for otherwise that which all ages and places have contended for in Laws, [f23] namely certainty and to avoid arbitrariness and that extravagencc that would fall out, if the reasons of judges and advocates were not kept in their traces would in half an age be lost.[138]

This conservation of law within bounds requires men well informed by study, observation and reading.

Similar considerations apply to the "exposition" of Acts of Parliament and Written Laws. Those who have studied law are better at this because, first, they know the body of pre-existing law and the mischief to be remedied, second, they have knowledge of other expositions of the Acts, by judges for example, and third, they know expositions of other Acts with identical clauses or similar clauses, or analogy of reasons.[139]

"II. Of Sovereign Power"[140]

While seventeenth century constitutional views are on the perimeters on the scope of this article, Hale's approach to this section of Hobbes' *Dialogue* confirms the *Certainty* and stability were seen by Hale as vital for the preservation of property and the social production of wealth. No doubt these considerations were also related to Hale's view of the need for *Certainty* in making and expounding law, which he developed in the earlier folium, explored above.

In the first part of this section of the manuscript an extensive technical justification is made of the accession by William the Conqueror after Edward on the basis of descent.

Hale asserts most of the King's powers are subject to Parliament, and especially the King's law making powers. Most important grants of liberties to subjects are not new grants but the restoration of old rights granted in the Laws of Edward, the Charter of King John, and so forth.[141] These were original rights, which were part of the original and primitive institution of government in England. The oath of Princes is to uphold them. Though no

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[138] Hale, above, n 93, Add ff 22-3 LQR 293.

[139] Hale, above, n 93, Add f 24 LQR 294.

[140] This part of the manuscript is virtually identical to another manuscript reproduced under the same title in MS BM Hargrave 96.

[141] Hale, above, n 93, Add ff 41-2 LQR 300.

subject has the right to judge or arraign the sovereign for violation of the oath[142] yet no man could question that the King is in the sight of God and bound by natural justice.

This is a dangerous point for governments, because the happiness of any government rests in the mutual confidence of the governor and thc governed, which Hale describes as the golden knot. Unfortunate experience should remind us that insinuations, and so forth, secretly nourished, are dangerous, and there is no better way to raise jealousies, than to declare openly to the world the King is not bound by the laws and constitution and may abrogate them.[143] Such doctrine and teaching betrays sovereign power with a kiss:

> ... when People are under this apprehension, that their properties and estates are no longer theirs, then it shall please their Governors. It [f45] destroys industry and care to enrich themselves by Trade or adventure, and consequently impoverisheth the Kingdom and renders men lazy, slothful, and poor spirited.[144]

It is in the King's interests to use power to benefit his subjects, to keep them rich and therefore obedient, rather than to impoverish them and make them desperate.

> Yet it is most certain that once Men under that jealousy, that the laws of the lands do not sufficiently fix their properties and liberties, Mens minds will be penulous and unquiet and subject to feares and doubts and thereupon Industrie and Paines will wither and decay whatsoever [f46] Orations men of wit and eloquence may otherwise make to secure them.[145]

The reason and intention of government is common safety. Laws are not to be framed for the unlikely event, but for the usual course. Therefore the remote possibility the kingdom might be overrun before an army can be raised does not justify allowing the King absolute power of taxation.[146]

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[142] Hale, above, n 93, Add f 43 LQR 301.

[143] Hale, above, n 93, Add 5 44 LQR 301.

[144] Hale, above, n 93, Add ff 44-5 LQR 301-2.

[145] Hale, above, n 93, Add ff 45-6 LQR 302.

[146] Hale, above, n 93, Add f 47 LQR 302.

> It is better to be governed by certain laws though they bring some inconvenience at some time, then under arbitrary government which may bring many inconveniences at many times though it answer some inconveniences [f48] that the other doth not.[147]

In 500 years there had been no instance of parliament not approving *Supply* in time in those "broyles" that take place between King and Parliament which would never if the King had not consented to a Bill to make it perpetual. Ministers of State are not so stupid they cannot foresee a war breaking out in six weeks.

The manuscript does not reveal any deep renovation by Hale of Natural Law jurisprudence to align Common Law with the *new science.* It does demonstrate constitutional changes underlying the Restoration settlement. Hale was so confident about the Restoration relationship between King and Parliament which he described that advocacy of a return to broader monarchal prerogative was to be equated with the kiss with which Judas betrayed Christ, again showing theology was never far from the surface of his writing.

Hale had adopted from science a manner of argument, and found a store of scientific and mechanical metaphors. Notable in Hale's use of these is his inclusion of "lower order technicians", such as mechanics and plowmen, among reasonable beings with equal faculties of reason who develop them in different directions in the way that lawyers, physicians and mathematician do. These points distance his work from, for example, the Renaissance equity theory of Lord Chancellor Ellesmere, written perhaps only 60 years before. Further, Hale emphasised *Certainty* for the benefit of property, industry, trade and adventure, as Coke would have. This value of *Certainty* was to be achieved by recognition of the absence of monarchal arbitrariness and by establishing uniform judicial elucidation of the Common Law by legal experts, above equitable consideration for justice in the individual case as Ellesmere would have understood it.

This more mechanistic perception of how justice was to be accorded, and the resolute insistence against exceptions for the individual case, would indicate a transformation in the notion of justice itself, except that Coke had also asserted it in an earlier intellectual context. Nevertheless, it was a perception which accorded with the new 17th century world view. Discovery of the legal

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[147] Hale, above, n 93, Add ff 47-8 LQR 302.

methods required to implement it did not have to wait for a jurist also capable of writing scientifically about physical phenomena such as the gravitation of fluids.[148] It required a jurist with political sense, and a scholarly understanding of the legal underpinnings of the commercial success of the Hanseatic trading league, and the Spanish and Dutch trading empires - in short, the refined methodology of the continental Civil Law. It was also desirable this jurist should be conversant in the scientific vernacular, as well, and command respect in those circles. Hale filled all these qualities of the jurist best equipped to defend the common law against Hobbes, and from other quarters as well. Securing the legitimacy of the Common Law, in the sense of its broad political acceptability to the citizenry, was a recurring concern for Hale.

No doubt Hale believed in what he was doing, and his success would have confirmed his beliefs. That Hale's view of the universe was highly ordered and unchaotic, is particularly evident in his manuscript *Some Chapters Touching The Law of Nature.* It would have seemed perfectly natural to him his understanding of the *new science* would dovetail with his understanding of the intrinsic merit of Roman Law and its Natural Law foundations.

*Some Chapters Touching The Law of Nature*[149]

Much of this large manuscript comprises a catalogue of biblical sources identified by Hale as support for his theory of Natural Law. Indeed the later folium[150] are devoted almost entirely to the quotation of biblical sources. The following survey of the manuscript is confined to the chapters which demonstrate the clearest connections between law, science and theology - thus throwing the greatest light on Hale's idea of *legal science* and the basis he saw for it in Natural Law.

Hale commenced by seeking to define the terms which he employed.

"Law"

A law is a *Rule of Moral Action* given to a being endued with understanding and will, by him that has power or authority to give the same and to exact

[148] Shapiro, above, n 25, pp 739 and 741.

[149] Hale, MS BM Additional 18234, 41.

[150] Hale, above, n 93, from f 140 to the end of the manuscript.

obedience "hereunto, *modum unpery,* commanding or forbidding such actions under some penalty expressed or impliedly contained in such a law.[151]

"Rule"

The sciences and "every mechanical art or operation" have rules whereby the artifice is effected and without which the end cannot be attained, but these rules lack authority.

"Moral Action"

When considering *Moral Action* distinctions are to be made between *voluntary action* and *involuntary action* such as the heartbeat. There is also *mixed voluntary and involuntary action* which flows from the *Animal Life in Man*, such as action common to humans and animals, like eating, drinking and sex, the last of which is species preservation and so natural. Nevertheless, the timing, measure and manner, order and degree are open to choice.[152] In *Beasts* this action is measured by appetite, but in *Man* there is a superior faculty of understanding and will, which though not commanded by *Reason* is enlightened and directed by it.

Though *mixed actions* are not properly subject to law in brutes, they are in *Man* therefore they are the proper subject of true and formal law. Thus, sobriety, chasity, temperance, moderation of passions and many more moral virtues may be subject to law. The actions are natural but the modification and circumstances are moral, and thus, "... capable to be under the Sanction of a Law in Man".[153]

Understanding is requisite because without it law cannot be known as law. Will and intrinsic liberty is required, otherwise law cannot be obeyed as law and obedience or disobedience cannot reasonably be attended, nor reward nor punishment so described. If a person is already determined to observe the tenor of law, the law is needless. If a person is determined to the contrary, the law is unreasonable because it is impossible to be observed, and it is unreasonable to exact punishment from one under an invincible intrinsic netessity. Thus the subject must have will.[154]

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[151] Hale, above, n 93, at ff 43-4.

[152] Hale, above, n 93, f 45.

[153] Hale, above, n 93, at f 45.

[154] Hale, above, n 93, at f 46.

"Proper Author of Law"

The *Law Giver* must be distinct from the subject because there must be an obligation owed to the party who "gives" the law, by the party to whom it is "given", to obey it. Members of a community give their "Monothetical power" to the law giver, whether democratic, monarchical, or otherwise. This "paction" makes one part of the community. This is the basis of *Man-Man* laws, which are thus civil contracts, and the root of all civil government under *God*.[155]

"Law of God"

The *Law of God* maintains the order of the universe, the orderly motion of clestial bodies, and so forth.[156]

"Law of Nature"

Nature is not the author "... for nature properly cosidered is not any real efficient,but [the Law of Nature] is the Effect Law or order that the Supreme Intellectual Being hath instituted or ordered in things ..."[157] It is called *Law of Nature* or *Natural Law* because in animals and plants it is connatural to them by the wise institution of *God*.

The *Law of Nature* affects *Man* - one cannot be in two places at once, and one falls down and not up.[158] But man is a *reasonable* creature capable of moral action, and so the proper subject of law. Thus *Natural Law* also includes laws that affect man as an intellectual and voluntary agent.[159] The *Law of Nature* passed to Adam and thence to the primitive fathers in pure form. At this point Hale departed to add to his inventory of biblical proof. Hale went on to point out that all Ages have acknowledged a common intellective influence,[160] and then again departed to prove this point with biblical sources.

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[155] Hale, above, n 93, f 48.

[156] Hale, above, n 93, f 54.

[157] Hale, above, n 93, f 57.

[158] Hale, above, n 93, f 58.

[159] Hale, above, n 93, f 59.

[160] Hale, above, n 93, f 104.

"Caput II Concerning Human Laws And Their Use in Relation to The Law of Nature"[161]

Hale's analysis carries him to the point where he must ask why, if the *Law of Nature* conjoins with human law and is sanctioned by external penalty and published in Gospels, is there a need for *Human Law*?

To answer this Hale has recourse to *Lex Permissiva.* There are, Hale points out, areas left unregulated by the *Law of Nature*, Should I write today or tomorrow? Hale would exercise his choice in favour of writing today, because he might have an accident tomorrow.[162]

Also, there are some matters left by the *Law of Nature* to external punishment, such as theft, adultery, drunkenness, and so forth, in order that the punishment may be proportioned to the offence. This behaviour is contrary to the *Law of Nature* but enforced by the *Law of Nations.*

Hale thus reaches the point where he may describe the proper sphere of *Human Law*. First, human law cannot forbid what the *Law of Nature* enjoins, nor command what the *Law of Nature* prohibits, but only as passive obedience allows. Second, human law may be consistent with, and thus enact what the *Law of Nature* enacts. Third, the proper sphere of human law is therefore the area of free will, the *lex permissiva.*[163]

While the *Law of Nature* "... of great virtue and efficacy ..." for directing mankind in moral affairs, yet civil government is necessary for the wellbeing of mankind.[164] Therefore, for perfection of the *Law of Nature* a balance is struck with human laws and institutions. This balance has five aspects. First, the institutions commanded by the *Law of Nature* are formed by governments and receive determinations from human government. Second, laws of state are made by the kingdom in the areas left unregulated by laws of nature: for example, there would be unimaginable confusion without rules of property, or rules that all punishments be equal, or that one must keep one's word. Third, the corruption of manners, and so forth, is so great through the blindness and prejudice of men, through their love of themselves and their interests, and human law balances this. Fourth, although the *Law of Nature*

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[161] Hale, above, n 93, f 133.

[162] Hale, above, n 93, f 134.

[163] Hale, above, n 93, f 135.

[164] Hale, above, n 93, f 136.

commands *The Eternal Punishsment* some people forget, or do not fear it, or are corrupted by the attraction of pleasure in present life outweighing the *Fear of Damnation*. Yet others would be as wolves, bears or lions. Thus, those who are a danger to mankind must be coerced with laws of severity suitable to their fears.[165] Fifth, even in good men there is sensual appetite, the present attraction of which outweighs distant punishment, thus human law introduces a present punishment.

God could strike people down immediately, but this is not appropriate to the "... ordinary and constant administration of the world". As in the natural world, God rarely interferes, and leaves affairs to civil law and government:

> ... so that by this meanes the [fl38] several wheels of the great engine of the great human nature are orderly set awork and everything acts its part regularly and orderly.[166]

The *Law of Nature* gives ceneral direction and the *Law of Reason* perfects it.

"Caput 12 Concerning the end of the Laws of Nature"

Hale identified nine ends of the *Law of Nature*. First, God is good and wise as well as intellectual, so the end must be good. Second, God engraved the manner of perfecting the *Law of Nature* in the soul of man, who is "an efficient and no way inferior toy". Third, men are above animals, and so directed to a life above animals - that is, to a reasonable life and a life answering the dignity and value of the reasonable nature. Fourth, for the common benefit of mankind. Fifth, to create tranquillity so that man may enjoy the life of his animal body. Sixth, with certain law we can know when we put our souls at risk. Seventh, man can know his evils when he begs forgiveness. Eighth, even if his faith fails, if a man abides by law he might still enter heaven. Ninth, there are degrees of damnation, and thus degrees of glory. Even without explicit knowledge of Christ, men may experience some glory by adhering to the laws of nature, and this is the case of natives in far lands who through no fault of their own do not have this knowledge.[167]

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[165] Hale, above, n 93, f 137.

[166] Hale, above, n 93, ff 137-8.

[167] Hale, above, n 93, f 139.

This analysis, Hale claimed, is supported by the scripture of the Christians, and by the ancient Patriarchs of Jewish faith, some of whom foretold Christ.[168] As noted, the rest of the manuscript is devoted to establishing this with biblical quotations, advanced in support of Hale's argument in the manuscript.

In this treatise Hale set out his view of an ordered cosmos installed and maintained in motion by laws of divine origin, from the movements of celestial bodies down to the "several wheels of the great engine of ... human nature". Human law plays its part most authentically when it maintains *Certainty* in human affairs, for reasons of civil order and to assist the balance between divine retribution and reward. *Rules* employed in science and trade are set apart from this cosmic mechanism and its *Laws*. God could intervene directly, but chooses not to for reasons which actually enlarge a divine purpose for the human legal system.

Hale's view of *Natural Law* is not a rigorous scientific reconceptualisation. It is a view of *Natural Law* adapted to his times by making a place for science. In this it is not original. More prominent than the place for science is the linking of *Certainty* in human justice to divine purpose with no clear place for qualities of mercy and charity. The significance of this view is *not* originality in systematically reorganising jurisprudence anew as a scientific body of knowledge, as the image of Hale as legal scientist would lead us to expect, and as Bacon might have attempted. Rather, its significance lies in the fact that a man in Hale's towering position, and with commensurate influence, propagated this view in the Restoration legal and political order. Elements of the perspective can be traced in Hale's own background - his Puritan upbringing, his scholarship in Common Law and Roman Law and his interest in science. In this sense elements of the theory, and most of Hale's work, satisfied a spectrum of views in Restoration society, without necessarily fully satisfying any one group. Hale's popularity with diverse interests in the new order supports this conclusion. Hale was not a thoroughgoing legal scientist - he composed a *Toccata and Fugue* of prevailing thought, one movement of which dwelt on *the scientific,* and largely as a store of new metaphors to illustrate old points.

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[168] Hale, above, n 93, f 140.

## Making Human Laws Certain

Hale's own intention to emphasise *Certainty* in the Common Law, as a principle of judicial exposition of the law, which would place it on a level comparable with contemporary technique in other countries already under the sway of the Enlightenment and influenced by Roman Civil Law, such as Holland, was in a practical sense successful. In the context of English Restoration legal thought which I have sketched, the King's Bench led by Chief Justice Sir John Vaughan, associate and close lifetime friend of Matthew Hale,[169] decided *Dixon v Harrison*[170]

> Where the law is known, and clear, though it be unequitable and inconvenient, the Judges must determine as the law is, without regarding the unequitableness or inconveniency.
>
> Those defects, if they happen in the law, can only be remedied by Parliament; therefore we find many statutes repealed, and laws abrogated by Parliament, as inconvenient, which before such repeal or abrogation, were in the Courts of Law to be strictly observed.
>
> But where the law is doubtful, and not clear, the Judges ought to interpret the law to be as is most consonant to equity, and least inconvenient.
>
> And for this reason, Littleton in many of his cases, resolves the law not to be that way which is inconvenient, which Sir Edward Cook, in his comment upon him often observes; and cites the places, sect. 87.

In *Bole v Horton*[171] the same court held that judicial opinion delivered *ex curia* or as *obiter dictum is* not binding. Nevertheless, a court is bound to follow an earlier judgment which was itself given according to law.

> But an opinion, though erroneous, concluding to the judgment, is a judicial opinion, because delivered under the sanction of the Judges oath, upon deliberation, which assures it is, or was, when delivered, the opinion of the deliverer.

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[169] Burnett, above, n 17, p 14.

[170] (1669) Vaughan 36, 38.

[171] (1673) Vaughan 360, 382-3.

> Yet if a court give judgment judicially another Court is not bound to give like judgment, unless it thinks that judgment f~rst given was according to law.

If the following court thought the "judgment first given" was given "according to law", then in the view of the King's Bench led by Sir John Vaughan, it was bound. What was erroneous was a legal question, not a question of conscience. It was to be determined by the correctness of the use of authority in the previous case.

Correction of erroneous precedent could not be removed from this formulation until the complete institution of a uniform hierarchy of courts established superior courts with this power. The House of Lords could not be bound by its own decisions until it took the qualities of a body of professional legal thinkers.[172] The area of doubt and ambiguity was further reduced by improvements in law reporting, which flourished across the 18th century and through the 19th century. These institutional arrangements were made as the doctrine of precedent took hold.

Nevertheless, in 1673, two years before Hale's death, an idea of *stare decisis,* with an early distinction between *ratio decidendi* and *obiter dictum* formulated, was enunciated by one of the closest members of the Hale circle in a form which was an innovative development beyond its conception in the centuries which had preceded it. Vaughan's innovation was entirely consistent with Hale's ideas for thc Common Law which we have seen in the manuscripts explored in this article, even if Hale did not specifically deal with the obligation to follow past decisions as a discrete issue in judicial method. Over the next two centuries the doctrine of precedent was to be progressively accepted until it was a feverous ideal. If Hale's influence was at work behind this element of a Common Law *system,* it still does not necessarily amount to a systematisation through seventeenth century *new science.* Hale was much more traditional than that, inspired by continental juristic ideas with a much longer history in which he had been educated, and which were perhaps delivered to him again in a new form from Holland. Religious justification of a link between *Natural Law* and *Human Law* dominates Hale's writing. While Hale doubtless respected science, he drew upon it as a store of metaphors to explain why the Common Law system deserved the political respect of the new social circles with allegiance to the

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[172] See R Stevens, *Law ad Politics: The House of Lords as a Judicial Body 1800-1976,* University of North Carolina Press/Weidenfeld & Nicolson, London, 1978.

idea of science. So far as the Common Law emerged rationalised from the seventeenth century through science, it underwent the process under the *mantle*[173] of the *new science* and not because of it.

The appeal to science stabilised the Common Law at a time when the English legal system could well have been much more fundamentally reorganised. The Glorious Revolution added to the independence of the judiciary through the *Act of Settlement.* The independence of the English judiciary, and its attendant legal profession, to develop legal science in its own way was thus assured. Some more practical results of the exercise of this national legal independence nevertheless suggest that sideways glances, scientific or not, were still cast from time to time to the Continent.[174] This point emphasises the view that European legal scholarship retracted to national borders relatively recently,[175] and then not completely. In making such comparisons it is interesting to reflect on Max Weber's aside, that England won her early primacy among the so-called *early capitalist* countries largely *despite* the structure of her legal system rather than because of it,[176] but one should also keep in mind the irony that with regard to the strategic structuring of legal transactions, to safeguard interests and prevent litigation, in Weber's view, the English "legal technicians" most resembled the legal profession of Rome.[177]

Assessment of Hale's contribution to the emergence of a modern Natural Law, in the sense employed by Habermas, in the Common Law system is clearly problematic. If meteors, comets and other strange portends in the sky[178] are all that stand between English legal history and the identification of an early, perhaps embryonic form of modern Natural Law, then it should perhaps be recalled that even Galileo[179] was beckoned to Holland and Holland had no small influence over England at this time. Confusion set free

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[173] Habermas, above, n 12.

[174] The remarkable similarity, for example, between the English rules about what constitutes an easement and the relevant provisions of the German *Civil Code* suggests more than coincidence: compare *Re Ellenborough Park* [1956] 1 Ch 131 and *BGB* §§1018-20 (Grunddienstbarkeiten).

[175] See Zimmerman, above, n 4.

[176] M Weber, *Wirtschaft und Gesellschaft: Grundriss der Verstehenden Soziologie,* 5th ed, J Winckelmann (ed), J C B Mohr (Paul Siebeck), Tübingen, 1976, p 471.

[177] Weber, above, n 176, pp 443-4.

[178] Habermas, above, n 7, p 83. While disturbed natural events are signals of turmoil on Earth in Shakespear, for example in *Macbeth* Act 2 Scene 4, it is questionable how far into the 16th century these views were held by the educated, who were consciously adopting a scientific cosmology.

[179] Habermas, above, n 11, p 99 or p 72.

about meteorological events could still have been confusion between scientific and pre-scientific interpretations. On other issues there is substantial ground to suggest that Halc was working with early ideas of modern Natural Law. If a violent revolution was really necessary, the English Civil War with its regicide and settlement turmoil offers more than a token. In addition, thc rcconceptualisation of English Common Law attempted by Hale within a Natural Law framework suggests early attempts at the jurisprudential processes which were taken to more abstract levels in other countries.

This reconceptuahsation took with it many of the elements of the revolutionary process identified by Habermas. First, while people with technical skills in non-lawyerly positions were treated by Hale with respect, Hobbes' contribution was argued away on the basis of a division of intellectual labour. Second, despite his ultimate links to Ellesmere through circles of patronage, Hale adopted jurisprudential positions which were a clear break from the Renaissance view of equity. Third, Hale acknowledged complexities in subjects offering obedience to law which could bc seen as promising signs for the necessity of law to be legitimated from below in more than form. Fourth, Hale projected the origin of rights to back to former times when "social compacts" were made. Fifth, Hale saw a need to impose Natural Law against human corruption. Sixth, Hale argued for a *naturalness* in a complete order which he sought to impose. Seventh, Hale formed at least one of his notions in reflection upon reflection upon *natives* in far lands, as Rousseau seems to have done.[180] Eighth, Hale's Puritan background, and respect for an equality of ability, suggests satisfaction of Habermas' *new theology and equality* hurdle.[181] Finally, Hale drew on the science of his time as a metaphor to explain his project as the Progress promised by the past, and not deeply as an organising principle for his work - for deeper organising principles he drew upon the Roman Civil Law tradition. In this sense Hale's idea of Natural Law emerged under the *mantle* of science.[182]

On the other hand, significant departures seem to deny Hale's work the modernist character - he did not see property as an absolute, and, probably most importantly, it would be difficult to describe his view of the naturalness of the order as a revolutionary self understanding.

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[180] Habermas, above, n 7, p 106.

[181] Habermas, above, n 15.

[182] Habermas, quoted in full above, n 12.