Order Number 9018635

Roman law mind and common law mind: A study in the comparative history of English and continental jurisprudence before 1709

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The Johns Hopkins University, 1990

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Roman Law Mind and Common Law Mind:

A Study in the Comparative History of English and Continental Jurisprudence Before 1700

by

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A dissertation submitted to The Johns Hopkins University in conformity with the requirements for the degree of Doctor of Philosophy

Baltimore, Maryland

1989

ABSTRACT

Legal scholars in this century have settled upon a received understanding about the distinguishing characteristics of common law and civil law jurisprudence. In part, this understanding holds that civil law systems purport to be coherent bodies of rules deduced from general principles and arranged systematically in codes having fixed and authoritative texts. By contrast, the common law is said to have been from early in its development a set of rules inferred inductively from decisions in particular cases. Roman and civil law, in this view, are conceptual and theoretical while the common law is particularistic and pragmatic. The common law is, and always has been, judge-made case law strongly strongly tied to the doctrine of binding precedent, but the civil law has depended upon the legislator and the legal scholar for its development.

This study demonstrates that the absence of a sustained and detailed comparative historical study of the jurisprudence of the two traditions--one which takes into account the changes that sometimes quickly took place in the thought of both traditions, and the frequently striking differences among contemporaries within the same tradition--has led to the widespread overestimation of the uniformity of each tradition and of the starkness of the contrast between the two traditions. The study further shows that common law doctrines about customary law, case law and precedent, reason and the law, and legislation, equity, and interpretation are derived largely from the Roman law. The differences, frequently noted by comparativists, between civil and common law jurisprudence, in many instances merely reflect the common law's having followed a particular strand of civil law thought--a strand not ascendant

in the civil law at the point in time upon which comparisons between the two traditions were based but which at other times in the history of the civil law tradition may have been dominant.

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ACKNOWLEDGEMENTS

I wish, first, to express my gratitude to my wife, Virginia Tubbs, for not divorcing me when I decided to leave my law practice and return to the impoverished life of a graduate student. She not only accepted a much lower standard of living for several years, she also worked hard to provide the income we needed in order to survive. This project would have been impossible without her.

Next, I wish to thank Professors J. Woodford Howard and J.G.A. Pocock for guiding me through this project. Working with them has been the most rewarding experience of my academic career.

Finally, I would like to thank Maxine Riley, Terry Kingrea, Kim Hedge, and Luci Zipper for typing and retyping this manuscript, including the Latin quotations, with great accuracy and good grace.

PREFACE

This study originated as an attempt, at Professor J.G.A. Pocock's suggestion, to write a short paper entitled "Roman Law Mind and Common Law Mind." In its initial conception, the paper was to be an exploration of characteristic Roman law and English common law ways of thinking about law. The fact that distinguished scholars of both common law[1]

and Roman law[2]

had attempted brief comparative statements of the distinguishing characteristics of Roman and common law thought made such a project seem feasible. And the fact that textbooks on comparative law regularly, in the space of a few sentences, make sweeping comparisons of what are taken to be the fundamental

attributes of the two traditions, did not diminish the project's credibility. I quickly became convinced, however, that an essay of the brevity originally contemplated could not adequately cover the proposed topic. More importantly, I had read enough of the literature of both traditions to question whether it made sense to speak of either "common law mind" or "Roman law mind" without substantial qualification. To so speak would be to suggest that most, if not all, persons trained in one of these legal traditions have held certain basic attitudes and beliefs about the nature, theory and practice of

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[1]See, e.g.,
R. POUND, THE SPIRIT OF THE COMMON LAW (1921).

[2]See, e.g.,
Stein,
Logic and Experience in Roman and Common Law,
59 B.U.L. REV. 433 (1979).

law in common, and that those attitudes and beliefs have held constant over time and from country to country.

To be sure, it may be plausible to suppose that persons of one time and place, who have received similar educations and similar legal socializations, will think about many jurisprudential topics in similar ways. It is considerably less plausible to suppose that lawyers from different historical periods have been of the same jurisprudential "mind." Certainly we should expect that on some points lawyers from different eras will have been of similar mind. But it is dangerous to assume commonality of jurisprudential outlook without close scrutiny, particularly in the light of cautionary examples such as Roscoe Pound's mistaken assumption that a particular movement in nineteenth century German legal thought was representative of two thousand years of the Roman legal tradition.[3]

Legal scholars in this century have settled upon a standard statement--a received understanding--that the civil law and common law traditions have each had a few constant fundamental characteristics that distinguish one from the other. In part, this understanding holds that civil law systems purport to be coherent bodies of rules deduced from general principles and arranged systematically in codes having fixed and authoritative texts. By contrast, the common law is said to have been from early in its development a set of rules inferred inductively from decisions in particular cases. Roman and civil law, in this view, are

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[3]R. POUND, supra.

conceptual and theoretical while the common law is particularistic and pragmatic. The common law is judge-made case law strongly tied to the doctrine of binding precedent, but the civil law has depended upon the legislator and the legal scholar for its development. The common law, for many centuries, was conceptualized as immemorial unwritten custom which had a higher standing than statutory law; although custom could attain standing as law in the Roman tradition, it was always subordinate to statutory law.

This catalogue of differences is on some points completely erroneous. Even when it is not entirely wrong it is misleading. Despite Maitland's warning that "History involves comparison, and the English lawyer who knows nothing and cares nothing about any system but his own hardly comes in sight of the idea of legal history," the comparative instinct has been weak among common law historians. When the instinct has existed it has usually been satisfied with a shorthand formula of the type outlined above. Most recent scholars of comparative law, on the other hand, have had little interest in history. Some of the fathers of comparative law as a discipline (Maine; Gray) had historical interests but a very inadequate historical methodology. Thus there have been virtually no sustained and detailed comparative historical studies of the jurisprudence of the two traditions which have taken into account the changes that sometimes quickly took place in the thought of both traditions, and the frequently striking differences among contemporaries within the same tradition. The absence of such studies has led to the widespread scholarly overestimation of the uniformity of each tradition and of the starkness of the contrast between the traditions.

To my knowledge there are no close models in English for the kind of

detailed, closely documented, comparative historical study of the legal theory of the two traditions that I have attempted here. To make this claim is to invite a demand that I specify as precisely as possible what there is about my approach to jurisprudential scholarship that is different from the approaches other scholars have taken, and that I show why there is a need for a new approach. I shall briefly describe what my subject of study has been, explain how and with what methods I have engaged in that study, and why I have thought it worthwhile to travel once more over ground upon which some of the giants of legal scholarship have already walked.

JURISPRUDENCE

My description of this work as a study in the comparative history of English and continental jurisprudence before 1700 needs explication. In the first place, the term "jurisprudence" has more than one common meaning. In the sense closest to its Latin roots
(juris prudentia)
it means the science or study of law in general. It is also used as a fancy synonym for law (e.g. Roman jurisprudence). More technically, it refers to the enterprise, activity or product of thinking about, examining, or analyzing questions or problems having to do with law's nature, its sources, its authority, its elements and their relation to each other, its relation to equity or justice, its rationality, and so on. The present work is concerned with jurisprudence in the third sense; it is not concerned with substantive legal doctrines of property, contract, or the like, except where a juristic discussion or treatment of such doctrines may shed light on the more abstract and fundamental questions of jurisprudence being investigated.

SOURCES OF LAW

A completely thorough comparative study of English and Continental juridical approaches, over a period of several centuries, to only one of the fundamental questions of jurisprudence--say the problem of authority or the problem of obligation--could easily amount to a very large book. Therefore I have had to be selective about the topics I would cover. I chose to concentrate on some of the jurisprudential questions that traditionally have been grouped together under the heading "sources of law."

Like "jurisprudence" itself, the term "source of law" is used in several different senses by writers on jurisprudence.[4] It may be used to refer to some historic event, practice, or borrowing that led to the existence of a rule or principle of law in a particular system. For example, it might be said that the source of a particular common law maxim was the civil law. In a quite different sense, Percy H. Winfield primarily used the phrase in his book

The Chief Sources of English Law,

to refer to the "available oral or documentary evidence for the existence of any fact in issue."[5] In other words, Winfield used the term to refer to the statutes, public

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[4] See SALMOND ON JURISPRUDENCE 109-112 (12th ed. 1966); C. ALLEN, LAW IN THE MAKING 1-66 (7th ed. 1964); D.M. WALKER, THE OXFORD COMPANION TO LAW 1156-58 (1980).

[5] P. WINFIELD, THE CHIEF SOURCES OF ENGLISH LAW 42 (1925).

records, reported cases, textbooks, etc., at which one could look and obtain information about the law.

I shall frequently be concerned with the historical origins of particular legal practices, concepts or modes of conceptualization, and my discussion will be almost entirely based on "sources of law" in Winfield's sense, but in neither of these senses are sources of law the subject of my investigation. I shall be concerned primarily with what used to be called the "formal" sources of the law.[6]

These are sources which "by reason of their accepted authority, confer validity and legal force on principles or rules drawn from them. They are the recognized law-creating and law-declaring agencies from which came valid rules of law,"[7]

One of the timeless questions in jurisprudence, asked abstractly and philosophically, is "What is law?" Asked more concretely and pragmatically, this question can become "Is this rule or principle now being alleged to cover the facts of this case an authoritative, binding legal rule or principle, or is it something else?"

One of the most important means of answering the latter question involves asking and answering a further question: "Does the putative rule come from a recognized formal source?" In Western European jurisprudence at one time and place or another, the recognized sources of law have included custom, legislation, judicial precedent, equity,

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[6]E.g., in J. SALMOND, JURISPRUDENCE (1902).

[7]WALKER, supra, at 1156.

and natural law. For two thousand years in the civil law, and since the twelfth century in the common law, jurists have explicitly debated and discussed what the authoritative sources of law were, have explored the theoretical justifications for considering them to be sources, and have compared and ranked admitted sources in terms of their relative authority.

It might be fair to say of one who set out to compare English and Continental jurisprudence, and only looked at problems connected with each tradition's treatment of the formal sources of law, that that person had an unpoverished concept of the filed of jurisprudence. These are important problems having to do with the definition of law, the analysis of legal concepts, and forms of legal reasoning that may not be addressed in an investigation which concentrates on sources of law. To those who might complain that I might better have chosen some other jurisprudential topic for investigation I can only contend that it is fundamental, for one who sets out to understand the legal theory of either tradition, to know what sources are considered to be authoritative in a legal system at the points of time being examined. Likewise, if one sets out systematically to compare the legal theory of the two traditions, the treatment of sources of law will certainly be among the most basic points of comparison. Consider, for example, the person who wishes to compare the dominant methods of reasoning in the civil law with those of the common law. It will be critical for such a person to know what sources of law are recognized as authoritative in each tradition, and what the relationship is among the recognized sources. The method of reasoning used to determine the rule of law in a particular case likely will vary, for example, according to whether

statute law or case law has priority as a source of law.

Apart from my estimation that source of law problems are fundamental in jurisprudence, and the fact that those problems were a recurrent concern over many centuries among jurists in both legal traditions, I had another reason for concentrating on them. The orthodox view of the characteristic differences in the two systems' jurisprudential thought is largely framed in terms of what sources each legal system recognized, the pecking order among the sources a system recognized, and the consequences that flowed from a system's recognition of, or giving priority to, particular sources. I suspected that the orthodox view of characteristic differences remained orthodox largely because scholars had not reexamined the original sources (sources of law in the first two senses I listed earlier) to see if the great scholars of the nineteenth and early twentieth centuries, whose pronouncements had established those differences, had been correct in their interpretations and reliable in their reporting.

It has recently come to be accepted by students of comparative law that the received understanding of the characteristic differences between common law and civil law jurisprudence is in error on many points as applied to the two systems in their present form.[8]

But legal comparativists are apt to assume that the old statement of antitheses is in error merely because one or both of the legal systems has recently changed, not because the original scholarship was bad.

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[8] See, e.g.,
M. Rheinstein,
Comparative Law and Legal Systems,
in 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 204, 208 (1968).

One has little way of knowing, from the early classic works in comparative jurisprudence, whether any actual human beings had really utilized the modes of jurisprudential thought they reported. Some authors who claimed historical accuracy for their work were long on assertion and short on documentation. Sir Henry Maine is perhaps the premier example of this.[9]

C. H. McIlwain, provided considerably more historical documentation than Maine, but his famous teaching that the common lawyers had always conceived of the common law as a customary, fundamental law, superior in authority to statutory law, was supported by virtually no documentation.[10]

Roscoe Pound, in

The Spirit of the Common Law

(1921) presented his comparisons between the Roman law and common law, including his assertion that the ideas of the common law were Germanic ideas, without citing authorities for his claims.[11]

There have been two classic works in English on the formal sources of law, John Chipman Gray's

The Nature and Sources of the Law,[12]

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[9]The D.N.B. says of Maine that "his inability for drudgery shows itself by one weakness of his books, the almost complete absence of reference to authorities."

[10]See,
THE GROWTH OF POLITICAL THOUGHT IN THE WEST (1932); CONSTITUTIONALISM ANCIENT AND MODERN (1940); THE HIGH COURT OF PARLIAMENT (1910).

[11]See
THE SPIRIT OF THE COMMON LAW, 16-21 (1966 ed.).

[12]First published in 1909; a revised edition was published in 1921.

and Sir Carleton Allen's

Law in the Making.[13]

Historical claims are made in both, but neither is primarily historical in intention. Both Gray and Allen shift easily, and without warning, from their own analytical schema and normative theoretical claims to historical assertion to criticism of the jurisprudential viewpoints portrayed. Allen far surpasses Gray in historical scope and documentation, but his work is primarily analytical in focus, not historical. There are no more recent comprehensive comparative historical studies of Roman law and common law treatments of authoritative sources of law. John Dawson, in

The Oracles of the Law,[14]

provides an excellent treatment of the place of case law and precedent in medieval and modern Roman law and English common law, but there are several gaps in his historical treatment. He hardly mentions Roman law before the medieval revival, nor does he much distinguish between the glossators, post-glossators, and legal humanists.

In short, I found that one who wanted to know how the common lawyers and Roman lawyers thought about various sources of law at particular points in time had no choice but to turn to the original sources. The classic works on sources of law either provided insufficient historical information, even in the form of bare assertion, or provided insufficient historical documentation. My reaction to C. H. McIlwain, to

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[13]First published in 1927, Allen revised it seven times. The Seventh Edition was published in 1964.

[14]J. Dawson, THE ORACLES OF THE LAW (1968)

take only one example, was very similar to F. W. Maitland's reaction to Maine's scholarship.[15]

> You spoke of Maine. Well, I always talk of him with reluctance, for on the few occasions on which I sought to verify his statements of fact I came to the conclusion that he trusted much to a memory that played him tricks and rarely looked at a book that he had once read . . .

COMPARISON

In describing this work as a comparative historical study of the Roman law and common law traditions of jurisprudence I did not mean to classify it as "comparative law," as that discipline is now understood by its principal practitioners. Although comparisons between systems of law have been made since the time of Aristotle, the branch of legal study known today as comparative law had its origins in the last half of the nineteenth century. It still reflects, to a high degree, the interests and assumptions of its nineteenth century originators.

Some of the founders of the modern discipline of comparative law were interested in making the study of law a science--a science modeled on natural science. Peter Stein has described how, in the eighteenth century, there was a growing consciousness of "differences between a man's moral duties and his legal duties, between his legal duties in different countries and between his legal duties in the same country in different periods."[16]

Natural law theory did not work very well in explaining these differences or in showing how they came about. Certain Scottish thinkers thought that

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[15]THE LETTERS OF F. W. MAITLAND 222 (ed. C. H. S. Fifoot 1965).

[16]P. STEIN, LEGAL EVOLUTION ix (1980).

legal difference and change could be better explained in terms of the stages of a society's development; as society progressed, so did the law.[17] Later, the German historical school similarly taught that a nation's law depended upon the social conditions of the time (especially the spirit of the nation),[18] and that it developed as the nation developed.[19]

When British jurists like Pollock and Maine became interested in comparative law in the latter half of the nineteenth century they had these models to work from, and they seemed to fit very well with the doctrine of evolution that was then taking over natural science. Darwin, whose Origins of Species was filled with comparisons,[20] was understood by Sir Frederick Pollock to be using the same methods in biology as he and his fellow jurists were applying to law:[21]

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[17] Id. at x.

[18] M. Rheinstein, Comparative Law and Legal Systems 206, in 9 Int. Ency. of the Soc. Sciences (Sills ed. 1968).

[19] STEIN, supra at x.

[20] See J. HALL, COMPARATIVE LAW AND SOCIAL THEORY 4 (1963).

> The doctrine of evolution is nothing else than the historical method applied to the facts of nature; the historical method is nothing else than the doctrine of evolution applied to human societies and institutions. When Charles Darwin created the philosophy of natural history...he was working in the same spirit and toward the same ends as the great publicists who, heeding his field of labor as little as he heeded theirs, had laid in the patient study of historical fact the basis of a solid and rational philosophy of politics and law.

Although Maine's

Ancient Law

probably depended less on Darwin as a model than on mid-nineteenth century geology,[22]

the idea of evolution was central to his work. His purpose was to compare the law of two or more societies with the aim of being able to formulate empirical laws about the stages of development or evolution which legal systems undergo.[23]

The early identification of comparative law with natural science has greatly affected the orientation of comparative law to this day. With the exception of a few early figures like Maine and Pollock, comparative lawyers have been interested almost entirely in the practical, not the theoretical, side of the law. Roscoe Pound, for example, was interested in making a "functional comparison" of laws, in which the central concern was how the rules or mechanisms of law actually

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[21]English Opportunities in Historical and Comparative Jurisprudence
41, in OXFORD LECTURES (1890).

[22]See STEIN,
supra,
at 88.

[23]Maine claimed that by utilizing the method of comparison he discovered a universal law of legal development: legal systems, as they evolved, moved from an emphasis on legal status to an emphasis on contract.

worked

in particular societies.[24]

Given their interest in making law a science, what Pound and other leading figures in twentieth century comparative law[25] were interested in was not the language in which rules or precepts of law were cast, or technical legal analysis or arguments about such rules, but how the rules functioned in their societies. They were interested in the "real," as opposed to the ostensible, content of laws. Among today's practitioners of comparative law, those whose work has a scientific or scholarly, and not just a practical purpose, still tend to insist that what matters in comparative law is how rules or precepts of law function.[26]

Other important originators of the modern study of comparative law were less interested in making law an empirical science than in making it a practical science. Their aim was to comb other legal systems than their own for approaches to legal problems that might be the basis for improving their nation's law. As Henry Maine himself put it in 1871:[27]

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[24]Pound, What May We Expect From Comparative Law?, 22 A.B.A.J. 59 (1936).

[25]For example, Max Rheinstein, who identified the scientific study of comparative law with the "social function of law." Rheinstein, Teaching Comparative Law, 5 U. of Chi. L. Rev. 619, 622 (1938). For discussions, see Jerome Hall, COMPARATIVE LAW AND SOCIAL THEORY, supra, at 11.

[26]See, for example, K. ZWEIGERT & H. KOTZ, I AN INTRODUCTION TO COMPARATIVE LAW (1977).

[27]MAINE, VILLAGE COMMUNITIES IN THE EAST AND WEST 4 (1889 ed.).

> It would...be universally admitted by competent jurists, that, if not the only function, the chief function of Comparative Jurisprudence is to facilitate legislation and the practical improvement of law.

The primary scholarly journals in the field of comparative law have always reflected this conception of comparative law as, in Pollock's phrase, "wholly or mainly...a handmaid to the theory of legislation."[28]

The journals primarily publish articles comparing different nations' current approaches to some relatively narrow problem in some substantive area of the law such as contracts or property. Articles comparing fundamental concepts of general jurisprudence are rare.

I have no doubt that trying to find out how legal rules or precepts actually function in various societies, trying to discover scientific laws of legal development, and trying to improve one's own society's laws by comparing those laws with approaches taken in other societies are all worthy endeavors. In labeling this work a comparative historical study of the legal thought of the Roman and common law traditions, however, I had none of these aims primarily in mind. What I have studied is how lawyers in both traditions talked about, wrote about, analyzed, argued about, and conceptualized legal custom, legal precedent, legislation, and equity. Because I have attempted to uncover each tradition's discourse about the subjects examined in as much richness and detail as possible, it has not seemed to be a workable

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[28]Pollock, History of Comparative Legislation, J. of Soc. of Comp. Legis. 86 (1903).

strategy always to make the comparison between the two traditions explicit and constant.[29]

Nevertheless, I do claim more for the comparative nature of my work than what Professor Jerome Hall once disparagingly called "a serial description of the laws of two or more countries set down in the physical juxtaposition of printed words."[30]

When Maitland chided English lawyers for knowing and caring about no system of law but their own, he had in mind how the lack of such comparative knowledge limited their understanding of their own law. As Rene David has written, "The historical origins of the classifications known to any system, the relative character of its concepts, the political and social conditioning of its institutions, all these are really understood only when the observer places himself outside his own legal system..."[31]

The nature of the present work, then, is not comparative in the sense of having the primary aim of drawing explicit and constant comparisons between the doctrines of the two traditions, but it is comparative in that what was written about the fourteenth century common law understanding of custom, to take an example, was written with a detailed knowledge of Roman and civil law approaches to custom firmly in mind.

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[29]I was relieved to discover that such an expert as Professor von Mehren has written that such an explicit and constant comparison is not necessary. A. von Mehren, An Academic Tradition for Comparative Law?, 19 Am. J. Comp. L. 624 (1971).

[30]J. HALL, COMPARATIVE LAW AND SOCIAL THEORY 5 (1963).

[31]R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 5 (2nd ed. 1978).

The study is considerably more explicitly comparative within each tradition. For example, the teachings of particular medieval civilian glossators on the theoretical basis of custom as a source of law are compared with the teachings of their civilian contemporaries, with the doctrines of the Roman jurists who preceded them, and the doctrines of the post-glossators who succeeded them. To summarize, I have thought it important that this study be comparative in the sense that

I have described

not because I have entertained the hope of discovering through the process of comparison new empirical laws about law, but primarily because one cannot understand an intellectual system or a mode of discourse only from the inside. To know what is universal, or unique, or original about a system of legal thought one needs to know some other system. Volumes of nonsense about the common law have been written because their authors knew little about the civil law.

HISTORICAL STUDY OF LEGAL THOUGHT OR DISCOURSE

None of the terms that are commonly applied to a historical study of this type seem quite adequate to describe my conception of the enterprise. "History of ideas," "intellectual history," and "history of political thought" are all expressions commonly used to describe works similar to this one, but "history of the speech or discourse of civilians and common lawyers before the seventeenth century" probably more accurately describes what I have actually done. However,

I am not satisfied

the latter expression either. Although examining and

comparing the recorded speech or discourse of civilians and common lawyers, tracking its nuances, and tracing how "languages" or "modes of

discourse" develop, change, shift, or mutate may all be interesting and worthwhile in their own right, in the end I am interested in the speech because it provides me with the best hope I have of knowing how particular civilians and common lawyers understood certain subjects, what their conceptions were, and how they reasoned their way through certain problems. I want to know, if I can, the meaning the speech had for the speakers.

But I will want to know more. To use the terminology of speech-act theorists such as J. L. Austin and John Searle, if, for example, I am trying to recover the historical meaning of what the great fourteenth century post-glassator Bartolus wrote about customary law, I will need to know its locutionary meaning, its illocutionary force, and its perlocutionary force.

When Bartolus wrote about custom, what he said had a propositional or locutionary meaning. That meaning was conditioned and limited by the linguistic, ideological, professional, cultural, and other contexts in which he wrote. If he said, for example, that for a custom to have binding legal force it must have been observed and for

longi temporis

or

longissimi temporis,

the locutionary meaning of his statement was conditioned by particular texts in the books of Justwien that were his ultimate sources, by the linguistic and jurisprudential conventions had been developed regarding those texts and those terms by civilian jurists in the course several centuries of glossing them and commenting on them, and by the nature of

the technical juristic vocabulary and language he had inherited from his civilian and canonist predecessors and shared with his contemporary jurists. The historian, then, who wants to understand or recover the meaning of what Bartolus wrote about custom must understand and feel at home among the "conventions"[32]
shared by Bartolus and his readers.

One who seeks to recover the meaning of Bartolus's remarks on custom must also seek to understand the illocutionary force of those statements--what his point or intention was in making them. Was he, in discussing the time necessary to establish custom, only interested in establishing what the authoritative law texts required, or was his primary concern to establish a particular doctrine about the popular or imperial consent necessary to establish law? Understanding what the author was
doing
in manipulating the conventions available to him is especially important for a historian who not only wishes to know what a particular author meant but also is trying to determine what the standard views of the time were on the topic being examined. Does the author's purpose or agenda transform what on the surface may appear to be a conventional, orthodox statement into something quite different? The historian's understanding of what he should make of a particular argument may differ according to whether it was being made by an advocate in court or a judge speaking from the bench, to take only one example.

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[32]A term that Quentin Skinner uses to refer to shared linguistic usages, theoretical assumptions, principles etc.

Finally, the historian who wants to recover the general understanding of custom among civilian jurists in the fourteenth century and afterward will also be interested in the perlocutionary force of statements made by Bartolus or of any other jurists whose writings the historian considers. In other words, the historian will want to know, insofar as he can determine it, the way the author's readers took what he wrote and the effect that the writing had on them. In studying the effects that an author's or speaker's language had on his readers or hearers, one is no longer concerned with the author's intention; his readers may interpret his language in ways different from those he had in mind and they may put it to uses different from his. If a historian is seeking to determine whether it is possible to identify a "common law mind" or "Roman law mind"--ways of looking at and thinking about a particular legal subject that are characteristic of a time and legal tradition--then it will be important for him not only to understand what particular authors meant in using language but also to know how his readers took what he said.

Of course, it is much easier to prescribe how to do a study of this kind than actually to do it. The principal proponents of this kind of approach to the history of political thought--J.G A. Pocock, Quentin Skinner, and John Dunn--have all been criticized for prescribing a method that is unworkable in practice and for chasing after an authorial intention and textual meaning that probably doesn't exist and almost certainly cannot be discovered.

I shall not try to persuade those who are convinced that texts exert no authority on those who interpret them,
or that the meaning of texts is determined by what the reader makes of

them, not by what it is possible to say in a particular language, idiom, or mode of discourse, or by what an author intended to say. I can only say that if one thinks it worthwhile to try to discover how particular jurists of a given time and tradition wrote and thought about about a jurisprudential subject, or whether there were commonly accepted modes of talking and thinking about such subjects, I know of no method of study that will give the historian a better claim that his interpretation was not merely the product of his own ingenuity or ideological bias than the method espoused by Pocock, Skinner and Dunn.[33]

Much of the criticism of this approach to the history of political or legal thought focuses on the difficulty of establishing the locutionary meaning of a text--the text's sense and reference. The historian following this approach seeks to guard against erroneous, anachronistic interpretations, or interpretations that are the product of his own ingenuity or ideological bias, by trying to reconstruct with as much richness of detail as possible the context within which the author created the text. A major part of this context will consist in

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[33]See J.G.A. Pocock, The History of Political Thought: A Methodological Inquiry, in P. Laslett and W. G. Runciman eds., PHILOSOPHY, POLITICS AND SOCIETY 183-202 (1962); VIRTUE, COMMERCE, AND HISTORY 1-34 (1985); Quentin Skinner, Meaning and Understanding in the History of Ideas, 8 History and Theory 3-53 (1969); Motives, Intentions and the Understanding of Texts, 3 New Literary History 393-408 (1972); Some Problems in The Analysis of Political Thought and Action, 2 Political Theory 277-303 (1974); John Dunn, The Identity of the History of Ideas, 43 Philosophy 85-116 (1968).

the linquistic

conventions within which the author worked and which made it possible for him to say certain things and prevented him from saying others. Other important parts of the context include the theological, philosophical, juridical, or political assumptions common to a time, place, and institution, or peculiar to a particular author. Professor Pocock has described the practice of a historian of political discourse who is seeking to know the context of the discourse he is examining.[34]

> It is a large measure of our historian's practice to learn to read and recognize the diverse idioms of political discourse as they were available in the culture and at the time he is studying: to identify them as they appear in the linguistic texture of any one text, and to know what they would ordinarily have enabled that text's author to propound or "say." The extent to which on author's employment of them was out of the ordinary comes later. The historian pursues his first goal by reading extensively in the literature of the time and by sensitizing himself to the presence of diverse idioms.

His claim that he has in fact correctly identified a language, sub-language, rhetoric or mode of thought may always be open to challenge, but the greater the number and diversity of instances that he can document, the greater the number of actors, texts, and contexts in whom he can locate the idiom or mode of thought,[35]

> the more the hypotheses erected by those who would imprison him within the hermeneutic circle must come to resemble a Ptolemaic universe, consisting of more cycles and epicycles than would satisfy the reasonable mind of Alfonso the Wise; in short, the more it will exhibit the disadvantages of non-refutability.

I may best be able to give a sense of my own approach to historical scholarship by describing my study of the jurisprudence of the common lawyers. I read virtually every extant book in English law (excluding

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[34]J.G.A. Pocock, VIRTUE, COMMERCE, AND HISTORY 9 (1985).

[35]Id. at 10.

case reports) written between the twelfth and seventeenth centuries. Beginning with the Year Books from the reign of Edward I, I read all the cases reported in years selected at about ten-year intervals. I read all the cases reported in the majority of the named case reports of the sixteenth and seventeenth centuries. As I read the case reports I kept detailed notes of any statements I found that had a bearing on general legal theory or the sources of law questions I was examining. Every time I found a statement on common law, common right, custom, reason, law and reason, time, time of memory, time immemorial, usage, common usage, prescription statutes, interpretation, equity, equity, or precedent I wrote it down. I constructed lists of all the instances, by case and page, in which I had found discussions about any of these subjects.

I did this not for sheer pedantry's sake but in order to learn as much as I could about the idioms, rhetorics, and modes of discourse available to the common lawyers in the period examined, to be familiar enough with their ways of talking and thinking about the subjects I was interested in, to be able to recognize nuances, to be able to tell when changes in speaking or thinking were occurring, and to be able to say with some confidence whether a particular statement about the law was representative of the time it was made or whether it was out of the ordinary.

This systematic and detailed examination of primary sources is radically different from the historical methods used in the previous comprehensive comparative studies of sources of law on which we have relied for our knowledge of that area of jurisprudence.

When one reads Gray or Allen one has no way of knowing whether the conclusions they report are the result of a systematic study of a wide range of sources or whether they have sunk shafts at random into the great masses of English legal literature and have taken whatever they have found to be representative of the common law mind. This is not to condemn Maine, Gray, Allen and the other early pioneers of the comparative history of jurisprudence for shoddy workmanship. F. W. Maitland's revolutionary approach to legal historical scholarship, with its exhaustive examination of original sources and close documentation had not yet taken hold. (Unfortunately it still has not taken hold with many legal historians). It is not irrelevant, either, to their weaknesses as history, that

Ancient Law, The Nature and Sources of the Law,

and

Law in the Making

were all courses of lectures that were later published. Even Dawson's,

The Oracles of the Law,

a far superior historical study, first appeared as a series of lectures at the University of Michigan. When the lecturer walks up to the podium he is expected only to report his results, not read a list of footnotes.

I have no illusions that I have produced anything like the last word on the topics I have examined, nor has it been my purpose to replace the old conventional wisdom about civilian and common law doctrine about sources of law with a new corrected version. Given the richness and complexity of each tradition and the widespread disagreements among jurists of the same tradition, it was precisely the attempt to distill the essences of the two traditions into a brief summary or statement of antitheses that

I found misleading. I have found it a daunting enough task merely to try to reconstruct the discourse of the jurists from both traditions with some degree of accuracy and documentation.

CHAPTER ONE

ROMAN JURISPRUDENCE THROUGH THE TIME OF JUSTINIAN

REPUBLICAN AND CLASSICAL JURISPRUDENCE

Despite the fact that Roman law was the primary source of the medieval and modern civil law systems, more than one student of Roman law has argued that, substantive rules aside, there is more affinity between classical and imperial Roman law and English common law than between Roman law and medieval and modern Continental civil law.[1] Professor Peter Stein has written: "When we think of civil law systems today, we think of coherent bodies of rules purportedly deduced from general principles and arranged systematically in codes having fixed and authoritative texts... By contrast, the common law appears more as a set of rules inferred from decisions in particular cases."[2] The methods of the Roman jurist, like those of the common lawyer, are said to have been intensely casuistic: "[I]t was unusual for a Roman lawyer, except in elementary books, to enter on abstract statements of the law on a topic: he nearly always put the matter in a concrete case."[3] While it has been argued that the Romans had, in principle, no case law because the decision of a court did not make a binding precedent,[4] it must be remembered that the doctrine of precedent did not become firmly established in

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[1]W.W. BUCKLAND & A. MCNAIR, ROMAN LAW AND COMMON LAW xii (1936).

[2]Stein, Logic and Experience in Roman and Common Law," 59 B.U.L. REV. 433, 438 (1979).

[3]BUCKLAND & McNAIR, supra, at 8.

[4]See id. at 9.

English law until late in the eighteenth century.[5] Like the common law, Roman law was built up by argument from case to case,[6] although the cases involved may often have been hypothetical rather than real. As a result, to the modern civil lawyer ancient Roman law and English common law share the same disorderly appearance and lack of apparent underlying rational structure.[7] The underlying principles may be there, and even sometimes surface, but there usually is no systematic effort to make them apparent or coherent.[8]

Although much of Roman law was built up by argument from case to case, it was not, as was English common law, developed in the hands of judges. The Roman judge (iudex) was not an expert in the law. He was, in effect, a layman discharging an arbitral function by presiding over disputes according to formulae supplied by another official, the praetor. For legal advice he resorted to the jurisconsult, who was recognized as an expert on the law, but who had no legislative or judicial responsibility.

The earliest Roman jurists were state priests (sacerdotes publici) who applied and developed sacral law. Beginning in the third century B.C., the priests of one of the four priestly colleges (the pontiffs) began developing a science of private law. Central to this development were sacerdotal opinions

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[5]See my subsequent discussion of precedent in the common law.

[6]BUCKLAND & McNair, supra, at 9.

[7]Stein, supra, at 438,441.

[8]See BUCKLAND & McNair at 9.

(responsa, decreta) given by the pontiffs in response to questions put to them concerning the legality of actions either contemplated or already performed. The opinions of these early jurists were based not on reasons, but on authority. The jurists were not philosophers and had no interest in theorizing. They were reluctant to commit themselves in advance, and thus their practice was to wait until an actual case occurred, and to feel their way from case to case. No abstract general rules were deduced from the responsa deciding individual cases.[9] As in prayer to the gods, so also in legal relations it was thought that everything depended upon the use of the right words.[10] Like all magic art, the legal knowledge of the pontiffs was secret, and the collections of formulae for deciding legal cases were available only to members of the college. Until the beginning of the third century B.C., the pontiffs' answers to the questions put to them concerning the interpretation of statutory and customary law were given only to the questioners, and not officially published.[11] The monopoly of the pontiffs was not broken until members of the college began to deliver their legal opinions publicly.[12]

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[9]See F. SCHULZ, HISTORY OF ROMAN LEGAL SCIENCE 1-37 (1936).

[10]W. KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY 92 (J.M. Kelly trans, 1966).

[11]P. Stein, REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS 27 (1966).

[12]KUNKEL, supra at 93.

In the second century B.C., legal knowledge began to be isolated from other branches of pontifical learning: a distinction came to be drawn between sacred and profane law.[13] Secular jurists appeared who were prepared to give advice in their own name.[14] In the Ciceronian age, non-pontifical jurists grew more numerous, and advocates (specialists in forensic advocacy, who know little law) came to be sharply distinguished from jurists. The main function of the jurists continued to be to give responsa, which remained authoritarian and still did not state reasons for the rules they declared. Even contemporaries were struck by the nonrational, authoritarian character of this jurisprudence, and satirized it. The outlook of the jurists continued to be nontheoretical; one finds no discussion of the nature of law, justice, or legal method. The practical orientation was reflected in the education of jurists: instead of theory the student was taught the art of deciding the concrete case.[15]

By the end of the second century B.C., the field of private law had become so covered with piecemeal juristic opinions that it became necessary to organize the mass of material in some way.[16] Despite the disdain of the jurists for other disciplines

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[13]See F. SCHULZ, PRINCIPLES OF ROMAN LAW 19-26 (M. Wolff trans. 1936).

[14]Stein, supra.

[15]See F. SCHULZ, HISTORY OF ROMAN LEGAL SCIENCE 38-98.

[16]Stein, REGULAE IURIS 33.

such as philosophy or rhetoric, Roman legal science was born of the marriage of Greek dialectic to traditional Roman legal forms. Roman jurisprudence lacked the capacity to become a logical, unified, and systematic discipline until the Greek method was imported. In the time of Cicero, as now, "dialectic" had a great variety of possible meanings.[17] At its most general, it could refer to a method of seeking the truth by reasoning. It could refer to the Socratic elenchus, "a prolonged cross-examination which refutes the opponent's original thesis by getting him to draw from its, by a series of questions and answers, a consequence which contradicts it."[18] It could, as for the Stoics, primarily mean formal logic. As employed by the Roman jurists of the late republic and early Principate, it was closest to the kind of reasoning emphasized by Plato in his later dialogues: an attempt to study kinds by a repeated analysis of genera into species, combined with a complementary opposite process of synthesis.[19]

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[17]See R. Hall, Dialectic, in 2 ENCYLOPEDIA OF PHILOSOPHY 385 (P. Edwards ed. 1967).

[18]Id. at 386.

[19]The Greek methods adopted by the jurists were primarily Aristotelian. For Aristotle the important step in the transition from experience to science was the progress from particulars to universals (the discovery of common elements uniting individual cases). See TOPICA 1.12. Knowledge of dialectic allowed the Roman jurist to "single out the essential kernel of a legal set of facts, to associate like, to distinguish unlike, and in this way effectively to penetrate and master the entire body of law." W. KUNKEL at 95.

With the techniques of Greek dialectic at their disposal, some jurists set out to discover the particular principles of their law and to formulate them into propositions.[20] The earliest Roman jurist to show clear evidence of the influence of Greek dialectic was Q. Mucius Scaevola (d. 82 B.C.). Pomponius tells us that he was the first to make a digest of the civil law, and to arrange it in genera.[21] Q. Mucius also compiled a short book of definitiones, which were the product of observing the various cases in which an expression had been used, and isolating the common element in those cases.[22] There is general agreement among authorities that Q. Mucius reached a higher level of abstraction than did most of his contemporaries in the framing of his definitions. There is less agreement concerning the degree to which most jurists of the late republican and classical periods were inclined toward abstraction in their formulations of the law. Professor Schulz expressed what until recently was the standard view of the matter: "The Roman disinclination for abstract formulation is...shown in an avoidance of juristic definitions."[23] Schulz argued that on the whole, during the

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[20]Stein, REGULAE IURIS 36.

[21]D. 1.2.2.41. Unless otherwise noted, references to, or quotations from the DIGEST of Justinian will be based on the Mommsen and Krueger edition (trans. A. Watson, 1985).

[22]Stein, REGULAE IURIS, at 37. In general, when the jurists provided definitiones they saw their task as that of describing certain phenomena rather than that of laying down norms. Still, when a definition was recognized as an accurate description, it naturally had great authority. Id. at 48.

[23]SCHULZ, PRINCIPLES, at 43.

republican period only very elementary rules were rendered in abstract formulae, and in classical times these efforts were carried on only with great reserve.[24] In support of this view, a statement attributed to Iavolenus (a leader of the Sabinian school at the end of the first century A.D.) is frequently quoted: "All definitio in civil law is hazardous."[25]

Professor Stein, on the other hand, insists that the received understanding greatly exaggerates the resistance to abstraction on the part of the republican and classical jurists. The jurists were far from avoiding the making of definitiones: the structure of the law they made consisted of definitions, although such definitions certainly differed in the degree of their abstraction.[26] Stein's point is not that there were no traditionalists who avoided the Greek influence toward abstraction, but that there was more diversity in both republican and classical jurisprudence than commonly has been recognized.[27] While it has been widely recognized that in the early principate (first century A.D.) Roman jurists split into two schools, the Proculians and the Sabinians, most modern historians have denied that we have evidence of any important doctrinal or

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[24]Id. at 51.

[25]D.50.17.202. Omnis definitio in iure civili periculosa est.

[26]Stein, REGULAE IURIs, at 48.

[27]The traditional view was recently expressed by Professor Kunkel: All classical jurists employ more or less the same methods on the same subjects, and have to a certain extent the same thinking..." KUNKEL, supra, at 105.

methodological differences between them.[28] Professor Stein has sought to demonstrate that there was a substantial difference in legal method and technique, if not in substantive law.[29]

The Proculians, he argues, wanted to make law a science: "more clearly defined, more logical, more rational, more systematic, and so more certain."[30] The method of their founder, Labeo, was to look first for a lex (a statement of law in a fixed text) as the source of the relevant law.[31] Where such a text was found, the legal problem resolved itself into one of interpretatio verborum, and Labeo and the Proculians "sought an objective meaning of the words used and then applied it rigidly without regard to whether or not that interpretation represented the original intention of the parties responsible for the text."[32] In cases of doubt, Labeo preferred a literal interpretation, holding that the author of a statement submitted for interpretation must have known the meaning of what he was saying and should be held to the ordinary meaning of his words.[33]

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[28]See H. F. JOLOWICZ & B. NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 379 (3d ed. 1972); F. SCHULZ, HISTORY, supra, at 119-122.

[29]Stein, Logic and Experience, supra, at 442; The Two Schools of Jurists in the Early Roman Principate, 31 CAMBRIDGE L. J. 8 1972).

[30]Stein, Logic and Experience, at 443.

[31]Stein, The Two Schools, supra, at 10.

[32]Logic and Experience at 445.

[33]The Two Schools at 12.

In contrast, the Sabinians stressed the importance of custom and practice. The rationality of law was less important to them than that it should conform to the facts of life.[34] If a decision turned on the interpretation of a text, they were less interested in the precise meaning and weight of words, or in consistency, and more concerned with making a reasonable decision in the particular case.[35]

Most of the disputes between the two schools, however, were not about interpretatio verborum but about the application of the unwritten law. Labeo and the Proculians assumed that customary law consisted of a set of rules with definable limits which could be precisely stated. The scope of such a rule, they thought, could be determined by divining the underlying rational principle which justified it and indicated its relationship to other rules.[36] Labeo, making use of the techniques developed by the rhetoricians, was adept at definitions and distinctions. Earlier jurists had engaged in the process of defining and distinguishing, but Labeo was more rigorous in his approach.[37] Central to his technique was the use of analogy, which he learned from the Greek grammarians. The grammarians were divided into two groups, analogists and anomalists, according to their understanding of the nature of language. The analogists,

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[34]Logic and Experience at 447.

[35]Id.

[36]Id.

[37]The Two Schools at 14.

believing that language was inherently orderly, undertook to show that parts of speech could be classified in orderly declensions and conjugations on the basis of similarity of form. Once established, such declensions and conjugations were used as standards for testing doubtful elements in the language. The anomalists denied that language was governed by general principles, and pointed out that the rules sought by the analogists were riddled with exceptions.[38] Labeo, interested generally in problems of language and grammar, was clearly an analogist, and used his linguistic technique at analogy as a method for enunciating new rules from established principles which were implied in the law.[39]

The Sabinians, instead of looking for the principle behind an unwritten or customary rule, looked for evidence of its antiquity, for they felt that the validity of a law was somehow connected with its observance from time immemorial.[40]

This dispute between the Proculians and Sabinians, as described by Stein, is interesting not only because it parallels several of the most widely recognized differences between the civil law and common law traditions, but also because it anticipates, and contributes sources of authority for, both sides of a recurring debate within the civil law tradition. Neither approach to law won a final victory among the classical jurists.

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[38]See Stein, REGULAE IURIS at 53-63.

[39]Stein, The Two Schools, supra, at 16.

[40]Stein, Logic and Experience, supra, at 447.

Instead, the jurists came to recognize that they had a variety of techniques at their disposal: in some cases established practice and authority would determine what was law, and in others logical reasoning and analogy would be more useful.[41]

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[41] See id. at 450.

JUSTINIAN'S CODIFICATION

At the time of Justinian's accession to the throne in the year 527 A.D. the writings of Roman jurists, spanning several centuries, formed a very large and unwieldy mass of literature containing many contradictions and discrepancies. Since differing opinions of equal authority could be cited on many important points, there was much uncertainty in the law. There was also uncertainty in respect to the ius novum--the ordinances of the emperors of the middle and late Empire--because later ordinances frequently had the effect of changing or repealing earlier ones without expressly mentioning them. This was particularly a problem because ordinances were extremely numerous, and because no complete collection existed.[42]

Immediately upon Justinian's accession he appointed a commission of ten, headed by Tribonian, to deal with the problems of the ius novum. The commission was directed to select from existing constitutions those of practical value, to omit everything obsolete or unnecessary, to resolve all contradictions and remove all repetitions, to add to or change the constitutions as necessary, and to arrange the selected constitutions in titles according to subject matter.[43] The result was promulgated as a

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[42]For a short discussion of the conditions leading to Justinian's codification see James Bryce, Justinian I, in 15 ENCYCLOPEDIA BRITANNICA 596-597 (11th ed. 1911). For a fuller treatment see A. M. Honore, The Background to Justinian's Codification, 48 TUL. L. REV. 859 (1974).

[43]Haec quae necessario. (The constitution prefixed to the revised Codex in the Corpus Iuris.) For discussion see JOLOWICZ & NICHOLAS, supra, at 479-480.

consolidated statute in 529.[44]

Pleased with the success of this undertaking, Justinian set out to accomplish nothing less than "the full and supreme amendment of the law, so as to amend and rearrange the entire Roman jurisprudence."[45] He ordered Tribonian to form a new commission "to read and to work up the books dealing with Roman law left by the learned of old time to whom the most sacred Emperor allowed the privilege of writing and interpreting rules of law, so that the whole substance might be taken from them, all repetition and all discrepancy being so far as possible got rid of, and hereupon a single result might be presented in place of the scattered materials which preceded."[46] The commission was ordered not only to avoid contradictions and repetitions, but to modify the old texts selected to get rid of unnecessary prolixity or to bring them into conformity with the law of Justinian's time.[47] The result was published in 533 as the work we now know as the Digest or Pandects, and promulgated as law.

Justinian tells us that the commissioners, in preparing the Digest, read nearly two thousand books by the old jurists, containing more than three million lines, and reduced them to about one hundred and fifty thousand lines.[48] We know that the

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[44]C. Summa. The second introductory constitution.).

[45]Constitutio Deo Auctore, Section 2.

[46]Id. at Section 4.

[47]Id. at Section 7.

[48]Constitutio Tanta at Section 1. Modern scholars have been able

Digest contains 9123 extracts from thirty-nine authors. We do not know the extent to which the commissioners altered the extracts from the named authors.[49] Justinian said that the alterations were multa et numerata,[50] but they are in no way indicated in the text. The legal humanists of the sixteenth and seventeenth centuries were much concerned wtih discovering these alterations, and scholars of the late nineteenth and early twentieth centuries enthusiastically resumed inquiry into this problem. Scholarly opinion has been very unstable in respect to the success of such efforts, but it is now generally accepted that much more of the Corpus Iuris is authentic than would have been believed four or more decades ago.[51]

Justinian admitted that repetition was not entirely avoided,[52] but claimed that contradictions would not be found, and said that if anyone should think he had found one, he should look more carefully.[53]

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to identify 1528 books as having been read by the commission. Honore & Rodger, How the Digest Commissioners Worked, 87 ZEITSCHRIFT DER SAVIGNY STIFTUNG 246, 314 (1970). The size of the books was variable, but most ancient prose libri contained from 1500 to 2500 lines (versus) of about 35 letters each--from ten to fifteen thousand words. Honore, Justinian's Codification, supra, at 872.

[49]See JOLOWICZ 7 NICHOLAS, supra, at 486-489.

[50]Constitutio Tanta at Section 10. Some versions read multa et maxima.

[51]See J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 60 (1976).

[52]Constitutio Tanta at Section 13.

[53]Id. at Section 15.

In promulgating the Digest, Justinian repealed all the other law contained in the writings of the jurists: "where rules of law have to be enforced, let no one seek to quote or maintain any rule of law save as taken from the above-mentioned Institutes or our Digest or Ordinances such as composed and promulgated by us, unless he wish to have to meet a charge of forgery."[54] In attempting to limit all law to the text of his codification, Justinian also commanded that:[55]

> [N]o man of those who either at this day are learned in the law or hereafter shall be such shall venture to append any commentary to these laws, save so far as this, that he may translate them into the Greek tongue.... Any further interpretations, or rather perversions, of these rules of law we will not allow them to exhibit, for fear lest their long dissertations cause such confusion as to bring discredit upon our legislation.

This and similar attempts to prevent infringement of the emperor's prerogative of interpretation proved futile. Within Justinian's own lifetime notes, abridgements, excerpts, general summaries, and commentaries appeared, first in the schools, but soon among practitioners and judges.[56]

Because the complexity and difficulty of the Digest and Code, Justinian ordered the preparation of an elementary textbook to prevent overloading the mind of the beginning student with a multitude and variety of topics.[57] The result, published as the Imperatoris

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[54]Id. at Section 19.

[55]Id. at Section 21.

[56]H. D. HAZELTINE, Roman and Canon Law in the Middle Ages, in 5, THE CAMBRIDGE MEDIEVAL HISTORY 717 (1926).

[57]J. 1.1.2.

Iustiniani Institutiones, was promulgated as a statute on the same day in 533 as was the Digest. The Institutes, like the Digest, were a compilation of passages from early authors, with the difference that there were no inscriptions to show from whom each passage was taken.

The first Code of Justinian, promulgated in 529, soon became out of date because of the enactment of a large number of new constitutions. A second edition containing the new matter was promulgated in 534, together with a prohibition against reference to the first edition or to the newer constitutions except in the form in which they appeared in the new Code.[58] It is this new Codex that has come down to modern times; all copies of the earlier edition have disappeared.[59]

These three works (Digest, Institutes, and Code) completed Justinian's work of codification, but between 534 and 565 he promulgated a large number of additional ordinances, known as Novellae post codicem (Novels). These were never officially collected, but make up the fourth part of what in the Middle Ages came to be known as the Corpus Iuris civilis.[60]

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[58]JOLOWICZ & NICHOLAS, supra, at 494.

[59]Bryce, supra, at 598.

[60]Id.

THE RULER AND THE LAW

Justinian held himself, as emperor, to be the "sole maker and interpreter of the laws."[61] A fragment of the Institutes of Ulpian, reproduced twice in the Corpus Iuris,[62] supports the view that the will of the prince has the force of law (quod principi placuit, legis habet vigorem). If the emperor's pronouncement is law, there would seem to be little point of raising the question of the degree to which he is subject to the law. Thus we are not surprised to find a text of Ulpian's in the Digest which states that "the prince is not bound by the laws."[63] Other texts, however, raise questions concerning the coherence of Roman doctrine on the relationship of the ruler to the law. A rescript[64] of Theodosius and Valentinian seems incompatible with the passage last quoted:[65]

> It is a statement worthy of the majesty of a reigning prince for him to profess to be subject to the law; for our authority is dependent upon that of the law. And, indeed, it is the greatest attribute of imperial power for the sovereign to be subject to the laws.

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[61]C. 1.14.11.1.

[62]D. 1.4.1. and J. 1.2.6.

[63]D. 1.3.31. Princeps legibus solutus est.

[64]Rescripts were imperial rulings on points of law, made not only upon the petition of officials throughout the empire, but also upon the request of private citizens. The replies of the emperor to requests for favors, privileges, etc., were also called rescripts.

[65]C. 1.14.4. Digna vox est maiestate regnantis, legibus alligatum se principem profiteri; adeo de auctoritate iuris nostra pendet auctoritas. Et revera maius impero est, submittere legibus principatum...

The Corpus Iuris contains an attempt, not entirely successful, to reconcile two entirely different constitutional theories.[66] The earlier theory was that of popular sovereignty: the theory that imperium (the sum of governmental or jurisdictional power), whose possessor alone had the right to make law, belonged to the Roman people. This theory is reflected in the excerpt from Julian in the Digest which holds custom and written law to be equally binding, since the validity of each is said to rest upon the will of the people.[67] By the time of the later Empire, however, popular sovereignty had in fact been replaced by the imperial will. The second theory, developed to reflect this fact, is that of Ulpian: the pleasure of the prince has the force of law. The jurists sought to reconcile these two theories by reference to the lex regia. In both the Institutes and the Digest Ulpian's pronouncement quod principi placuit is immediately explained by a reference to lex regia:[68]

> What the emperor has determined has the force of a statute; seeing that, by a lex regia which was passed on the subject of his sovereignty, the people transfer to him and confer upon him the whole of their own sovereignty and power.

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[66] But see 1 R. W. & A. J. CARYLE, A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST 63-70 (1916), where it is argued that the Romans from the jurist Julianus in the second century to Justinian in the sixth century agreed that the ruler's will was law, but only because the people chose to have it so.

[67] D. 1.3.32. See the more detailed discussion of this passage in the section on custom infra.

[68] D. 1.4.1. Quod Principi placuit, legis habet vigorem; utpote quum lege Regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.

This statement of the lex regia is repeated by Justinian in his constitution Deo Auctore: "by an ancient enactment, the so-called lex regia, all legal authority and all power vested in the Roman people were transferred to the Imperial Government (imperatoriam potestatem)..."[69]

There is no evidence that Roman jurists doubted that the enactment of a lex regia explained and justified the omnipotence of the emperor, reconciling apparently incompatible constitutional theories.[70] The texts remained ambivalent on their face, however, and from the twelfth century onward, gave rise to endless discussion among both canonists and civilians. As we will see, theories of both popular sovereignty and of political absolutism were justified by reference to the Roman texts we have discussed here, including those treating of the lex regia. Indeed, although reference to the lex regia is most commonly thought to have been made in support of theories of absolutism, in fact it was the idea of popular sovereignty over the ruler, embedded in the myth of the lex regia, that first fascinated the minds of medieval political thinkers.[71]

It must not be supposed, either, that this mixed theoretical legacy is reserved for Continental lawyers and political theorists. The lex regia and its associated problems will figure prominently in our discussion of Bracton's understanding of the relation of the

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[69] Quum enim lege antiqua, quae regia nuncupabatur, omne ius omnisque potestas populi Romani in imperatoriam translata sunt potestatem...

[70] See E. Meynial, Roman Law, in THE LEGACY OF THE MIDDLE AGES 385 (C. G. Crump & E. F. Jacob ed. 1962).

[71] Id.

English king to English law.

CASE LAW AND PRECEDENT

Karl Llewellyn once argued that case law in some form is found wherever there is law; precedent operates whether or not it is consciously recognized.[72] Allen took an even stronger position concerning the role of cases in Roman law, claiming that Roman law was entirely built up by judicial practice.[73] Engelmann, by contrast, expressed what has commonly been taken as the most important distinction between the Roman and English legal traditions: that the characteristic mark of Roman law was its systematic prohibition of precedent.[74]

Appeals to previous decisions were recommended by the schools of rhetoric for use by orators in court argument.[75] This recommendation, probabably amounting to no more than advice as to trial tactics, does not prove that even the orators believed in the binding force of precedent. It was also a commonplace with the orators, particularly Cicero, that res iudicata was an integral part of the law.[76] But Cicero did not mean by res iudicata what we now mean by precedent. For him it meant only a decision of law binding only in a particular case, and not a permanent contribution to the general body of law.[77]

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[72]K.N. Llewellyn, Case Law, in the ENCYCLOPEDIA OF THE SOCIAL SCIENCES (1930).

[73]C. ALLEN, LAW IN THE MAKING 110 (1927).

[74]W. ENGELMANN, DIE WIEDERGEBURT DER RECHTSCULTUR IN ITALIEN (1938).

[75]F. SCHULZ, HISTORY, supra, at 92.

[76]ALLEN, supra, at 109.

[77]Id.

The classical jurists held no general theory that previous judicial decisions were binding, except where the decisions were made by the emperor.[78] The emperor's decreta really amounted to legislation, so even they should not be considered precedent.[79] Thus, Allen notwithstanding, most scholars take the position that the great bulk of non-legislative Roman law was built up from the opinions of the jurists rather from the decisions of judges. The jurists did not collect notable decisions,[80] but their responsa were published, and they engaged in legal writing after the style of responsa. Both the responsa and writings came to be recognized as among the sources of written law.[81] Although the jurists framed their discussion of legal problems in terms of cases, these cases were often hypothetical rather than real. For authority they cited juristic opinions rather than judicial decisions. Even during the time of the Empire, when a professional judiciary was established, it was so subordinated to imperial authority that a system of precedent by judicial decision was never established.

As we have seen, Justinian promulgated the Corpus Iuris civilis upon the theory that it constituted a complete code of laws without contradiction or imperfections. He decreed that decisions were to be rendered according to the law,[82] not according to examples

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[77]JOLOWICZ & NICHOLAS, supra, at 368.

[79]See BUCKLAND & McNAIR, supra, at 7.

[80]SCHULZ, HISTORY supra, at 92.

[81]T.B. Smith, Legal Precedent in DICTIONARY OF THE HISTORY OF IDEAS (1973); also see J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 40-54 (1976).

[82]C. 7.45.14; C. 1.14.2. Unless otherwise noted, reference to, or

(precedents), and that the emperor himself should be regarded as the sole maker and interpreter of the law.[83] In a interesting conjecture, Sir Carleton Allen suggested that Justinian's prohibition of precedent as a creative source of law was evidence of a tendency among judges to utilize the principle of stare decisis.[84] This is possible, but a more likely explanation is that Justinian's emphasis was upon establishing the sole authority of the emperor as a source of law. What he prohibited was the use of any juristic opinions not included in his codification. The responsa were written in a casuistic form, as the resolutions of specific, concrete legal problems, and so might be considered exempla.

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quotations from the Code of Justinian will be based upon the translation of S.P. Scott (1973).

[83]C. 1.14.12.

[84]ALLEN, supra, at 112.

CUSTOM

While most scholars have believed that the Corpus Iuris of Justinian accurately expressed the place that custom held in Roman law, several distinguished scholars have contended that there was a vast difference between the idea of customary law in the classical period and that of post-classical times.[85] No one doubts that many Roman legal institutions originated in custom, and few would deny that the part played by custom in classical Roman law was small. The dispute lies in whether the jurists had any definite theory as to the place of custom as an authoritative source of law.

Cicero and the rhetorical writers, following Aristotle, made a distinction between law (ius scriptum) and unwritten law (ius non scriptum). Aristotle had used the distinction between written and unwritten law to contrast the particular law of a given people with natural law. The Roman orators, in contrast, used ius scriptum to refer primarily to statute law and ius non scriptum to refer to customary law.[86] There is no doubt that the orators considered custom to be one of the sources of law. Cicero, in a famous passage,[87] held that the ius civile was to be found in custom as well as in statutes, resolutions of the Senate, the opinions of experts, edicts, and equity.

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[85]See, e.g., SCHULZ, HISTORY, supra, at 137.

[86]Schiller, Custom in Classical Roman Law, 24 VA. L. REV. 268, 270.

[87]TOPICA 5:28.

The opinion of classical jurists on the matter is not so clear. A passage attributed to Julianus (a jurist of the period of Hadrian and the Antonines) in the Digest of Justinian contains the fullest statement of the theory of custom to be found in Roman law until the Middle Ages:[88]

> In any kind of cases in which there are no written laws the rule which ought to be observed is that which has come to prevail by use and custom... 1. Immemorial custom is observed as a statute, not unreasonably; and this is what is called the law established by usage. Indeed, inasmuch as statutes themselves are binding for no other reason than because they are accepted by the judgment of the people, so anything whatever which the people show their approval of, even where there is no written rule, ought properly to be equally binding on all; what difference does it make whether the people declare their will by their votes, or by positive acts of conduct? On this principle it is also admitted law...that statutes are abrogated not only by the voice of one who moves to repeal them, but also by their falling out of use by common consent.

Many modern scholars insist that this passage was interpolated by post-classical writers and did not reflect the views of Julian or any other classical jurist.[89] Classical jurists, they argue, did not know the term "customary law" either in the sense of this passage or as understood by the rhetoricians; for them, custom made law only

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[88]D. 1.3.32. De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et conseutudine inductum est... 1. Inveterata conseutudo pro lege non immerito custoditur, et hoc est ius, quod dicitur moribus constitutuum. Nam quum ipsae ligis nulla alia ex causa nos teneant, quam quod iudicio populi recepti sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes; nam quid interest, suffragio populus volemtatem suam declaret, an rebus ipsis et factis? Quare rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudenem abrogentur.

[89]See Schiller, supra.

indirectly, through the medium of interpretatio.[90] Even those who believe that Julian was the author of D. 1. 3. 32, and that the jurists were familiar with the idea of customary law, concede that custom was of negligible importance as an active source of private law and of no importance at all in constitutional law.[91] In addition, most would agree that the whole question of the theoretical basis of custom held little interest for the classical jurists.

Whatever its place in classical Roman law, custom was fully accepted as a source of law by the time of Justinian. In a famous text in the Digest,[92] Ulpian divides the law into ius scriptum and ius non scriptum. By ius non scriptum only custom is meant; the term ius scriptum is used, in a literal sense, to include not only enacted or statutory law, but also law derived from the responsa prudentium, because the responsa existed in writing.[93] We have seen in D. 1. 3. 32 that custom is held to be observed "as a statute" (pro lege) in cases where there are no written rules. This idea is repeated in a text attributed to Ulpian,[94] where it is said that it is the practice in such cases "for custom of long standing to be observed for law and statute" (pro iure et lege).

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[90] See JOLOWICZ & NICHOLAS, supra, at 353.

[91] Id.

[92] D. 1. 1. 6. 3.

[93] J. 1. 2. 3. Unless otherwise noted, references to, or quotations from the Institutes of Justinian will be based on the translation of Thomas Sauders (1970 ed.). Also see JOLOWICZ AND NICHOLAS, supra, at 353.

[94] D. 1. 3. 33.

The Digest includes theoretical justifications by both Julian and Hermogenian for the acceptance of custom as law. Julian, as we have seen, held that statutes themselves are binding "for no other reason than because they are accepted by the judgment of the people," so it makes no difference "whether the people declare their will by their votes, or by their positive acts and conduct."[95] Hermogenian's justification is similar: rules of law established by long-established custom over many years "may be treated as being the subject of a tacit agreement on the part of the citizens in general, and are as fully maintained as those which exist in writing."[96] The doctrine of these texts, clear enough if only these texts are regarded, is not easy to reconcile with that of other texts in the Corpus Iuris, particularly those holding that "the Emperor alone can make laws."[97]

Apart from the problem of the inconsistency of texts, the greatest question concerning the Byzantine conception of custom as a source of law involves its relationship to written law. The primary text establishing custom as a form of law speaks only of custom having legal status in cases "in which there are no written laws."[98] What of cases in which custom differs from, or conflicts with, written law, and particularly with statute? On this question, too, the Corpus

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[95]D. 1.3.32.

[96]D. 1.3.35. Sed et ea, quae longa consuetudine comprobata sunt ac per annos plurimos observata velut tacita civium conventio, non minus, quam ea, quae scripta sunt iura, servantur.

[97]E.g., C. 1.14.11.

[98]D. 1.3.32.

Iuris elaborates no coherent theory. Julian tells us that "statutes are abrogated not only by the vote of the legislator, but also by the fact of their falling out of use by common consent."[99] This view is echoed in Justinian's Institutes, which says that enacted laws, unlike natural law which is immutable, "suffer frequent changes, either by tacit consent of the people, or by some subsequent law."[100] This idea that custom and subsequent statute have equal right to abrogate enacted law makes sense upon the theory of Julian and Hermogenian that custom is but a kind of tacit statute, representing the people's legislative intention. But it conflicts with the imperial theory that the prince alone could make laws. The latter theory is represented in the Code by a constitution of Constantine which, while conceding that the authority of long-continued custom is not small, nevertheless holds that custom will not overcome either reason or statute.[101] As we will see, the medieval glossators and post-glossators of the Roman law, working upon the premise that the Corpus Iuris was internally consistent and based upon a single coherent theory of law, went to ingenious lengths to develop a reconciliation of these apparently

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[99]Id. Quare rectissime etiam illud receptum est ut leges non solum suffragio legislatoris sed etiam tacito consensu omnium per desuetudinem abrogentur. Many scholars have regarded this passage as interpolated, but see JOLOWICZ 7 NICHOLAS, supra, at 354.

[100]Inst. 1.2.11. Sed naturalia quidem iura, quae apud omnes gentes peraeque servantur, divina quadam providentia constituta, semper firma atque immutabila permanent. Ea vero, quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi, vel alia lege postea lata.

[101]C. 8.52.2 Consuetudinis ususque longaevi non vilis auctoritas est, verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem.

contradictory texts.

STATUTES, EQUITY, AND INTERPRETATION

The history of Roman law may have begun with a code--the Twelve Tables--and as the classical period progressed, legislation certainly increased in importance, but in that period there never was a time when *interpretatio* did not make up the bulk and legislation the minor part of the law.[102] The jurists used the word *interpretatio* in two quite different senses. In its broadest sense it referred to the activity of the jurists in developing the law, and was contrasted with enacted law.[103] In this sense *interpretatio* dominated the development of Roman law. In its narrow sense, referred to as *interpretatio iuris*, it signified the attempt to discover the meaning of the language of a written instrument.[104] The pre-classical pontiffs and early jurists utilized what is now called "word" interpretation, which is not to be confused with the later "grammatical" interpretation. In the older form, word interpretation, the jurists based their *responsa* upon the words and provisions of some legislative enactment, but paid little attention to the meaning of those words and provisions; the words were regarded merely as pegs from which to hang some new development in the law.[105] Rather than focusing on the meaning of words, it became the practice to base *responsa* on a statute's reasons (*ratio legis*). The major premise underlying the rule in question was

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[102]Schiller, *Roman Interpretatio and Anglo-American Interpretation and Construction*, 27 VA. L. REV. 733, 738 (1941).

[103]*Id.* at 734.

[104]*Id.* at 745.

[105]*Id.* at 737, 749; *also see* JOLOWICZ & NICHOLAS, *supra*, at 89.

sought in order to derive, as a logical consequence, a series of other rules not directly contained in the enactment.[106]

Jurists of the late Republic and early Empire developed a refinement of the "word" interpretation. They attempted to explain the idea inherent in the words of a statute on the basis of the meaning of the words themselves.[107] Some, like the Proculians, preferred a grammatical approach, and pursued lexicographical, syntactical, and similar studies in an attempt to arrive at an objective meaning.[108] Others sought not an objective meaning of the words but the intention (voluntas) of the legislator as the key to interpretation. This method is referred to by modern scholars as "logical interpretation." Stroux, in a leading but controversial treatment of this subject,[109] contended that by Cicero's time the jurists had fused the "grammatical" method with the "logical" by adopting a method very similar to that of the Roman rhetoricians. The rhetoricians, he claimed, had developed a complete theory of interpretation based upon the notion of aequitas,[110] which in turn was drived from the Greek concept of equity (epieikeia). The rhetoricians, in this view, not only adopted aequitas as their central principle of interpretation, but went beyond the Greeks in recognizing

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[106]Schiller, Roman Interpretatio, supra, at 738.

[107]Id. at 749.

[108]Id.

[109]J. STROUX, SUMMUM IUS SUMMA INIURIA: EIN KAPITEL AUS DER GESCHICHTE DER INTERPRETATIO IURIS (1926).

[110]This view is supported by Schiller.

aequitas as a body of law alongside of ius, which was superior to ius.[111] As we shall see, these claims about the rhetoricians' theory of interpretation must in large measure be rejected. There can be no doubt, however, about the central influence of Greek concepts of equity, and Roman rhetorical theory about interpretation, upon the ideas about equity, law, and interpretation that grew up in Roman jurisprudence. The distinguished English legal historian T.F.T. Plucknett regularly required his students to begin their study of English law with the work of Bracton, telling them that they would not understand one word of medieval and early modern English law until they had mastered that early giant. Because such a knowledge of the works of Aristotle, Cicero, and Quintilian is just as essential to any understanding of the ancient and medieval Roman jurisprudence of equity and interpretation, we will begin with them.

There is a problem with discussing ancient and medieval conceptions of equity with lawyers educated in the common law tradition, and this problem goes beyond the fact that the term "equity" has been used, and continues to be used, to cover a number of quite different juridical concepts. In common law jurisdictions the idea of equity several hundred years ago got very confused with problems in the jurisdiction of various courts. However, because jurists for two thousand years have been concerned with a tension between law and a cluster of ideas to which they have applied the term "equity",[112] and because their explorations of this tension make up a

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[111]See Roman Interpretatio, supra, at 757.

[112]In English, both the Greek epiekeia and the Latin aequitas are translated as "equity". In the Middle Ages there was considerable

central theme of this study, I shall also use the term but try to make clear particular usages as I go along.

The ancient Greeks noticed that there was a problem with law and proposed epieikeia as a solution. A fundamental idea of epieikeia was expressed by Plato in the Statesman: legal generalizations are imperfect and thus justice requires some supplement to legal rules.[113] Aristotle expanded this point in a famous passage in his Nicomachean Ethics:[114]

> [A]ll law is universal, but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the very nature of the thing... When the law speaks universally, and a case arises on it which is not covered by the universal statement, then it is right where the legislator failed us and has erred by oversimplicity, to correct the omission... And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact, this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite, the rule is also indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts.

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debate among both jurists and theologians over the degree to which aequitas covered the same concepts as did epiekeia. This question was complicated by the fact that historically the Greek and Latin terms each had had several meanings, not all of which could be shown to be connected to a single idea or theme. The use, then, of the word "equity", which carries its own quite different intellectual baggage as a result of the peculiar history of the jurisdiction of English courts, is bound to raise difficulties.

[113]PLATO, STATESMAN, 294A (Jowett translation).

[114]BK. V, CH X (trans. W. D. Ross).

Arstotle's point is that no matter how carefully a statute is drawn, by its very nature it must be written in general terms. This in some cases presents a difficulty that resort to the words of the text will not resolve. In another passage on epieikeia, this time in his Rhetoric,[115] Aristotle illustrates the difficulty with an example: Athenian law made it a crime to injure a man with a weapon, and of necessity that law spoke in general terms for it would take a lifetime to make a list of all the different sizes and shapes of weapons with which it would be possible to inflict wounds. Suppose a man with nothing more than a finger-ring struck another and injured him: according to the words of the law he apparently would be guilty of the crime. Equity, said Aristotle, would correct the law to achieve the correct result, namely, that such an actor would be innocent of the crime of injuring with a weapon.

Aristotle has here identified a fundamental conceptual and practical problem with attempts at a literal interpretation of authoritative legal texts. What is needed in cases in which the law speaks in general terms is a means by which judges may decide how the general provision is to be applied to the wide variety of particular circumstances presented in actual cases. Unless it can be shown that such a means exists, much of the certainty and predictability which constitutes an important part of the rationale for the existence of law at all would appear to be unattainable.

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[115]RHETORIC, BK. I, CH. XIII.

Aristotle was interested in the problem of whether the particular facts of an individual case could and should be subsumed under the law's statement of a general rule, not just as a technical problem of judicial reasoning and decisionmaking but because justice required some rather subtle discriminations between the facts presented by different cases. He divided justice into legal justice and equity; equity was the particular kind of justice that went beyond the written law.[116] Unfortunately, he was unclear about how a judge is to determine what it is that equity requires when it is employed to make subtle distinctions between different sets of facts, all of which arguably are covered by the general words of the law. Following his discussion in the Rhetoric of the hypothetical case of injury by finger-ring, he provides several aphoristic statements of the requirements of equity, not all of which have common underlying principles:[117]

> The second kind [of right and wrong conduct] makes up for the defects of a community's written code of law. This is what we call equity; people regard it as just; it is, in fact, the sort of justice which goes beyond the written law... Equity must be applied to forgivable actions; and it must make us distinguish between criminal acts on the one hand, and errors of judgment, or misfortunes, on the other... Equity bids us to be merciful to the weakness of human nature; to think less about the laws than about the man who framed them, and less about what he said than about what he meant; not to consider the actions of the accused so much as his intentions, nor this or that detail so much as the whole story... It bids us remember benefits rather than injuries...to be patient when we are wronged; ...to prefer arbitration to litigation--for an arbitrator goes by the equity of a case, a judge by the strict law.

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[116]NICOMACHEAN ETHICS, BK. V, CH. X; RHETORIC, BK. I, CH. XIII.

[117]RHETORIC, supra.

What this treatment of equity lacked in coherence it made up for in fertility. Some medieval jurists, citing Aristotle as authority, treated equity as if it were nothing more than a technical means of filling lacunae in the law; others focused on what we may loosely call equity-as-fairness (this is what certain English common lawyers had in mind when they identified equity with "conscience"). Some concentrated on equity as mercy for human weakness while others saw the primary function of equity to be to emphasize a legislator's intentions over his words.

At least two of Aristotle's conceptions of equity were common in ancient Roman law. They appear to have been imported into Roman legal thought through at least two intermediaries, the Stoic philosphers and the Roman rhetoricians. The latter were essential players in the legal system of ancient Rome, and it is to their writings that we must now turn.

Stroux, in claiming that the rhetoricians held a complete theory of interpretation which was based on the idea of aequitas, radically misunderstood his sources. In fact, Roman rhetoricians were much more interested in developing a wide variety of arguments about interpretation, which might be used by advocates in legal cases, than they were in developing a scientific theory of interpretation. They were pragmatists who taught their students to argue on both sides of any question. We see this most clearly in works like Cicero's De Inventione, which was a slight reworking of a textbook of rhetoric widely used in the time of his youth. In De Inventione, Cicero presents a long series of arguments to be used by speakers who have

the task of persuading a judge to adopt a strict, or literal, reading of a legal text. Then, playing no favorites, he sets forth a corresponding set of arguments to be used by speakers who need to argue for a freer, or equitable, interpretation.[118] The rhetoricians, primarily interested in forensic advocacy, had little interest in either scientific jurisprudence or philosophical hermeneutics, and there is little evidence on the basis of their beliefs about jurisprudence or the nature of texts that they preferred one set of arguments about interpretation to the other. The Roman jurists, however, who appropriated their arguments, soon came to take one side or the other with dead seriousness, and this tendency still continues among jurists. The rhetoricians' arguments comprise a major part of the arsenals of both camps in our current disputes over approaches to the interpretation of legal texts.

To point out that the rhetoricians were not primarily interested in jurisprudence is not to say that their arguments did not contain points which deserved to be taken very seriously by legal theorists. Many of the rhetoricians' standard arguments in favor of a freer interpretation take into account problems with strict interpretation mentioned by Aristotle in his discussion of equity, and their arguments in support of strict interpretation identify serious problems with interpretation that is controlled by considerations of equity. One of Quintilian's[119] minor declamations contains one of the

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[118]DE INVENTIONE, BK. II, CH. XL-XLVIII. Cicero discusses problems of interpretation that arise from, or concern, ambiguity, letter and intention, conflicts within laws, reasoning by analogy, and definitio.

[119]Quintilian (35-95 A.D.) became head of the most important school of oratory at Rome, and sometimes pleaded in the law courts. Trained by

most eloquent statements ever made of the problem with equitable interpretation.[120]

> Nowadays there is a tribe of ingenious pleaders who would have us "interpret" this statute. It does not, they claim, mean what it says... Now before I deal with the purpose of this particular statute, I have just this one remark to make to the court, that this kind of so-called interpretation is thoroughly mischievous. For if the court is always to be spending its time turning statutes inside out to find out what is just, and what is equitable, and what is expedient: well then, there might as well be no statutes at all. No doubt there was a time when the law was nothing but a kind of naive justice. But because justice appealed to different minds in different ways, and it was therefore impossible to decide with certainty what it ought to be, a definite form of law was established to govern our lives. That form the framers of statutes expressed in explicit words: and if everybody is allowed to change it and twist it to his own purposes, the whole purpose and force of the law is gone.

Several themes in this short oration have been repeated time and again over the centuries. Perhaps central among them is the idea that the primary purpose of law is to provide a sure, certain, definite, predictable standard for living our lives and doing business in society. Such certainty is to be achieved by the use of written laws expressed in explicit words. This approach assumes that the meaning of the words used will normally be transparent enough so as not to require interpretation at all, but if a search for meaning is required, the guide is to be the purpose of the enactment, or the intention of its framers, not something as incapable of commanding

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Seneca and Domitius of Nimes, he was a great admirer of Cicero and hoped to raise the orators of his age to the level of the age of Cicero. His most important surviving work is the INSTITUTIA ORATORIA in twelve books.

[120]THE MINOR DECLAMATIONS ASCRIBED TO QUINTILIAN, SECT. 264.7-264.9 (W. DE GRUYTER ED. 1984). The translation is taken from C. ALLEN, LAW IN THE MAKING, supra, at 398 (7th ed. 1964).

agreement and certitude as an appeal to justice, equity, or expediency. Equity and justice fail as guides to interpretation because they "appeal to different minds in different ways."[121]

According to this line of reasoning the effect--indeed the very point--of enacting a law is to stop the debate within the legal system about what is just and equitable on the point covered by the law. The debate may continue in the larger society, and may result in a change in the law, but for the purpose of deciding cases in the legal system it is closed in the interest of attaining a fixed standard.

In Western Europe for the past two thousand years there have always been a substantial number of jurists who have thought this line of reasoning compelling, and it is easy enough to see why this has been so. Whether or not we believe that there exist universal principles of justice and equity, our history and experience have taught us that men are not likely to agree about what they are. So if having a predictable standard to measure our anticipated future actions against is important to us, and I think it is, then justice and equity are unlikely to provide us with such a standard on a case by case basis. But the case for preferring the letter of the written law to an unwritten equity loses much of its compulsion unless it can

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[121]English and American jurists have repeatedly made similar points. John Selden, the great seventeenth century scholar and common lawyer, spoke bitingly of equity: "Equity is a roguish thing, for [in] law we have a measure to know what to trust to. [But] Equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity." Justice James Iredell, in the 1798 U.S. Supreme Court case of Calder v. Bull, rejected Justice Chase's appeal to principles of natural justice as bases for constitutional decisions, saying in response: "The ideas of natural justice are regulated by no fixed standard; the ablest and purest of men have differed on the subject..."

be shown that certainty and predictability are attainable by such literalism. As we have seen, Aristotle fundamentally undermined the idea that a completely determinate text was possible. The law by necessity speaks in general terms, and unless a means exists by wich judges may with certainty and consistency decide how the general provisions are to be applied to the wide variety of particular fact situations presented in actual cases much of the certainty and predictability which constitutes an important part of the rationale for strict interpretation (and ultimately for the existence of law itself) would appear to be unattainable.[122]

Just as for more than two millennia there have always been adherents of a jurisprudence of strict interpretation, during that time there have also always been jurists who have felt quite comfortable with the idea that written law is always, of necessity, imperfect or at least incomplete, and hence needs to be supplemented by, or interpreted in the light of, extrinsic authorities and aids. There have always been jurists who have argued that all human law, and

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[122]If perfect certainty turns out not to be attainable, the conclusion does not follow, as some would have it, that we should give up on the letter of the text. The tendency in twentieth century American jurisprudence, especially by the legal realists and the more recent critical legal realists and the more recent critical legal studies movement, has been to enthusiastically embrace any evidence which suggests that texts are (and must be) less than perfectly determinate, and to conclude as a consequence of this that judges may decide what they wish. But if texts cannot provide us with the kind of perfect certainty that the most simple-minded defenders of strict interpretation have thought possible, they may in many (perhaps most) instances provide a reasonable certainty of direction. If a primary goal of having law is to increase our ability plan our lives and affairs, we should not accept or reject instrument for attaining that goal on the basis of whether they work perfectly; we should choose our instruments on the basis of how they compare with other available instruments.

not just passages made problematic by their generality, is subject to correction by the requirements of a higher law, whether that be divine law, natural law, or equity.[123] Other jurists have insisted that even if no question my be raised about the meaning of a written law, its certainty of meaning and predictability of application are not of themselves sufficient to legitimate it: it must also be just or fair.

In short, it is no exaggeration to say that the current dispute among lawyers and judges over the degree to which the American Constitution can and should be strictly interpreted is merely the latest flare-up of a controversy that has burned without interruption among lawyers for at least two thousand years. This may only mean that jurists haven't learned much in all that time, but I believe the situation suggests that here we may be up against one of those fundamental, apparently unresolvable, tensions that sometimes exist between widely held and deeply felt political values and goals. Jurists have wanted their law to be certain, but they also have wanted

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[123]Aristotle's claim for equity was not this broad; there is no hint in his discussion that equity was to be used to revise laws whose meaning was not in question, even if they appeared to be unjust. Generally speaking, in both Roman and common law jurisprudence, although at the level of theory all human law is said to be subject to the requirements of equity, in practice equity's overt use as a source of law has tended to be limited to two particular problems in interpretation. Aristotle did not separate these problems and spoke only in terms of the problems raised by the need to state legal rules in universal terms, but jurists in the Middle Ages thought it useful to distinguish two separate problems which were implicit in what Aristotle said. The first was what we now call the problem of the omitted case; it arises when there is a question whether the statutory language is broad enought to cover a particular set of facts. The second problem involves the question of whether the statutory language is too broad. In both Roman and common law, jurists claimed to find the solutions to these problems in equity, but in both traditions they were much more willing to extend the scope of a law than to narrow it.

it to be just and equitable and therefore flexible. No one has been able to come up with a theoretical accommodation of their aspirations for law which works well in practice. Concentration on certainty often leads to a rigidity which fails to take into account the particular circumstances in cases. This violates the fundamental principle of justice and equity that like cases must be treated alike and that significant differences in circumstances must be taken into account. On the other hand, attempts to shape the interpretation of texts to the requirements of equity radically undermine the certainty of law because men have never agreed about what equity requires.

The tension between equitable and strict interpretation thus endures less because lawyers are stupid than because the ends to which strict and equitable interpretation are directed (certainty and justice) are both very appealing, and because the application of each approach to interpretation tends to work against the achievement of the end associated with the other approach. As long as both ends are valued the tension will no doubt continue.

The history of jurisprudence on this question, in both Roman and common law, is roughly cyclical in nature. Ius strictum will for a time gain the upper hand, but then the disadvantages associated with it will become so evident that a reaction will set in, and a freer, equitable, approach to interpretation will be the rule until the inconveniences of that approach become onerous and set off a shift back to ius strictum. Scholars who have claimed to find a fundamental difference between the Roman law and common law jurisprudence of interpretation have been misled by the fact that the two systems have been in different phases of the cycle at the time they were examined.

A substantial portion of this work will be devoted to an examination, by historical periods within each legal tradition, of juristic treatments of statutory law, equity, and interpretation. Juristic treatment of these topics has seldom been enlightening, but it has been infused with more passion than has been expended on any other topic in jurisprudence. The current emotional debate between such jurists as Attorney General Edwin Meese and Justice William Brennan is being conducted in almost the same terms, using even the same invective, as the Roman rhetoricians and jurists used in the time of Christ. The fact that the problem of <u>ius strictum</u> and equity has remained unresolved may not suggest that lawyers are stupid, but the fact that they, century after century, have lined up on one side or the other, and have taken to heart the same old arguments so cynically contrived by ancient rhetoricians suggests at a minimum that they have suffered from an almost total absence of historical perspective.

III

Several distinguished students of ancient Roman law have claimed to have detected a steady movement toward the triumph of the equitable approach to interpretation,[124] but I find little evidence for this. Most of what we know about the classical Roman jurisprudence of interpretation comes from texts preserved in Justinian's sixth century codification, and there, despite Justinian's claim to have eliminated all contradictions, apparent contradictions on the subject of statutes and their interpretation abound.

A statute is defined in the Institutes as "what the people enact at the request of a senatorial magistrate."[125] In accord, an excerpt in the Digest from the jurist Julian holds that statutes are binding only because they are accepted by the people.[126] Yet a famous passage of the Code holds that the emperor is to be regarded as "the sole maker and interpreter of the laws,"[127] and another in the Digest says that "the will of the emperor has the force of a statute."[128]

There are several passages, including the one quoted above, which provide that the emperor is the sole interpreter of the law. The emperors Valentinian and Martian commanded that if "anything should be

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[124]These tend to be the same people (e.g., Stroux) who erroneously claimed that aequitas was the guiding principle for the rhetoricians.

[125]Inst. 1.2.4. Lex est quod populus Romanus senatorio magistratu interrogante, velute consule, constituebat.

[126]D. 1.3.32.

[127]C. 1.14.11.1. Explosis itaque huiusmodi ridiculosis ambiguitatibus, tam conditor quam interpres legum solus imperator iuste existemabitur...

[128]D. 1.4.1.

found to be obscure in these laws, it must be explained by the interpretation of the emperor,"[129] and a constitution [enactment] of Constantine held that "It...is lawful for Us alone to interpret questions involving law and equity.[130] In effect these passages hold that there may be no interpretation at all; interpretation by the legislator ("authentic interpretion") is really a form of legislation. Justinian, in a futile attempt to limit all law to the text of his codification, prohibited any commentary on, or interpretation of, that text. Within his own lifetime a profusion of commentaries, abridgements, and general summaries appeared. His own Digest contains several excerpts from the jurist Julian explaining why interpretation was unavoidable:

> Neither statutes nor senatus consulta can be written in such a way that all cases which might at any time occur are covered; it is however sufficient that the things which very often happen are embraced.[131]
>
> And, therefore,...[in such cases] more exact provision must be made either by [juristic] interpretation or by a legislative act...[132]

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[129]C. 1. 14. 9. Si quid vero in iisdem legibus latum fortassis obscurius fuerit, oportet id imperatoria interpretatione patefieri...

[130]C. 1. 14. 1. Inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicare.

[131]D. 1. 3. 10. Neque leges, neque senatusconsulta ita scribi possunt, ut omnes casus qui quandoque inciderent, comprhendantur, sed sufficit et ea, quae plerumque accidunt, contineri.

[132]D. 1. 3. 11. Et ideo de his, quae primo constituuntur, aut interpretatione, aut constitutione optimi Principis certius statuendum est.

This is clearly the same rationale for the necessity of interpretation that Aristotle gave in his Ethics: the need to deal with the problem of the omitted case. But the Digest solution (again taken from Julian) to this problem at first glance appears to be quite different from Aristotle's solution, which was to appeal to equity to fill the gap in the law. Some Corpus Juris texts explicitly invoke the principle of equity, but they do not do so in respect to the problem of the omitted case. Instead, when equity is explicitly mentioned as a principle, it is set in opposition to strict law: "in all things, the principles of justice and equity, rather than the strict rules of law should be observed."[133] Consideration of equity is not to be reserved for cases where the legislator has blundered or shown lack of foresight; it is to be considered "in all matters, and especially those relating to the law."[134] This conjunction of equity and justice looks less like Aristotle's view of equity as a principle of interpretation, as enunciated in his Ethics, and more like his description, in the Rhetoric, of equity as eternal and immutable.[135] The Digest remedy for the over-general statute or the omitted case is not equity but analogy: "It is not possible for every point to be comprehended in statutes or senatus consulta; still, if in any case that arises, the meaning of the enactment is clear, the presiding magistrate ought to proceed by analogical reasoning (ad similia) and

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[133]C. 3.18. Placuit, in omnibus rebus praecipuam esse iustitiae aequitatisque, quam stricti iuris rationem.

[134]D. 50.17.90. In omnibus quidem, maxime tamen in iure, aequitas spectanda sit.

[135]See ARISTOTLE, RHETORIC, 1.13 (1374a).

declare the law accordingly."[136]

Analogical reasoning may at first glance appear to have nothing to do with equity, but Cicero, some six hundred years before Justinian, had made a connection. In a discussion of arguments by comparison, after asserting that what was valid in respect of one of two equal cases should be valid in the other, he added, "Equity should prevail, which requires equal law in equal cases."[137] This statement reminds us immediately that one of the fundamental ideas of justice and equity (species, as Aristotle noted, of the same genus) is that like cases are required to be treated alike. Therefore, even though the Corpus Juris does not deal with the problem of the omitted case by explicitly referring to equity, its solution to the problem implicitly draws upon one of the fundamental concepts associated with equity. I find, however, no evidence that the Roman jurists who proposed reasoning ad similia as a solution noticed the equitable implications of such a procedure.[138]

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[136]D. 1.3.12. Non possunt omnes articuli singulatim aut legibus...; sed quum in aliqua causa sententia eorum manifesta est, qui iurisdictioni praeest, ad similia procedere atque ita ius dicere debet.

[137]TOPICA 4.23 (H.M. Hubbel trans. 1949).

[138]The hidden depths of the practice of proceeding ad similia in the law suggest that it would be well for those modern jurists who would cheerfully abandon past legal precedents ("the dead hand of the past") in the interest of achieving equitable results to think the question through again. The practice of following precedents may usefully be thought of as more than a blind following of past examples, or even as a method for achieving certainty and predictability in law: it may be considered an equitable practice. The imperative to treat like cases alike is not limited to cases occuring at roughly the same historical point in time. The decision to abandon a precedent should not be seen as merely giving preference to equity or justice over strict law; it should be seen as a rejection of the claims of one aspect of equity in favor of the putative claims of another of its aspects.

The use of analogy presupposes consistency in the law.[139] More precisely, in reasoning by analogy a conclusion is drawn from one instance to another upon the assumption that a generic rule (often called a principle) is discoverable which will cover both cases. The search for such a rule became universally self-conscious in the Middle Ages and indeed was one of the identifying marks of the jurisprudence of the fourteenth century post-glossators of the Roman law. But in classical Roman law, despite the tests we have noticed demanding that jurists proceed by analogy, and despite the fact that the collection of juristic fragments and statutes that made up Justinian's Corpus Juris was put together with the purpose of bringing coherence and consistency to Roman law (and hence presupposed a theory consistent with the use of analogy), at least two texts seem to deny that legal interpretation by analogy can or should work. One Digest text holds that it is "impossible to assign the principle of every rule of law laid down by our forefathers."[140] For this reason, adds the next text, "the reasons of the law laid down ought not to be inquired into."[141] If the principles or reasons of laws may not be inquired into, there can be no basis for proceeding ad similia one is left only with intuitive comparisons. The greatest question raised in the Digest, however, in respect to the extension of a rule to an omitted case by

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[139]See W.G. Hammond, On Analogy and the Ratio Legis, Note G, in F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 278 (1880).

[140]D. 1.3.20. Non omnium, quae a maioribus constituta sunt, ratio reddi potest.

[141]D. 1.3.21. Et ideo rationes eorum, quae constituuntur, inquiri non oportet...

analogy, is not the theoretical basis of such an operation, but whether it should be done at all. Despite the texts quoted, and another attributed to Papinian which holds that "what has been omitted by the laws should not be omitted by the conscientious judge,"[142] at least one text refuses to permit such an extension:[143]

> The law only speaks of the husband and his heir. Nothing is mentioned with reference to a father-in law and his successors; and Labeo notices this as having been omitted. In these instances, therefore, the law is defective, and not even a praetorian action can be granted.

Most of the discussions of interpretation which have been preserved in the Corpus Juris are not about the extension of words by analogy, but are about whether the words themselves, or the intention and will of the legislator, were to be the primary concern of the interpreter. Hence there is also a connection with equity because, it will be recalled, one of the defining characteristics of equity for Aristotle lay in its attention to the legislator's intent rather than to his words.

In terms of sheer numbers of texts, the Corpus Juris favors spirit and intention over the letter or the word. The following are representative texts:

> To know the statutes does not mean to have got hold of the actual words, but to be acquainted with their sense and application[144]

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[142]D. 22.5.13. Verumtamen quod legibus ommissum est, non omittetur religione iudicantium...

[143]D. 24.3.64.9 De viro heredeque eius lex tantum loquitur, de socero sussessoribusque soceri nihil in lege scriptum est; et hoc Labeo quasi omissum adnotat. In quibus igitur casibus lex deficit, non erit nec utilis actio danda.

[144]D.1.3.17. Scire leges non hoc est, verba earum tenere, sed vim ac potestatem.

> Statutes ought to be interpreted indulgently so as to preserve the intention [voluntas].[145]
>
> There is no doubt that he violates the law who, while obeying its letter, attempts to destroy its spirit... We order that this shall apply to all legal interpretations in general.[146]

This superiority of intention over word, which is characteristic of Justinian's Corpus Juris, did not so clearly exist among the classical jurists of a few centuries earlier; their opinion was more evenly divided between the verba and the voluntas. The idea of equity as intention was embraced by the absolute emperors because ius strictum subjected them to limitations.[147] Some passages which indicated a very acute awareness on the part of classical jurists of problems with a reliance on intention somehow slipped by Justinian's editors. For example, in a section of the Digest dealing with the substantive law of the inheritance of furniture, the jurist Celsus pauses to report a dispute that arose between two other jurists, Servius and Tubero, over what was to be done in a case in which there was a discrepancy between one party's claim about what the legislative intention had been in regard to the statutory language, and the meaning of that language as established by custom or usage.[148] This is

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[145]D. 1. 3. 18. Benignius leges interpretandae sunt, quo voluntas earum conservatur.

[146]C. 1. 14. 5. Non dubium est in legem committere eum, qui verba legis amplexus contra legis nititur volentatem... Quod ad omnes etiam legum interpretationes, tam veteres quam novellas, trahi generaliter imperimus...

[147]See Schiller, Roman Interpretatio, supra, at 58-60.

[148]D. 33. 10. 7

a fascinating dispute because it appears to anticipate a recent debate among philosophers of language (Wittgenstein and others) over the possibility of a private language. Servius and Tubero agreed that language was an instrument for the conveyance of thought, but parted company over what might be concluded from this. Tubero concluded that it meant that a word could mean anything its user wanted it to mean, but Servius held that if words were to convey the intended message, well-established usage must be followed. Therefore, Servius contended, in interpreting texts one was restricted to the meaning common usage gave to words, and should not speculate about what the writer meant to say. Celsus, the jurist who reported this dispute, sided with Servius and added that nobody could be held to say that for which he did not use the right word. One who took the position of Servius and Celsus regarding the claims of custom and usage in establishing the interpretation to be given to a word did not thereby conclude that all problems of interpretation could be resolver by resort to custom and usage. Celsus himself admitted the possibility that a word might be ambiguous; when this occurred, "that sense is to be preferred which avoids an absurdity, especially when by this method the intention of the statute is also secured."[149]

In addition to texts which made it clear that juristic opinion had once been divided on the question of jus strictum and equity, a few texts were included which unambiguously prefer a literal reading

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[149]D. 1. 3. 19. The Corpus Juris provides no additional guidelines for the treatment of statutory ambiguities. For a much more extensive treatment of the problem of ambiguity by Roman rhetoricians see CICERO, DE INVENTIONEM BK. II, Sect. 116-120; QUITILIAN, INSTITUTIO ORATORIA, BK. VII, CH. IX.

of the law to the demands of equity. For example, a text attributed to Ulpian holds that a law imposing limitations on the right of a woman separated from her husband to alienate her property "is to a certain extent a hardship, but it is the written law."[150]

The tension in republican and imperial juridical thought about interpretation was cast primarily in terms of word and intention, but there is evidence in the Corpus Juris for one other important line of disagreement about what the relationship between law and equity was, and what the practical consequences of that relationship should be. The very first passage of the Digest is taken from the Institutes of Ulpian, who in turn approvingly quoted Celsus's definition of law: "law is the art of goodness and fairness."[151] The Latin word here rendered as "fairness" was aequi, which could also be translated as "the equitable." This became a very important text for certain Roman and canon lawyers in the Middle Ages. Some medieval jurists took it to mean that the law as written in Justinian's compilation already contained equity, and therefore there was no need to look outside the text of the law for a superior, external equity. In a similar vein certain English common lawyers in an attack on the equity jurisdiction of the Chancellor in the early sixteenth century, argued that the common law itself fully contained equity and fairness so that no resort to the chancellor's equity was necessary.[152]

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[150]D. 40. 9. 12. 1. Quod quidem perquam durum set, sed ita lex scripta est.

[151]D. 1. 1. 1. [I]us est ars boni et aequi.

[152]There is no direct evidence that the common lawyers took this argument from Roman law although some of them almost certainly had been exposed to Roman sources.

Other medieval jurists got a very different message from this text. For them, to say that the law was the art of the good and the fair was to imply that a text which was putatively law was not really law unless it conformed with equity. Equity for them was something that stood above and apart from law and contained criteria for law's validation. This second group of jurists tended to read the Celsus definition of law in connection with another passage in the Digest, taken from the work of the jurist Paul, which said that the term "law" (ius) was used in several senses: when it is used to mean the fair and the good, it means natural law.[153]

It is hard to judge what the jurists of Justinian's time made of these last two texts. Aside from their placement at the beginning of the Digest nothing is made of them. I have found no example in the Corpus Juris where the written law was set aside or modified on the ground that its literal application would result in hardship or unfairness. This was not uncommonly done in both medieval Roman and English law. In the Corpus Juris literal requirements of laws may be avoided on the basis of legislative intent but not on the basis of fairness.[154]

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[153]D. 1. 1. 11. Ius pluribus modis dicitur: uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale.

[154]See text above at Footnote No. 150.

IV

In every legal system, both past and present, there is a tension--even a conflict--between ius strictum and equity, if the latter term is understood to include such ideas as justice, fairness, and the spirit or intention of the law. The tension will likely be inescapable unless agreement can be had to abandon one or the other of the sets of ends associated with law and equity. But the framework in which the debate arising from this tension has been conducted has not been unavoidable; it has been historically conditioned, and it is possible to trace lines of influence. In our discussion of medieval and early modern theories of legislation and interpretation we will be concerned with those lines of influence.

CHAPTER TWO

THE MEDIEVAL REVIVAL OF ROMAN LAW

After the fall of the Western Roman Empire and the powerful social disturbances of the seventh century, the codification of Justinian was soon not widely understood, and Roman law as a system fell into disuse in Western Europe.[1] This is not to say that Roman law had no impact on legal practice or that learning in Roman law entirely ceased. When Germanic kingdoms were established in the Western provinces of Europe, the Roman population was allowed to continue to live under Roman law, while the Germanic population lived under Germanic law.[2] The intercourse between the two populations brought Roman law and Germanic law face to face, with the result that in parts of Italy and southern France Roman law was to some degree fused with Germanic legal customs. The prevailing legal institutions were largely Germanic, but from the time of the fall of the western Roman empire until the ninth century, various German peoples felt it necessary to put their local customs into writing (leges Barbarorum) in order to protect them from the more sophisticated Roman law. Still, despite their origins in attempts to preserve the purity of Germanic customary law, the leges Barbarorum show strong Roman influence. As a result of the mutual influence of the two legal sources, much of Italy and France came to be governed by what scholars biased in favor of Roman law have called "vulgarized" or "barbarized" Roman law, although it more accurately could be called Romanized

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[1]See H. D. Hazeltine, Roman and Canon Law in the Middle Ages, in 5 CAMBRIDGE MEDIEVAL HISTORY 717 (1926); E. Meynial, Roman Law, in THE LEGACY OF THE MIDDLE AGES 366 (C. G. Crump & E. F. Jacob ed. 1962); H. J. Berman, The Origins of Western Legal Science, 90 HARV. L. REV. 894 (1977).

[2]Hazeltine, supra, at 720.

Germanic law.

Neither phrase, however, adequately suggests the true state of early medieval European law. If Roman law had been in a state of confusion at the time of Justinian's codification, European law, particularly in northern Italy, in the tenth and eleventh centuries was in a state of chaos. As Ullmann has written:[3]

> Three distinct systems of statutory enactments can be clearly discerned: Roman law, as transmitted through Justinian's compilation and modified subsequently by additional legislation of the Emperors; canon law, as represented in the various collections, and thirdly, the Germanic Lombard law. To these must be added the numerous statutes of the municipalities and independent States, around which collections there cluster many customary formulations of law, mostly of a supplementary and interpretative nature.

Such a heterogeneous and often inconsistent legal order presented almost insuperable problems regarding the selection of the rule of law appropriate to the concrete case. By the end of the eleventh century it had become clear that what was needed was a systematic formulation of the basic principles of the legal order. The means to this end were found in the revival of the study of Roman law.

The story, repeated even by Gibbon, that the medieval revival of Roman legal scholarship originated with the accidental discovery of a manuscript of Justinian's Digest in 1135 is now dismissed as pure myth.[4] From the fifth through the tenth centuries the study of Roman law never entirely ceased, although for much of that period it was not regarded as a science in its own right. There is no convincing

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[3]W. ULLMANN, THE MEDIEVAL IDEA OF LAW 71 (1969).

[4]H. Rashdall, The Medieval Universities, in 5 CAMBRIDGE MEDIEVAL HISTORY 577 (1926).

evidence of organized law schools in the early Middle Ages;[5] instead, some rudiments of law were taught in the schools of the liberal arts as part of the Trivium (grammar, rhetoric, and dialectic).[6] Rashdall tells us that rhetoric was divided into three branches, "demonstrative," "deliberative," and "judicial." Legal instruction was also closely associated with grammar because Latin, the language of Roman law, was ceasing to be a vernacular.

The Church from the eighth century also acted as a transmitter of the Roman legal tradition. Roman legal literature, after the fall of the Empire in the West, was limited to the glosses and epitomes made by monks and ecclesiastics from surviving juristic fragments.[7] Perhaps as important as the preservation of fragments of Roman legal literature, though, was the fact that the Papacy found the imperial idea in Roman political and legal thought congenial.[8] By the tenth century the revived Empire also recognized the ideological potential of Roman law as a legitimating device.[9] Calisse has cautioned us, however, against concluding that the medieval renaissance of Roman legal studies was the result of the interest and influence of either the Papacy or the reconstructed Empire.[10] Instead, the major impulse

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[5]See P. VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE 27 (1909).

[6]There is some difference among the authorities about which branch of the Trivium encompassed the teaching of law. Calisse, Hazeltine, and Vinogradoff, all jurists, say dialectic, while Rashdall, an expert on medieval education, holds for rhetoric.

[7]See Hazeltine, supra, at 732, and Vinogradoff, supra, at 29.

[8]See W. ULLMANN, LAW AND POLITICS IN THE MIDDLE AGES 70-74 (1975).

[9]See id. at 75.

[10]C. Calisse, Italy During the Renascence, in 1 THE CONTINENTAL LEGAL

seems to have been the combination of the increased prosperity and urban revival of northern Italy with the disordered state of legal theory and practice in that region.[11]

The serious academic study of law demanded by these conditions was first achieved in Lombard, not Roman, law. Schools of Lombard law were established in Milan, Mantua, Verona, and Pavia.[12] Of these, the greatest was at Pavia. There the interpretation of Lombard law proceeded by means of questions, glosses, and parallel passages.[13] Indeed, the method which later gave fame to Bologna was already in use at Pavia in a primitive form.[14] Pavia's emphasis eventually shifted from Lombard law to Roman law. In an account of the school's history, written in about 1050, jurists there are divided into the antiqui, who had devoted themselves to the study of Lombard law, and the moderni, who were interested in Roman law as a means of improving Lombard law.[15]

The shift in interest from Lombard to Roman law at Pavia corresponded to the role that Roman law was coming to play in practice in northern Italy. After the fall of the Roman Empire, when rulers legislated they tended to confine themselves to specific subjects.

HISTORY SERIES 120 (1912).

[11]W. ULLMANN, THE MEDIEVAL IDEA OF LAW 71 et seq.

[12]Hazeltine, supra, at 732.

[13]VINOGRADOFF, supra, at 38.

[14]Calisse, supra, at 129.

[15]Calisse, Italy During the Middle Ages, in 1 THE CONTINENTAL LEGAL HISTORY SERIES 98 (1912).

All topics not touched by such legislation were understood to be left either to local regulation or to some pre-existing and commonly accepted body of law--to a ius commune.[16] Originally, this common law was Lombard custom for the German population and Roman law for the Roman population. Later, when origins were not so well remembered, both Lombard custom and Roman law competed to become this common law, and the canon law of the Church became an additional candidate.[17] By the time of the Pavian law school, Roman law was generally accepted as the general law. The triumph of Roman law in this role must be attributed to its comparative sophistication and capacity for systematization. Its proponents openly sneered at Lombard law as "a mere bundle of rules.[18]

Throughout the Dark Ages Ravenna was the primary center of Roman law teaching.[19] While at first Roman law was taught as an adjunct of grammar and rhetoric, at Ravenna it came to be taught as a science in its own right. Odofredus, a Bolognese jurist of the thirteenth century, wrote that in about 1084 manuscripts of Justinian's law were transferred from Rome to Ravenna,[20] and that the success of the law school there was due to access to those books.[21]

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[16]Calisse, Italy During the Renascence, supra, at 109.

[17]See id.

[18]Id. at 111.

[19]Rashdall, The Medieval Universities, supra at 577.

[20]See RASHDALL, 1 THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES 105 (1936).

[21]Hazeltine, Glossators, in ENCYCLOPEDIA OF THE SOCIAL SCIENCES.

Despite the early importance of Pavia and Ravenna, the greatest of the medieval law schools was established toward the end of the eleventh century at Bologna. The Roman jurisprudence that spread over all Europe except England spread largely from Bologna. It was once thought that the renaissance of Roman law suddenly originated at Bologna upon the accidental discovery of a manuscript of Justinian's Digest, but, as we have seen, the reawakening of interest in Roman law was gradual and not limited to Bologna. The Bolognese law school adopted features of legal science developed at other schools,[22] particularly the method of glosses developed at Pavia.

There have been several not necessarily inconsistent explanations of the sudden rise of the Bologna school. The simplest is that the law books of Justinian were transferred to Bologna from Ravenna. This actually seems to have happened. Certainly the great school of the Glossators never could have developed without access to Justinian's texts, because the famous glossatorial method centered upon textual analysis and explication. Another explanation attributes the emergence of Bologna as the great medieval school of law to the genius of its traditional founder, Irnerius. Here again there appears to be truth; undoubtedly the success and fame of Irnerius's lectures initially gave Bologna its name.[23]

According to Vinogradoff, the immediate occasion for the creation of the Bolognese school was the attempt by the Countess Matilda of Tuscany to found a center of Roman legal studies to assist the papal

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[22]Hazeltine, Roman and Canon Law, supra, at 734.

[23]RASHDALL, 1 THE UNIVERSITIES OF EUROPE, supra, at 114.

side in the struggle between Pope Gregory VII and the Emperor Henry IV.[24] Petrus Crassus, a jurist at Ravenna, had attacked the position of Gregory VII and used Roman legal sources to defend Henry IV. The Countess Matilda, a firm supporter of the papacy, is said to have founded the Bologna law school to train and nurture Roman jurists who could defend the papal position.[25] It is most unlikely that Matilda founded the school in the sense that later kings founded universities, but it is politically plausible that she would have wished to encourage a scholar of established reputation to apply himself to the papal cause.[26] In any event, the chronicler Burchard of Ursperg tells us that the "dominus Irnerius at the request of the Countess Matilda renewed the books of the laws, which had long been neglected, and in accordance with the manner in which they had been compiled by the Emperor Justinian of divine memory, arranged them in divisions, adding perchance between the lines a few words here and there."[27] Any hope Matilda may have had that the jurists of Bologna would support the papacy was frustrated. By the beginning of the twelfth century the Bolognese jurists were solidly in the imperial camp, and in 1118 Irnerius himself took a prominent part in the election of the antipope.

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[24]VINOGRADOFF, supra, at 44.

[25]For detailed discussion see W. ULLMANN, THE GROWTH OF PAPAL GOVERNMENT IN THE MIDDLE AGES 276-299 (1965).

[26]RASHDALL, 1 THE UNIVERSITIES OF EUROPE, supra, at 116.

[27]Quoted in id. at 115.

THE BOLOGNESE SCHOOL AND ITS METHOD

The school at Bologna soon became the greatest center for the study of law in the Middle Ages. In the twelfth and thirteenth centuries students flocked there from all parts of Europe and left to spread the Bolognese approach to legal study across the continent.

Although Irnerius has been accepted by tradition as the founder of the Bolognese school, he was not the first jurist to teach there nor the first to have knowledge of Justinian's Digest. The thirteenth century jurist Odofredus says that Pepo, before Irnerius, began to lecture in the laws at Bologna, adding however, that "he was a man of no name."[28] Pepo is also mentioned as a doctor of laws in a judgment delivered in 1076. These two items comprise the sum of our knowledge of Pepo. Even regarding Irnerius we have very little information. Odofredus says that he was a master of the liberal arts, and that "when the books of the law were brought from Ravenna, he began to study them by himself, and by studying to teach the laws, and he was a man of the greatest renown."[29] The extant glosses attributed to Irnerius have a literary and grammatical character which lends support to the claims that he originally was a master of grammar and rhetoric, and that the legal renaissance in which he figures so prominently "arose chiefly out of a literary interest in the monuments of ancient jurisprudence."[30]

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[28]P. VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE 44-45 (1909).

[29]Quoted in H. RASHDALL, 1 THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES 113 (1936).

[30]H. Rashdall, The Medieval Universities, in 6 THE CAMBRIDGE MEDIEVAL HISTORY 577 (1929).

The earliest scholastic fame of Bologna was as a school of liberal arts. All seven liberal arts were taught there, but grammar and rhetoric were emphasized. In Italy, in contrast to common ecclesiastical practice north of the Alps, grammar and rhetoric were studied as aids to the analysis and composition of legal documents rather than primarily as preliminaries to the study of Holy Scripture and the Fathers. Irnerius's great contribution to Western jurisprudence was his application of the methodology of grammar, rhetoric, and dialectic to the study of the rediscovered books of Justinian.

Medieval thinkers venerated the written word, particularly scriptural and patristic writings but also the great secular writings of the past,[31] including the works of Aristotle and the texts of the Roman law as compiled by Justinian. It has sometimes been asserted that the scholastic method, the great instrument for the advancement of learning in any discipline in Western Europe during the thirteenth and fourteenth centuries, presupposed the absolute authority of certain books.[32] But medieval philosophers generally did not believe that secular texts, however respected, were either infallible or complete, even if they usually laid down correct principles and normally were consistent.[33]

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[31]See Harris, Philosophy, in THE LEGACY OF THE MIDDLE AGES 228 (Crump & Jacob eds. 1962).

[32]See, e.g., H. Berman, The Origins of Western Legal Science, 90 HARV. L. REV. 894, 908 (1977).

[33]See S. Ebbeson, Ancient Scholastic Logic as the Source of Medieval Scholastic Logic, in THE CAMBRIDGE HISTORY OF LATER MEDIEVAL PHILOSOPHY 101 (1981).

Still, the Bolognese jurists came to see the law books of Justinian as the sources of authority from which all legal reasoning must proceed. They came to this understanding during the time of Irnerius. Their initial impulses may have been literary rather than juristic, as Rashdall argued,[34] but even their early grammatical and literary labors to reconstruct and fix the text of Justinian's codification were fueled by the assumption that the codification in its entirety was still valid law in medieval Italy, as if it had never ceased to be in force. In addition to assuming the continuing legal force of Justinian's texts, Irnerius and his followers began their study of the texts with the assumption that they formed a Corpus Juris--a complete, self-contained, and internally consistent body of law.[35] The glossators made this second set of assumptions in part because, as several scholars have remarked,[36] they took on faith Justinian's claim that the Digest contained no contradictions that could not be resolved.[37] Given the easily discernible inconsistencies in the Digest, however, one may wonder why Justinian's claim was accepted so readily. The answer seems to be that medieval thinkers saw their task to be that of reconciliation and synthesis.[38] Failure

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[34]Rashdall, The Medieval Universities, supra, at 577.

[35]See Hazeltine, Glossators, in THE ENCYCLOPEDIA OF THE SOCIAL SCIENCES 680, and Meynial, Roman Law, in THE LEGACY OF THE MIDDLE AGES, supra, at 368.

[36]See, e.g., STEIN, REGULAE IURIS 131 (1966).

[37]CONSTITUTIO TANTA, at Section 15.

[38]See Harris, supra, at 228.

to arrive at a satisfactory synthesis of apparently contradictory texts was attributed to corruption of man's intellect and not to problems with sacred texts themselves.[39] It is quite clear that the Bolognese jurists regarded the law books of Justinian as at least divinely inspired, if not sacred.

The assumption that the books of Justinian were coherent and consistent made the task of the glossators exceedingly difficult. As we have seen, Justinian's compilers had thrown together juristic statements and legislative enactments from over five hundred years of Roman history which were, despite the compiler's best efforts, frequently contradictory. Even at best, the contexts--historical, political, and textual--in which such statements and enactments originally were made had been lost. Given their assumptions, the glossators were faced with the forbidding task of creating a structure of order in a vast, inconsistent body of rules which was historically divorced from their own social and juridical experience.

The method chosen to accomplish this task of harmonization--the gloss--gave the Bolognese school of jurists its name.[40] The term

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[39] Id. at 229.

[40] Savigny, in his great multi-volume work on the glossators, says that the only true glosses originated at Bologna. 3 GESCHICHTE DES ROMISCHEN RECHTS IM MITTELALTER 564 (1834). This, we have seen, is not strictly accurate. Glosses were written from the time of Justinian until the Bolognese school arose, even if they were primarily grammatical (i.e., concerned with synonyms, etymologies, construction, etc.) and not juristic in nature. See, H. Kantorowicz, Note on the Development of the Gloss to the Justinian and the Canon Law, in B. SMALLEY, THE STUDY OF THE BIBLE IN THE MIDDLE AGES 53 (1952). But Savigny is certainly correct in saying that no other law school in Italy or France left such traces of the use of the glossatorial method.

"gloss" is nowadays indiscriminately applied to several distinct types of juristic activity at Bologna during the twelfth and thirteenth centuries, ranging from the giving of synonyms or explanations of single words (written above the words to be explained, between the lines) to full treatises. The standard account of the glossatorial method of jurisprudence runs back to the work of Savigny in the early nineteenth century.[41] According to this account, the earliest efforts of the Bolognese glossators were primarily grammatical and lexicographical, aimed at an accurate restoration of the Justinian text. At first the glosses were short interpretations of single words, written between the lines.[42] Eventually, as time passed and space was used up, the glosses spread into the margins of the manuscripts. Many of the earlier marginal glosses were concerned with identifying parallel or conflicting passes (similia and contraria) elsewhere in the Corpus Juris and seeking to reconcile any apparent contradictions.[43] Long columns of similia and contraria cover the margins of medieval manuscripts of the Corpus Juris by the thousand.[44]

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[41]The authorities on the Bolognese school provide almost no evidence for the historical progression of the gloss from simple grammatical and lexocographic concerns to more complex jurisprudential concerns. The glosses are almost universally undated, and under the siglum of Irnerius, the traditional founder of the Bogolonese school, one may find glosses ranging from the simple provision of synonyms to short juristic summulae.

[42]See Hazeltine, Glossators, supra, at 680
Kantorowicz, Note, supra, at 53.

[43]H. KANTOROWICZ, STUDIES IN THE GLOSSATORS OF THE ROMAN LAW 74 (1938).

[44]C. CALISSE, HISTORY OF ITALIAN LAW, 1 CONTINENTAL LEGAL HISTORY SERIES 138 (1912).

Soon the gloss developed into a genuine commentary which took several distinct literary forms: the summary (summa), the putting of illustrative cases (casi), the deduction of a general maxim (brocardus), and the discussion of concrete legal problems (quaestiones).[45]

The glossators wrote for a small, select public who knew the Corpus Juris almost by heart: they referred to parallel passages not by chapter and verse but by the first few words of the section of the book in which the text was found.[46] Such detailed knowledge of the Corpus Juris could be safely assumed because of the scope and nature of the program of civil law study in the medieval universities. Although, unlike students of theology and medicine, students of law were not required to hold the Master's degree in Arts before beginning their study of the "higher faculty," they typically began their university study with the course in the Arts (Aristotle and philosophy).[47] Admission to the doctorate in civil law required eight years of formal legal study.[48] At Bologna there were three lecture periods per day: one lasting about two hours in the morning, a second lasting two hours in the early afternoon, and a short lecture of only an hour and a half later in the afternoon.[49] The legal lectures at Bologna--indeed all legal studies there--were solely concerned with

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[45]Id. at 73.

[46]Rashdall, The Medieval Universities, supra, at 572.

[47]RASHDALL, 1 THE UNIVERSITIES OF EUROPE, supra, at 220.

[48]Id. at 216-217.

[49]Id.

the mastery, interpretation, and harmonization of the texts of Justinian. One may get a sense of this from a description, ascribed by Savigny to Odofredus, a third generation Bolognese jurist, of a course of lectures at Bologna:[50]

> First, I shall give you summaries of each title before I proceed to the text; secondly I shall give you as clear and explicit a statement as I can of the purport of each law (legum) thirdly, I shall read the text with a view to correcting it; fourthly, I shall briefly repeat the contents of the law; fifthly, I shall solve apparent contradictions (contraria), adding any general principles of law (to be extracted from the passage), commonly called brocardica, and any distinctions or subtle or useful problems (quaestiones) arising out of the law, with their solutions, as far as the Divine Providence shall enable me. And if any law shall seem deserving, by reason of its celebrity or difficulty, of a repetition, I shall reserve it for an evening repetition.

By university statute, the teacher at Bologna was required to read the "glosses" in his lectures immediately after reading the text.[51] In that way the glosses served an important function in legal education.

As time passed, the scope of the glossators' aims broadened. From attempts to understand troublesome words, to link related passages, to reconcile contraria, and to identify and organize the leading concepts of a Title of the Digest or Code, they began to move toward the construction of juristic works which would give a complete

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[50]SAVIGNY, 3 GESCHICHTE DES ROMISCHEN RECHTS, supra, at 553. Primo enim robis dicam summas cujusque tituli antequam accedam ad literam. Secundo ponam bene et distincte et in terminis ut melius potero casus singularium legum. Tertio legam literam corrigendi causa. Quarto verbis brevibus casum reiterabo. Quinto solvam contraria, generalia (quae vulgariter nuncupantur brocardica) et distinctiones et quaestiones subtiles et utiles cum solutionibus addendo, prout mihi divina providentia ministrabit. Et si aliqua lex repetitione digna fuerit ratione famae vel difficultatis, eam serotinae repitioni reservabo.

[51]RASHDALL, 1 THE UNIVERSITIES OF EUROPE, supra, at 218.

and coherent interpretation to all the books of Justinian as one corpus juris--a body of law demonstrated to be a consistent and indivisible whole. To this end they began to combine the single glosses into an apparatus which claimed to give a complete interpretation of a whole title of the Digest or Code. The first such apparatus was constructed by Bulgarus, a student of Irnerius and one of the four great jurists of the second generation at Bologna.[52] By the beginning of the thirteenth century, every law-book of Justinian had been provided with an apparatus at Bologna.

There is considerable irony in the history of legal studies at Bologna. One of the primary attractions which the rediscovered Roman law held for medieval jurists lay in the hope that it might provide a coherent common legal authority, and thus remedy the need for lawyers to wade through a forbidding multitude of contradictory legal authorities. The juristic attempts to interpret the Roman law, to explain any apparent inconsistencies in it, and to show it to be an ordered whole, produced instead a result that undermined the whole juristic enterprise. An astonishing number of glosses was produced in the century and a quarter after Irnerius. Several hundred thousand have survived to this day. The very process of seeking to establish the coherence of the legal text produced so vast a jungle of often-contradictory glosses that it became virtually impossible for any man to find his way through the wood. The ideal of a single, coherent code of law which would solve the period's enormous conflicts-of-laws problems thus appeared to be frustrated by the very

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[52]KANTOROWICZ, STUDIES, supra at 69; Note, supra at 53-54.

attempt to bring it into operation. This state of affairs was exacerbated by the fact that as the glossators' work progressed, the glosses on the law came to have, in practice, more weight with lawyers than did the texts about which they were written (a phenomenon not entirely unknown to twentieth century American constitutional jurisprudence).

POLITICAL UNDERPINNINGS OF MEDIEVAL JURISPRUDENCE

The most distinguished students of the political and legal thought of the Middle Ages have insisted that men of that time were not familiar with our division of human activities into legal, political, religious, moral, and economic spheres: "Christianity seized the whole of man."[53] Their holistic universe makes it imperative for a study of the jurisprudence of medieval civilians to take into account some of the theological and political underpinnings of that jurisprudence, both in terms of theory and of practice. This is particularly true of the treatment of custom. Moreover, the medieval revival of Roman law took place in the context of, and played a role in, struggles for power between pope and emperor, and between emperor and local governmental authorities.

As we have already noted, in the standard account Matilda, Marchioness of Tuscany, attempted to found a center of legal studies to act on the papal side in the struggle between Pope Gregory VII and the Emperor Henry IV. This struggle involved more than a fight for political power; it was a contest over conflicting political ideas. Gregory VII adhered to what Ullmann has called hierocratic doctrine.[54] He conceived of the Church as the corpus Christi, composed of both lay and ordained members of the Church (i.e., all Christian society).

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[53]See. e.g., W. ULLMANN, PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES 33 (1961). This fact about medieval thought did not prevent Professor Ullmann from writing books which respectively concentrate on what we today would call the "political" or the "legal" content of that thought.

[54]Id. at 75, 94
THE GROWTH OF PAPAL GOVERNMENT IN THE MIDDLE AGES, 276-279 (1965).

Over this societas christiana the Pope claimed to rule by authority of Peter's commission.[55] Medieval papalists asserted that the pope alone was entitled to demand unqualified obedience to his decrees. This absolute power, given by God to the pope through Peter, "excepted no Christian and no Christian's affairs."[56] Governing the Christian people also entailed supervision of those who in fact ruled the people, for kings and emperors were given their rulership by Peter, whose function was taken over by the pope. Because Peter had authority over kingdoms, so too did the pope.[57]

A logical consequence of the pope's rulership was the power to depose kings, who were obliged to obey church decrees and ruled by consent of the Church. On the other hand, the pope was outside the constraints of any earthly authority or tribunal. The entire sacerdotal order, while subject to papal control, was entirely free from lay control, including that of kings and emperors.[58] To summarize, in the view of Gregory VII, the societas christiana, while a spiritual body, was also an earthly society which the pope alone was qualified to direct and govern.[59]

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[55]THE GROWTH OF PAPAL GOVERNMENT, supra, at 277.

[56]Id.

[57]Id. at 280.

[58]Id. at 297.

[59]For a detailed discussion of the hierocratic theme, see THE GROWTH OF PAPAL GOVERNMENT IN THE MIDDLE AGES 276-299 (1965).

Henry IV, in contrast, held that God separated governmental power into temporal and spiritual spheres. This position denied the fullness of power alleged to inhere in the pope by virtue of the Petrine commission. According to Henry, the sole head of the Church was Christ, who appointed Henry emperor. Thus, his power as emperor came directly from God without any intermediary. Because of his direct commission, he stood on an equal footing with the pope on those matters exclusively within the temporal jurisdiction.[60]

If the traditional account is true that the Marchioness Matilda hoped by her support of legal studies at Bologna to develop a cadre of lawyers who would support the pope's claims against the emperor from the texts of the Roman law, she must have been greatly disappointed at the outcome. Nearly all of the leading civilians at Bologna eventually found themselves in the imperialist camp, and this cannot be attributed primarily to political conditions at Bologna. It is true that when Gregory VII excommunicated Henry IV, the bishop of Bologna and the local count took the imperial side, but by 1084 the papal side controlled the city.[61] The decisive factor lay in the deep commitment of the civilians to the authority of the Corpus Juris of Justinian, which supported an even stronger claim of imperial power regarding the papacy than Henry IV or his successors made. When Christianity became the only lawful religion in the Roman empire, the imperial conception of the omnipotence of the state over religion

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[60] Id. at 344-58.

[61] J. K. HYDE, SOCIETY AND POLITICS IN MEDIEVAL ITALY (1973).

underwent little change: Christian theory changed instead.[62] The Corpus Juris reflects these facts in its support of the absorption of the Church in the State.

After the fall of the Western Roman empire, the Byzantine theory of government was rejected in favor of a new theory (Gelasianism) which denied the supremacy of the temporal power in the spiritual realm--church and state were conceived of as coterminous, independent, and equal.[63] In practice, however, the state tended to merge into the church in Gelasian theory, so that while in both Byzantine and Gelasian theory there was but one society, in the East the society was a state and in the West a church.[64] The Investiture Contest between Gregory VII and Henry IV recast both theory and practice. In practice the temporal power had exercised a supremacy in both temporal and spiritual matters. Gregory, while claiming to uphold the Gelasian position, actually went well beyond it in demanding the absolute supremacy of the Church.[65] Henry, on the other hand, sought to maintain the practical supremacy of the temporal power.[66]

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[62]C.N.S. WOOLF, BARTOLUS OF SASSOFERATO 54 (1913).

[63]Id. at 55. J.A. Watt has vigorously insisted that it is a mistake to label as "Gelasian" only that strand of though which held that both powers were independent and supreme in their respective spheres; canonists also drew on Gelasian canons in constructing a theory of papal supremacy in both spheres. The Theory of Papal Monarchy in the Thirteenth Century, 20 TRADITIO 179, 209 (1964).

[64]WOOLF, supra, at 56.

[65]Id. at 59-60.

[66]Although the Roman legal texts would have supported a claim of temporal sovereignty, the lawyers only infrequently made such a claim. Id. at 72. Marsilius and Ockham, nonlawyers, were unusual in the early fourteenth century in arguing for temporal sovereignty. See A.S. MCGRADE, THE POLITICAL THOUGHT OF WILLIAM OF OCKHAM 24-25

The contest for power between pope and emperor probably would have heightened the interest of the glossators in the Corpus Juris doctrine of rulership even if they had not been actively solicited, as they certainly were, to produce arguments from Roman legal authorities in support of one side or the other. When the glossators turned to the legal texts for guidance, or for ammunition, they did not find a neatly worked out, philosophically coherent theory of government. They found a variety of terms which referred to aspects of rulership. The relationship of any one of these terms (e.g., auctoritas, potestas, imperium, iurisdictio, gubernatio) to the other terms was commonly not evident from the texts in which they appeared. The civilians' studies were made even more difficult by the fact that the Corpus Juris frequently did not speak with one voice on a subject. As a result, medieval political discourse was marked by conceptual ambivalence[67] and carefully selective use of authorities. Popes and princes alike, interested in maintaining or augmenting their centralized power, tended to find authority for their claims in one set of concepts and texts. Their subjects tended to rely on a different set in their attempts to put limits on regal or papal power.

(1974); and A. GEWIRTH ed., II MARSILIUS OF PADUA: THE DEFENSOR PACIS 132 (1956) for discussions of Ockham and Marsilius on the relationship of imperial to papal power.

[67]B. Tierney, Medieval Canon Law and Western Constitutionalism, 52 CATHOLIC HISTORICAL REV. 1, 13-14 (1966)).

[68]MEDIEVAL PAPALISM 139 (1949).

Professor Ullmann has written[68] that no passage in the Corpus Juris was so much quoted and over-interpreted as the Novella of Justinian, directed to the Archbishop and Patriarch of Constantinople, on the place of sacerdotium and imperium in human affairs:[69]

> The sacerdotium and imperium are the two greatest gifts which God in his clemency has bestowed upon mortals; the former has reference to divine matters, the latter presides over and dictates human affairs, and both, proceeding from the same principle, adorn the life of mankind; hence nothing should be such a source of care to the emperor as the honor of the priests who constantly pray to God for their salvation. For if the priesthood is everywhere free from blame, and the Empire, full of confidence in God, is administered equitably and judiciously, general good will result, and whatever is beneficial will be bestowed upon the human race.

Not surprisingly, papalists and imperialists interpreted this text to produce radically different conclusions. Civilians found in it the basis for a separation of authority in the Christian world into two spheres, sacerdotium and imperium, each with a head who was supreme in his own area of competence.[70] Papalists made this a central text for their claim of papal plenitude of power in both temporal and spiritual spheres. Read in context, the text might appear to be an extremely weak authority for the papal claims, but at least it was Roman law authority for the divine origin of the sacerdotium. In the Middle

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[69]NOVEL VI, Preface. Maxima quidem in hominibus sunt dona dei a superna collata clementia sacerdotium et imperium, illud quidam divinis ministrans, hoc autem humanis praesidens ac diligentiam exhibens; ex uno eodemque principio utraque procedentia humanum exorant vitam. Ideoque nihil sic erit studiosum imperitoribus , sicut sacerdotum honestas, cum utique et pro illis semper deo supplicent. Nam si hoc quidem inculpabile sic undique et apud deum fiducia plenum, imperium autem recte et competenter exornet traditam sibi rempublicam, erit consonantia quaedam bona, omne quicquid utile est humano conferens generi.

[70]W. ULLMANN, MEDIEVAL PAPALISM 139-40 (1949).

Ages, as Ullmann observed, "[n]o power could claim authority if it could not prove divine origin."[71]

The papal claims concerning the divine origin of papal supremacy were very largely based on Scripture,[72] the Fathers, and canon law, but any potential help from the Roman law was welcomed. The canonist polemicists for the papal position did not hesitate, however, to repudiate any Roman law texts, such as the several explicit declarations that the emperor was dominus mundi, which appeared to contradict the papal claim of plenitudo potestatis.[73] The primary importance of Roman Law for the papalists lay not in its provision of authority for papal claims of supremacy but in the fact that it contained powerful tools for analyzing the substance of monarchical authority, whether temporal or spiritual.

For the imperialists, on the other hand, there was a wealth of pleasant reading in the Corpus Juris. Even the Novel of Justinian, quoted above, which served as authority for papal divine origin, just as clearly spoke of the divine origin of the imperium. Moreover, that very Novel was, in its entirety, a set of peremptory commands by Justinian, laying down the law to the Church hierarchy about who could be made a priest or bishop and what the qualifications for

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[71]Id. at 141.

[72]For example, Jer. 1:10; Matt. 16:18; John 20-23; John 1:42; I Cor. 4:4.

[73]See, e.g., D.14.2.9. For a thorough discussion of plenitudo potestatis as the received term used to express papal sovereignty in both the temporal and spiritual spheres, see J.A. Watt, The Theory of Papal Sovereignty in the Thirteenth Century, 20 TRADITIO 179, 250-280 (1964).

ecclesiastical offices were. No one could read this entire Novel, or any number of those which preceded and followed it, and fail to conclude that Justinian believed that he had rulership and legislative authority over the highest ecclesiastical officials, even respecting ecclesiastical matters. A few samples will suffice to illustrate this point: "We do not permit the purchase of an office in the priesthood to be made with money..."; [74] "We absolutely require this of bishops..."; [75] "We direct your holiness...to continue to observe this law..." (concerning the expenditures of ecclesiastical revenues). [76] The first book of the Code was filled with similar examples. The doctrine of imperial supremacy was so overwhelming a presence in the Corpus Juris that it would have required almost an intellectual perversity for anyone like the glossators, who believed unquestioningly in the authority of that compilation, to support the claims of papal supremacy over the emperor.

One must avoid the impression, however, that problems in government were a fundamental concern of the twelfth and thirteenth century glossators (as indeed they became with the post-glossators of the fourteenth century). It is possible to produce a systematic statement of the glossators's political theory only by imposing an artificial order and coordination on their thought. Nearly all they wrote was in the form of commentaries on particular texts; consequently their contributions to political thought were dependent

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[74] NOV. 6.1.5.

[75] Id.

[76] NOV. 3.3.

upon the texts before them.[77]

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[77] See M.H. Keen, The Political Thought of the +Fourteenth-Century Civilians, in B. Smalley ed., TRENDS IN MEDIEVAL POLITICAL THOUGHT 109 (1965).

THE SOURCE OF IMPERIAL AUTHORITY AND POWER

The first text the glossators found when they opened the Digest proclaimed that the emperor governed under the authority of God, and that his empire was delivered to him by God.[78] The third prefatory constitution to the Digest added that God had set the imperial function over human affairs.[79] These texts were important to the glossators because in their view no power could claim authority if it could not prove divine origin at some point.[80] Indeed it is accurate to say that the entire Roman legal theory of legislative and political authority is a theory of origins. Yet these texts leave open the question of whether the emperor received his power directly from God or through some intermediary. The imperialists claimed direct, divine origin[81] of imperial power and authority, but the question was never directly addressed in the Corpus Juris, and a number of Justinian's texts appeared, at least at first reading, to cast doubt on that claim. The Digest,[82] Code,[83] and Institutes[84] all contained texts, based on a passage in Ulpian's Institutes, which declared that the

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[78]CONSTITUTIO DEO AUCTORE (A prefatory constitution to the Digest). Deo auctore nostrum gubernantes imperium, quod nobis a caelesti maiestate traditum est... This statement is also found at C. 1. 17. 1.

[79]CONSTITUTIO TANTA. [Q]uia ideo imperialem fortunam rebus humanis deus praeposuit...

[80]MEDIEVAL PAPALISM 141 (1949).

[81]See, e.g., CYNUS, COMM. ON DIG. VET. 1.4.3.

[82]CONSTITUTION DEO AUCTORE, Sect. 7; D. 1. 4. 1.

[83]C. 1. 17. 7

[84]Inst. 1. 2. 6.

emperor had received his authority and power directly from the Roman people. In the locus classicus of this doctrine, the compilers of the Digest quote Ulpian as having said that:[85]

> The will of the emperor has the force of law (lex) seeing that by a lex regia which was passed on the question of his imperium, the populus commits to him and confers upon him its own entire authority (imperium) and power (potestatem).

There has been scholarly doubt that this is exactly what Ulpian wrote on the subject,[86] but medieval jurists had no such doubts. In particular, from the twelfth century the glossators universally accepted the idea that an act of transfer or concession by the populus Romanus was the basis of the ancient and modern Roman empire.[87] This idea, at first glance, may appear to be at odds with the idea that the emperor's power and authority came from God, but for many medieval jurists and political writers the conception of the Imperium as a Deo did not exclude its conception as a delegation of the people. While all power on earth was ultimately from God, that power came to the emperor through the people.[88] This solution was satisfactory to the

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[85]D. 1.4.1. Quod principi placuit, leges habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.

[86]See, e.g., F. Schulz, Bracton on Kingship, 60 ENG. HIST. REV. 136, 154 (1945), who insisted that Ulpian could not have said that by the lex de imperio of classical times an unlimited power was conveyed to the emperor. In this Schulz is persuasive. He is not so convincing when here, as elsewhere, he goes on in an authoritative way to tell us, without benefit of an earlier text, what Ulpian must have said.

[87]O. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 39 (Trans. F. W. Maitland, 1958 ed.). This was a repeated theme in R. W. and A. J. CARLYLE, 2 A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST (1909).

[88]For most glossators this was a tacit assumption rather than an explicit claim. Political writers like Marsilius of Padua made the point explicitly, as did certain jurists (post-glossators like Johannes Faber) in the fourteenth century. See B. TIERNEY, RELIGION,

civilians, most of whom were in the imperial camp, because it at least avoided the conclusion that the emperor received his power through the pope. Another solution, supported by the glossators Accursius and Cynus, held that the emperor stemmed from the people but that the empire was from God.[89] For the papal jurists, however, these solutions, if not wrong,[90] were entirely too simple: They left out the most important link in the chain of authority. For them, any power in the Christian people was a derived power and a concession by the pope, who received his authority and power directly from God.[91]

Two distinguished scholars, A.J. Carlyle and Walter Ullmann, devoted considerable attention to medieval discussions of the source and nature of political authority, and each produced a "trademark" statement of his conclusions. Carlyle insisted in volume after volume of his monumental work that from the second century the Roman law knew one ultimate political authority: the people.[92] Further, the medieval glossators agreed without exception that the emperor's lawmaking power

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LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650 40-41 (1982); R.W. & A.J. CARLYLE, 6 A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST 22 (1936).

[89]For discussion, see E. KANTOROWICZ, THE KING'S TWO BODIES 103 (1966).

[90]The papal jurist Oldradus de Ponte, for example, denied that the Romans themselves had the power which they supposedly transferred to the emperor, and he argued, what they did not have they could not transfer. W. Ullmann, The Development of the Medieval Idea of Sovereignty, 250 ENG. HIST. REV. 1, 32 (1949).

[91]W. ULLMANN, PRINCIPLES OF GOVERNMENT AND POLITICS, supra, at 52-54.

[92]For example, in 1 A HISTORY OF MEDIEVAL POLITICAL THEORY, supra, at 63-65, and 69; 2 A HISTORY, AT 56.

was derived from the Roman people.[93] Carlyle is only able to take this position by ignoring the texts, noted above, which proclaim a divine origin of imperial authority, and other texts such as the one hundred and fifth new constitution (Novel) of Justinian which proclaimed:[94]

> The Emperor, however, is not subject to the rules we have just formulated, for God made the laws themselves subject to his control by giving him to men as a living law.

Ullmann's approach is not subject to this criticism, for the point of his famous distinction between "ascending" and "descending" themes of government in the Middle Ages is to draw our attention to the difference between the sources which, on the one hand, support the doctrine that the original law-creating power flows upward from the people, and those on the other, which hold that the powers of law making and rulership flow downward from God to lower and lower levels by means of delegation.[95] But his distinction of ascending and descending themes only works with pure forms of doctrine which rely on one set of Corpus Juris tests or the other. This is a serious weakness in a study of the political thought of the Glossators, for they were predisposed to try to find solutions to apparently contradictory texts or lines of authority, and in this case produced solutions (that imperial power came from God through the people, or that the emperor stems from the people but the empire is from God)

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[93]2 A HISTORY, SUPRA, AT 58; 5 A HISTORY, AT 64-65.

[94]NOV. 105. Ab omnibus vero, quae a nobis dicta sunt, Imperator eximatur, cui ipsas etiam leges deus subiecit, et quem tamquam vivam hominibus misit.

[95]See W. ULLMANN, LAW AND POLITICS IN THE MIDDLE AGES, 29-31 (1975); PRINCIPLES OF GOVERNMENT, supra, at 20-25.

which dissolve Ullmann's distinction.

THE NATURE AND SCOPE OF IMPERIAL AUTHORITY

Professor Meynial once asserted[96] that a fragment from the Institutes of Ulpian, reproduced twice in the Corpus Juris,[97] was the starting point of all Romanist doctrine on government after the twelfth century. In making this claim he was not thinking of the problem of divine versus popular origin of imperial authority and power, but of the fact that one text served as the basis for two quite different constitutional theories. The Roman law glossators could not deny that the immediate basis of imperial power and authority was an act of transfer by the populus Romanus of that potestas and imperium. This much was stated clearly enough in at least four places in the Corpus Juris.[98] There the agreement among the glossators ended.

It was possible to interpret the lex regia as the basis either of imperial absolutism or of popular sovereignty. In its immediate context in the Corpus Juris the lex regia is quoted to support the claim that "what the emperor pleases has the force of law," but the texts speaking of the lex regia do not say whether a full and permanent translatio of imperium and potestas was thereby made, or only a limited and revocable consessio to an individual emperor in persona.[99] Some of the leading glossators held that there had been a definitive alienation whereby the Roman people had renounced its power

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[96] E. Meynial, Roman Law, supra, at 385.

[97] D. 1.4.1.; Inst. 1.2.6.

[98] D. 1.4.1.; Inst. 1.2.6.; Constitutio Deo Auctore Sect. 7; C. 1.17.7.

[99] See KANTOROWICZ, THE KING'S TWO BODIES 103 (1966).

for good, that as a result it no longer held any legislative power and could not resume its former power.[100] In this view, even custom of the people had lost the power to make and unmake law.[101] Other glossators saw the lex regia as a mere concessio whereby an office and a usus were created but the substance of the imperium remained with the Roman people.[102] Bulgarus,[103] Johannes Bassianus,[104] Azo,[105] and Hugolinus[106] held that the people had not totally and irrevocably alienated their power and retained the right to resume it. The implication is strong in both Azo and Hugolinus that the Roman people continued to be, in some sense, the source of all legislative authority and political power.[107] The question of whether a total and irrevocable alienation of legislative power had once taken place held important consequences for medieval politics in two areas of particular interest for the present study: first, the legitimacy of

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[100]Irnerius, Placentinus, and Rogerius all took this position. For example, PLACENTINUS, SUMMA INSTITUTIONUM 1.2: Nam populos in principem transferendo communem potestatem, nulla sibi reservavit, ergo potestatem leges scriptas contendi, interpretandi, et abrogandi.

[101]For example, IRNERIUS, GLOSS ON D.1.3.32: Loquitur haec lex secundum sua tempora quibus populus habebat potestatem contendi leges, ideo tacito consensu omnium per consuetudinem abrogabantur. Sed quia hodie potestas translata est in imperatorem, nihil faceret desuetudo populi.

[102]GIERKE, supra, at 43.

[103]One of the four great jurists (the "four Doctors") of the second generation at Bologna. Famous for his defense of the ius strictum against the equitable tendencies of Martinus.

[104]A student of Bulgarus; like his master preoccupied with maintaining strict fidelity to the Roman texts.

[105]A student of Johannes Bassianus. One of the greatest of the glossators. Died in 1220.

[106]A student of Johannes Bassianus. Still alive in 1233.

and proper occasion for the enactment of municipal and local legislation and the relation of such legislation to imperial law,[108] and second, the legal authority and place of custom in medieval law. Because the latter is one of the central subjects of this work it is essential to explore the concerns which shaped the medieval civilian and canonist doctrine on custom. It is particularly necessary to do so because unbeknownst to many of the central players in the development of the English common law and contrary to the understanding of nearly all scholars of the common law, Romanist doctrine on custom (and not Germanic ideas about it) was the most important influence on the common law doctrine of custom.

What were the bases for the disagreement among medieval jurists over whether the Roman people retained any power to make law (by enactment or custom) after the lex regia, or whether they might revoke the power they had conceded to the emperor? The texts on the lex regia are silent on these questions. Sociological explanations have frequently been given of the fact that two of the Four Doctors, Bulgarus and Martinus Gosia, disagreed over ius strictum and aequitas (Martinus is said to have found the common law of the empire, taken strictly, to be inequitable because his native area retained strong Germanic customary influences). But such approaches appear to break down on this issue. Bulgarus, the great defender of ius strictum,

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[107]See AZO, SUMMA CODICIS 3.53.6; 1.14.8; HUGOLINUS, DISTINCTIONES, NO. 148.34.

[108]We will reserve treatment of this question to our discussion of the concept of imperium in Chapter IV.

here supports the retention of lawmaking power by the populus Romanus, particularly when exercised through the creation of custom; and the line of glossators usually sympathetic to aequitas supports a permanent alienation of lawmaking power. The most obvious explanation for this difference of opinion among the glossators (who frequently gave no reasons for their pronouncements) is that in addition to the texts on the lex regia, the jurists found other texts which led them in divergent directions. If a glossator concentrated on one set of texts he would be naturally led to think of the emperor as the sole maker, interpreter, and administrator of the law on whose actions in these capacities there were no legal limitations, particularly on the basis of a reservoir of power or authority in the people. A different set of texts, however, might lead the glossators to think of the emperor as limited in power and authority, bound by the law, and sharing his lawmaking power with the people, at least in the sense that their customs had the potential to become law.

Justinian's compilers of the Digest and Institutes had cited Ulpian's description of the transfer of imperium and potestas to the emperor, not because they were interested in the question of the source of imperial authority for its own sake, but because they were looking for a way to justify their claim that what the emperor pleased has the force of law.[109] The words "quod principi placuit, leges habet vigorem" may suggest to an untrained modern reader the idea that a claim was being made that the emperor had the right to do whatever he liked, but few medieval jurists read them that way (some early-modern

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[109]D. 1.4.1.; Inst. 1.2.6.

defenders of royal absolutism did). They understood the word placere to mean only the power to make law, and drew this conclusion from the text itself, which added, in the Institutes version, "Consequently, whatever the emperor has ordained by letter or decreed in a hearing or proclaimed in an edict is, beyond question, law: these are what we call constitutions..."[110] On the basis of the texts describing the lex regia, no medieval civilian would have denied that the emperor had the power to make law, and only a few would have required him to act in concert with other elements of the polity in doing so.[111] A text stating that the emperor may make law does not carry the implication that no one else may do so.

On the other hand, an enactment of Justinian, reproduced in his Code, said so quite explicitly: "...by the present enactment, the emperor alone can make laws... For who appears to be capable of solving legal enigmas, and explaining them to all persons, except he who alone is permitted to be legislator? Therefore, these ridiculous doubts being cast aside, the emperor shall justly be regarded as the sole maker and interpreter of the laws..."[112] When this text was combined with others proclaiming that "[t]he emperor is not bound by

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[110]Inst. 1.2.6. Quodcumque igitur imperator per epistuam constituit vel cogniscens decrevit vel edicto praecepit, legem esse constat: hae sunt quae constitutiones appellantur. Also D.1.4.1.1.

[111]Several important jurists held that his legislative authority could only be exercised with the counsel and consent of the Senate. See II CARLYLE, supra, at 69.

[112]C.1.14.11(12). Justinian gave this idea a slightly different twist in Novel 105, asserting that God had made the laws themselves subject to the emperor's control by giving him to men as a lex animata, with the effect that he was not subject to legal rules.

the law,"[113] and that custom would not prevail against the law,[114] and it was assumed that these texts were as dispositive of the allocation of political and legislative authority in medieval Europe as they had been in sixth century Constantinople, a persuasive case could be made that the people's transfer of political and legislative power had been total and permanent. Several of the leading glossators reached this conclusion.[115] Bartolus, the greatest of the fourteenth century post-glossators, waffled on the issue. He stated dogmatically in several places that only the emperor could make and interpret laws. In his discussion of C.8.52 he cited the glossator Placentinus for the proposition that the Roman people had no lawmaking power left, even to give customs the force of law. But Bartolus's analysis was different from that of the glossators; in typical post-glossatorial fashion it was based at least as much on actual political conditions as on textual authority. Originally, he said, the populus kept the power to make laws, even after the enactment of the lex regia, and this is shown by the fact that they still had the power of election and deprivation. This was no longer true, however, because the German

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[113]D.1.3.31. Princeps legibus solutus est. Two other texts in the Corpus Juris were cited to make the same point. The original text, C.6.23.3, stated that "...for although the jurisprudence of the empire exempts the sovereign from complying with ordinary legal formalities, still, no duty is so incumbent upon him as to live in obedience to the laws." Justinian's compilers transformed this text, which appeared to apply only to certain formalities, to make its referent law in general: "Along the same lines, the divine Severus and Antonius repeatedly observed in rescripts [C.6.23.3], 'Although we are not bound by the laws, none the less we live by the law." Inst.2.17.8.

[114]C.8.52.2.

[115]See Footnote Nos. 94 and 95 above.

princes had the power of imperial election and the pope had the sole right of deprivation. Therefore, he concluded, the people retained nihil de imperio. In what appears to be a contradiction, Bartolus was a strong supporter of customary law and frequently seemed to say that the people had the right to give their customs force of law.[116]

If the Corpus Juris contained sufficient grist for the mills of jurists dedicated to the principle of imperial legislative monopoly, it also contained texts which were hard to reconcile with the claim that the people no longer had any lawmaking power. There is a text at the beginning of Justinian's Institutes which at first glance appears to fall into such a category:[117]

> Our law (ius) comes either from written or unwritten sources, just as among the Greeks... Written law comprises legislation (lex), plebiscites, resolutions of the Senate, the will of the Emperor (principum placita), the edicts of the magistrates, and the responsa of the learned.

In this text the word "lex" is used narrowly to refer only to a particular kind of written law ("that which the Roman people commanded on the question being put by a senatorial magistrate"),[118] but it is not used consistently in this restricted sense in the Corpus Juris,[119]

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[116]See C.N.S. WOOLF, BARTOLUS OF SASSOFERATO 35-39 (1913).

[117] INST. 1.2.3. Constat autem ius nostrum aut ex scripto aut ex non scripto, ut apud Graecos... Scriptum ius est lex, plebiscites, senatusconsulta, principum placita, magistratuum edicta, responsa prudentium.

[118]INST. 1.2.4. Lex est quod populus Romanus senatorio magistratu interrogante, veluti consule, constituebat.

[119]For example, while D.1.4.1 and Inst. 1.2.6. (Quod principi placuit, leges habet vigorem) appear consistent with the division of written law in this text because the emperor's will is not said to be lex, only to have it force, C.1.14.11(12) does not preserve the text's technical distinction between principum placita and leges: instead, it repeatedly asserts that only the emperor can make leges.

and in the Middle Ages it was frequently used broadly to refer to any legislation of general application. Taken out of context, the Institutes definition of lex might seem on its face to provide powerful support for the view that legislation is something done by the Roman people and no one else, but when it is read in context the Roman people is seen as only one of several entities entitled to create written law. Perhaps more troubling for one who would use this definition to support the existence of a present power in the people to make law was the fact that owing to the tense used, the text could easily be read to mean that the power to make a lex was something that had resided in the Roman people in the past.

The only other Corpus Juris definition of lex was less obviously technical and much more promising for supporters of popular sovereignty. A Digest excerpt from Papinian defined lex as "a communal directive, a resolution of wise men,...a communal covenant of the state."[120] The next Digest text added:[121]

> For Demosthenes the orator also defines thus: "...all law is a discovery and gift of God, and yet at the same time is a resolution of wise men...and the common agreement of the polis according to whose terms all who live in the polis ought to live..."

Here very similar language is used to define both lex and "all law," and in both cases law is not made through the action or will of one individual but through "the resolution of wise men" and through the "communal agreement" of the polis (or res publica). The definitions

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[120]D. 1. 3. 1. Lex est commune praeceptum, virorum prudentium consultum,...communis rei publicae sponsio.

[121]D. 1. 3. 2.

of lex and "all law" in both these texts are in the present tense, so it is not possible to argue on a grammatical basis, as one could with the Institutes definition, that these texts merely reflect how law was created in the past, before all law-creating power was transferred from the community to the emperor.

The idea of the community was very important in medieval political thought. It was frequently expressed in terms of concepts and terminology drawn from the Roman law of corporations.[122] In classical Roman law, the idea of the state preceded that of the corporation: the corporation was said to exist "on the model of the state."[123] In medieval thought, by contrast, the order was reversed and technical ideas from the law of corporations were used to develop constitutional theories. Legally, a corporation (universitas) was conceived as a group that possessed a juridical personality distinct from that of its particular members. There were two medieval models of the universitas, that of the civilians and that of the canonists.[124] In the Roman law model, with which we are concerned, all power resided in the community and was delegated to the official who acted on behalf of the community (just as the emperor derived his power from a grant by the people). In the normal doctrine of private corporation law, the agent's powers were both revocable and subject to modifications. If this doctrine was rigorously applied to political

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[122]See B. TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 11, 19-27 (1982); C.N. WOOLF, BARTOLUS, supra, at 114; W. ULLMANN, PRINCIPLES OF GOVERNMENT, supra, at 33-34.

[123]B. TIERNEY, RELIGION, LAW, supra at 23.

[124]See id at 19-27.

society it yielded a republicanism in which the chief magistrate could always be deposed by the will of the people. The most common medieval doctrine held, however, that the powers delegated to the emperor were permanently alienated. This meant, in effect, that most medieval jurists were unwilling to rigorously apply private corporations doctrine to constitutional questions. Even those jurists who denied a permanent alienation of delegated powers faced difficult theoretical problems when they tried to apply rules of private corporation law to the public domain. How, for example, could a ruler be both sovereign and the agent of the universitas? Azo's solution, which we will see repeated in Bracton's De Legibus, was to draw a distinction between a people as a corporate whole (a universitas) and as a collection of individuals.[125] He held the emperor to be greater than each individual, so each was subordinate to him, but not greater than the corporate whole.

When the Digest texts proclaiming that lex (and indeed "all law") was the common agreement of the community were combined with concepts drawn from the Roman law of corporations, medieval jurists who were so inclined had a powerful textual basis for arguing that the Roman people still had, or at least could reclaim, the power to make laws. But the medieval claims for present popular lawmaking power centered less on these texts than on the texts setting forth the Roman doctrine of customary law. This was so because, as we saw in the previous chapter, the rationale given in the Digest for the binding legal

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[125]Id. at 26.

authority of customs was that they had been approved by the people:[126]

> Immemorial custom is observed as a statute (pro lege), not unreasonably; and this is what is called the law (ius) established by usage (moribus). Indeed, in as much as statutes themselves are binding for no other reason than because they are accepted by the judgment of the people, so anything whatever which the people show their approval of, even where there is no written rule, ought properly to be equally binding on all; what difference does it make whether the people declare their will by their votes or by positive acts of conduct? Accordingly, it is correct to accept the point that leges may be repealed not only by the vote of the legislature but also through the tacit consent of everyone through desuetude.

For a jurist trying to establish a present lawmaking power in the people this was an almost perfect text. First, it asserted that immemorial custom was observed "as a statute."[127] Second, it asserted that the source of lawmaking power for both statutes and custom is popular approval, and that the mechanism through which that approval is expressed doesn't matter. Finally, and critically, it asserted that even lex (and by implication imperial law) could be repealed through the expression of the people's will in not observing it.

In spite of the apparent power of this text, however, questions concerning the legal status of custom, both local and general, its relationship to both local and imperial legislation, and to the revived Roman law, were among the thorniest the medieval jurists had to face. This was so not only because the textual authorities

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[126]D. 1.3.32.

[127]The observation, sometimes made by modern commentators, that this doesn't establish custom as lex--only as analogous to lex for some purposes--does not seem to me to be very telling or interesting. After all, the law created by the emperor is not said, in the central text, to be lex, but to have the force of lex, and yet no one has thought it worthwhile to argue that principum placita were not really law.

appeared to contradictory, but because the resolution of the issues had enormous practical political consequences. In the next chapter we will consider in detail the medieval civilian and canonist theories of customary law, and in the following chapter, medieval theories of legislation, equity, and interpretation.

CHAPTER THREE

CUSTOM IN MEDIEVAL ROMAN LAW

CONSUETUDO AND MOS

Medieval civilians, canonists, and theologians used a rich variety of synonyms and related terms when they discussed customary law.[1] Eventually many of these terms came to have settled technical meanings (and I will attempt to identify some of these in the course of my discussion), but it took time for them to become established. One is frequently not sure from the glosses of the Bolognese civilians, for example, whether the words consuetudo and mos are being used interchangeably, or whether they have already attained a technical definition. At some point consuetudo became the word for a customary practice or usage which had come to have binding legal force; mos (or mores) and usus were used to refer to the physical and mental acts of general conduct or usage which might, under certain circumstances, rise to the level of consuetudo.[2] This chapter is primarily concerned with custom in the later, technical sense of consuetudo.

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[1]E.g., consuetudo, consuetudo longa, consuetudo longissimi, consuetudo inveterata, consuetudo vetus, mos, mores, mores diuturni, mores maiorum, mos inveteratus, praescriptio, praescriptio longa temporis, praescriptio longissimi temporis, usus, ius non scriptum.

[2]For a careful analysis of the meaning of mos and consuetudo by a later jurist see F. SUAREZ, ON LAWS AND GOD THE LAWGIVER 441-448 (1944 ed.). Suarez also distinguishes between mores, a word predicated of single acts, and mos, which is a collective term including the repetition of acts. The twenty chapters Suarez devotes to customary law comprise, in my opinion, the best and most exhaustive analysis of the jurisprudence of custom ever written by a legal philosopher. They contain hundreds of citations to the works of earlier theologians, civilian jurists, and, especially, canonists. The most comprehensive work of modern scholarship on the medieval civilian and canonist doctrines of customary law is Siegfried Brie's DIE LEHRE VOM GEWOHNHEITSRECHT (1899).

That the early glossators did not clearly distinguish between mos, usus, and consuetudo, and establish a uniform meaning for each term is a result of the failure of Justinian's law books to make such distinctions. In the Digest and Institutes the three terms appear to be used almost interchangeably. The principal Digest text on the legal force of custom provides that "What ought to be held in those cases where we have no applicable written law is the practice established by consuetudines and mores."[3] There is no hint in this text that the two terms have different meanings, or if they do, what those meanings might be. A second Digest test makes an almost identical point about the legal function of custom, but it refers only to consuetudo: "Well-established custom (diuturna consuetudo) ought to be observed pro iure et lege in relation to those matters which do not come under the written law."[4] The Institutes, by contrast, uses the words usus and mores rather than consuetudo in describing the legal force of customs: "Unwritten law is that which usus has approved. For diuturni mores[5] endorsed by the acquiescence of those who observe them take on the mantle of law."[6] It seems likely that it was such uncertainty in terminology, as much as apparent contraria in doctrine in the Corpus Juris texts on custom, which led the great

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[3]D. 1. 3. 32.

[4]D. 1. 3. 35.

[5]The standard medieval expression was diuturni mores rather than diuturna consuetudo (as in D. 1. 3. 35). When speaking of consuetudo medieval jurists typically used such adjectives as longa or inveterata.

[6]Inst. 1. 2. 9.

Bolognese glossator Azo to complain, "Quae sit longa consuetudo? Et ita licet contineatur in rubrica tamen leges sub ea positae obscure questionem istem prosequantur."[7]

MAY CUSTOM INTRODUCE LAW?

If asked in very general terms whether custom might introduce law, few medieval jurists, theologians or canonists would have responded negatively. Divisions among them came with more specific questions concerning how, under what circumstances, and by whom customary law might be established, and what its effect was when established.

Roman law glossators based their doctrine that custom might introduce law on two primary texts, one from the Digest and one from the Institutes. D. 1. 3. 32 quoted the jurist Julian as having said, in part, that "Immemorial custom is observed pro lege, not unreasonably; and this is what is called the law (ius) established by usage (moribus)." The Institutes' doctrine on custom was based on the Digest and held, first, that Roman law came either from written or unwritten sources,[8] and second, that:[9]

> Unwritten law is that which usage (usus) has approved. For long-practiced customs (diuturni mores) endorsed by the acquiescence of those who observe them take on the mantle of law.

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[7]SUMMA CODICIS, on C. 8. 52(53). 2.

[8]Inst. 1. 2. 3.

[9]Inst. 1. 2. 9.

Another Digest text relied on by the glossators on this point asserted that "every rule of law (ius) is either made by agreement or established by necessity or built up by custom."[10] Irnerius, in a gloss on this text, spoke of the threefold nature of law: that established by statute (tum lege), by custom (tum moribus), and by the necessity of nature (tum naturae necessitas).[11] A few generations later Azo asserted that custom not only created law, but abrogated and interpreted it.[12]

Canon lawyers, beginning with Gratian, based their doctrine that custom could establish law primarily on the Etymologies of Isidore of Seville rather than directly on the Roman law texts. Isidore, apparently relying on Roman legal doctrine, defined custom (consuetudo) as a kind of law (ius) instituted by general conduct (mores) which is accepted as lex when lex is lacking.[13] Gratian quotes Isidore as authority for the proposition that custom can institute law.[14] In fact, Gratian based his doctrine that all law may be fundamentally divided into divine and natural law, on the one hand, and human law (which was established by custom), on the other, on Isidore's statement that divine laws were established by nature and

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[10]D. 1. 3. 40.

[11]Reproduced in 4 SAVIGNY, GESCHICHTE DES ROMISCHEN RECHTS IM MITTELALTER, Anhang II at 388 (1826).

[12]AZO, SUMMA SUPER CODICEM, C. 8. 52. 6. (1966 ed.). Et quidem videtur quod consuetudo sit conditrix legis, abrogatrix et interpretatrix.

[13]ISIDORI HISPALENSIS EPISCOPI, ETYMOLOGIARUM, BK. V (W. M. Lindsay ed. 1911). Consuetudo autem est ius quoddam moribus institutum, quod pro lege suscipitur, cum deficit lex...

[14]GRATIAN, DECRETUM, D. 1. 5.

human laws by custom (mores).[15]

Theologians also relied upon Isidore for their doctrine that customs might become laws, but following Aquinas, they also quoted Augustine, who had written, "The customs of God's people (mos populi Dei) and the institutions of our ancestors are to be considered as laws (pro lege)."[16]

THE BASIS OF THE BINDING FORCE OF CUSTOMARY LAW

Professor Walter Ullmann has asserted that medieval jurists, almost without exception, based the binding force of custom upon the tacit consent of the people.[17] A series of texts in the Digest made this point quite explicitly. In a text attributed to the second century jurist Julian, it was argued that because statutes themselves were binding only because they had been accepted by the people through their votes, it was also fitting that what the people had approved through the substance of its actions should be binding on everyone.[18] A text attributed to Hermogenian, a late third century jurist, also based the binding force of customs on their being "a tacit agreement of the citizen (tacita civium conventio)."[19] The glossators knew these

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[15]ISIDORE, supra. Omnes autem leges aut divinae sunt, aut humanae. Divinae natura, humanae moribus constat,...

[16]SUMMA THEOLOGIA, I-II, Q.97, Art.3.

[17]See W. ULLMANN, THE MEDIEVAL IDEA OF LAW 63 (1969).

[18]D.1.3.32.1.

[19]D1.3.35.

[20]Quoted in II CARLYLE, A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST 53, Note 1 (1909).

texts well, and as a gloss[20] on the Brachylogus[21] makes plain, they also knew Cicero's definition of customary law: "Consuetudo is thought to be that which lapse of time has approved by the common consent of all without the sanction of statute."[22]

It might be thought that this doctrine would have been self-evident merely from the definition of custom--that the piling up of authorities in its support therefore would have been completely unnecessary. As Ullmann has remarked,[23] the very idea of customary law presupposes the participation of the people. This eliminates the idea, which the great sixteenth century Spanish jurist-theologian, Francisco Suarez, was at pains to refute, that the long-continued practices of a single person, even if that person were the ruler, could establish customary law.[24] But to say that the creation of customary law, as a definitional matter, presupposed the participation of the people is not necessarily to say, as Ullmann did elsewhere,[25] that technically it was the voluntas populi rather than the voluntas principis which gave legal character to custom. Medieval doctrine on the critical element in the transformation of customary practices into

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[21]One of two outstanding works of the early French offshoots of the school at Bologna, mistakenly attributed by Savigny to Irnerius. See H. KANTOROWICZ, STUDIES IN THE GLOSSATORS OF THE ROMAN LAW 43, 112, 113 (1938).

[22]CICERO, DE INVENTIONE 2.22.67 (H.M. Hubbell trans. 1949). Consuetudine autem ius esse putatur id quod voluntate omnium sine lege vetustas comprabarit.

[23]THE MEDIEVAL IDEA, supra, at 65.

[24]DE LEGIBUS, AC DEO LEGISLATORE, BK.VII, CH. IX (1944 ed.).

[25]W.ULLMANN, LAW AND POLITICS IN THE MIDDLE AGES 62 (1975).

legally binding rules was considerably more complex, and less uniform, than Ullmann's statement suggests.

Some of the earlier medieval jurists indeed seemed to hold in a straightforward way that the people's consent was the element that gave legal force to customary practices. Vacarius, a twelfth century glossator educated at Bologna, who is most famous for having been the first known expositor of Roman law in England, quite explicitly derived the legal force of custom from the people's consent.[26] The French jurist Petrus de Bellapertica (d. 1308), reacting against the opinions of some glossators[27] that there was a direct cause and effect relationship between usages (mores) and customary law (consuetudo), insisted that the actions of usage of themselves produced no legal force; the binding effect of custom came solely from the tacit consent of the poeple: Usus non est causa consuetudines, sed tacita voluntas populi."[28]

Still, based upon our finding in the preceding chapter that a substantial proportion of the glossators and post-glossators held that the emperor "held all laws in his breast" and that the populus Romanus as a result of a complete and irrevocable transfer of imperium to the emperor through the lex regia no longer held any lawmaking power, one

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[26]THE LIBER PAUPERUM OF VACARIUS 15 (F. de Zulueta ed. 1927). This was a gloss on the words tacito consensu in D. 1.3.32.1. To this may be added Vacarius's gloss on the words consensus fecit in D.1.3.40, in which he interprets the consensus spoken of as being that "in populo".

[27]E.g., Jacobus de Arena, who taught at Padua, Siena, Bologna, and Reggio in the second half of the thirteenth century, wrote: "Mores sunt causae producentes consuetudinem, consuetudo vero est causatum."

[28]LECTURA SUPER PRIMUS ET SECUNDA PARTE CODICIS, on C.8.52.1.

would suspect either that Ullmann was wrong in claiming that virtually all medieval jurists agreed that the legal effect of customary law came from popular consent or that the jurists were compelled to use some pretty fancy footwork in holding both positions.

I believe that Ullmann did overstate his case.[29] Apart from the statements quoted above, there is not much evidence that the Bolognese glossators were very concerned with identifying the active element in the transformation of mores to customary law. Because of division of opinion among the glossators over whether the the people of medieval Europe still had lawmaking power one might anticipate that those jurists who denied a present lawmaking power would be inclined to reject the idea that the force of customary law came from popular consent. This is in fact the position that Irnerius took. He admitted that in former times when people had the power of making laws, statutes might be abrogated through the people's tacit consent, but now, since their power to make law had been transferred to the emperor, this was no longer true.[30]

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[29]Although in his numerous distinguished works on medieval jurisprudence he is given to pronouncements about what "medieval jurists" thought on various subjects, virtually all of his evidence is taken from the works of the post-glossators (i.e., from works dated in the fourteenth century). He appeared to be familiar only with those earlier glosses which were quoted in the works of the post-glossators. In a footnote to his first published article, Bartolus on Customary Law (1940), he stated that he was writing a treatise "on the doctrine of Customary Law according to the Italian jurists of the Middle Ages." He never published such a treatise, and chapters on customary law in his later books concentrated on the doctrine of the post-glossators.

[30]Gloss on D.1.3.32, reproduced in 4 SAVIGNY, supra, at 387. Loquitur haec lex secundum sua tempora, quibus populus habebat potestatem condendi leges, ideo tacito consensu omnium per consuetudinem abrogantur. Sed quia hodie potestas translata est in imperatorem, nihil faceret desuetudo populi.

Generally speaking, the post-glossators took a middle position between that of Irnerius's denial of any popular lawmaking power and that of the jurists who held that popular consent was the sole element in transforming mores into consuetudines. One may see the beginnings of this position in Bartolus's successful attempt to combine the views of Jacobus de Arena and Petrus de Bellapertica. Usage, he said, was the remote cause of customary law, and the people's tacit consent was the proximate cause.[31] This solution appears to uphold a present power in the people to make customary law, in contradiction to jurists who insisted on imperial lawmaking monopoly.[32] But, as we saw in the preceding chapter, Bartolus did not hold a steady course on this issue. On the one hand it is true that in addition to stating that popular consent was the proximate cause of the legal effect of custom, he also approvingly quoted Gulielmus de Cunio as saying that the emperor only held the power to legislate while the right to give customs the force of law remained with the people.[33] On the other hand Bartolus elsewhere repeatedly denied the populus any power to make general laws; this was reserved for the emperor alone.[34] And even in

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[31]COMMENTARIUS AD DIGESTUM VETUS, Repetitio ad D.1.3.32: Usus et mores sunt causae consuetudinis, dico causa remota, nam causa proxima est tacitus consensus, qui colligitur ex usu et moribus.

[32]For example, Placentinus, whom Bartolus quoted disapprovingly on this point.

[33]BARTOLUS, COMMENTARIUS AD CODICEM, C.8.52.1. [Q]uod in principem translata est potestas condendi legem expressam et scriptam, non autem consuetudinarium, quae in eum non potuit transferri, cum procedat ex tactio consensu.

[34]For discussion see C.N.S. WOOLF, BARTOLUS OF SASSOFERRATO 37-40 (1913).

his approval of Gulielmus's assertion of the people's right to give their customs legal force, Bartolus assumed that this right was made effective by the emperor's tacit consent.[35] What all this appears to mean is that, despite Bartolus's language, in his jurisprudential scheme the tacit consent of the people is really only an intermediate cause of customary law, and the causa proxima is the emperor's tacit consent.

This latter interpretation, with a slight modification of language, became the standard civilian doctrine on the question. As Francisco Suarez analyzed the question of who had the power to give custom the force of law, one must distinguish between the proximate and primary causes.[36] The proximate cause, he said, was the men who inaugurate and continue a usage by their acts. In his elaboration, this cause was said to contain three elements: the agent, the external action or frequency of action, and the internal will or consent. He rejected the suggestion of the post-glossator Baldus[37] that the proximate cause contained a fourth element--time--saying that time was not a cause but only a requisite condition. The primary cause he identified as the sovereign power (superiorem potestatem) or the emperor (if his authority was necessary to give force to the custom):[38]

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[35]D. CONSTITUTIO PRIMO, lex haec autem tria, No. 3. Ipse (sc. princeps) praesumitur...potestatem introducendi consuetudinem populo concedere...consensisse praesumitur consuetudinem tanto tempore patiendo. Quoted in Ullmann, Bartolus, supra at 272.

[36]DE LEGIBUS, supra, BK. VII, CH. IX.

[37]Baldus was made a doctor of laws by Bartolus in 1344.

[38]DE LEGIBUS, supra.

> When the first of these two causes is called the proximate, especially in reference to a custom of fact (consuetudinem facti), for the reason that it effects (operatur) the custom directly and immediately. Of custom as law (iuris consuetudinis), however, the emperor is the principal (praecipua) cause. He may also be called the immediate (immediata) cause by reason of the immediacy of the lawmaking power exercised, even though he may not be such by reason of the immediacy of his personal agency...

Suarez had elsewhere denied that the people still possessed any present lawmaking power, and therefore he was led to the conclusion that that the principal cause of customary law must be the power of the prince. But he left open the possibility that in the case of other peoples, who had not parted with their imperium, the immediate cause of the force of customary laws might be the judgment of the people. This line of reasoning goes back at least to Aquinas, who held that:[39]

> The people (multitudo) among whom a custom is introduced may be of two conditions. For if they are free, and able to make their own laws, the consent of a whole people expressed by a custom counts for more in favor of a particular observance than does the authority of the prince, who has not the power to frame laws, except as representing the people. Therefore, although each individual cannot make laws, yet the whole people can. If, however, the people have not the free power to make their own laws, or to abolish a law made by a higher authority, nevertheless, a prevailing custom obtains the force of law in so far as it is tolerated by those to whom it belongs to make laws for that people; because, by the very fact that they tolerate it, they seem to approve of that which is introduced by custom.

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[39]SUMMA THEOLOGIA, supra.

Although this was the doctrine of a theologian, not a lawyer, I believe it well expresses the framework of analysis within which nearly all medieval and early modern civilians who were concerned with the question of how, and through whose actions or consent customs attained legal force, attacked the problem. Everything turned on the degree to which the people were held to possess lawmaking power. This is why I thought it necessary to devote considerable space in the preceding chapter to the medieval civilian doctrines of the lex regia.

Even jurists who held that the people no longer had legislative authority in their own right frequently held that through the express permission or tacit consent of the emperor the populus might introduce customary law,[40] and even if some jurists did not think that the people's consent was the principal basis of custom's legal force, nearly all held that it was an essential intermediate basis. As a consequence, the jurists, and particularly the post-glossators, took seriously questions about the expression of the people's consent. Some of the questions had to do with what "the people's consent" meant, and others were concerned with how the agreement of the community was to be established and proved.

As we saw in the preceding chapter, medieval civilians and canonists were wont to analyze questions about "the people" or "the community" in terms of doctrines drawn from the Roman private law of corporations. Regarding custom the question arose: Which consent was meant, that of individuals acting as individuals, or that of

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[40]For discussion and citation of authorities, see SUAREZ, supra, at 522-23.

individuals acting as members of a universitas called the populus?[41] By universal agreement of the civilians, the consent to be considered was that of individuals considered as members of a universitas. The principal effect of this analysis was the application of one of the central doctrines of corporation law--that the consent of the majority of the members of a corporate body was taken to be that of the whole body--[42] to the jurisprudence of customary law.[43]

The conditions for the validity of consent were borrowed from another branch of Roman private law in which will was an essential feature--the law of contracts. Bartolus compared custom with a contract: "Consuetudo aequiparitur pacto; ratio, quia utrumque procedit ex consensu."[44] He and the other post-glossators applied rules taken from the law of contracts concerning mistake, coercion, ability to express the will, and the like, to the doctrine of customary law.[45]

THE ELEMENT OF TIME IN CUSTOMARY LAW

The medieval civilians found a number of texts in the Corpus Juris which suggested that practices and usages had to be maintained over a certain period of time before they became binding as customary law. The problem was that the texts used three different words to describe that time period, and although they all suggested long use,

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[41]See Ullmann, Bartolus, supra, at 270.

[42]D. 50. 1. 19.

[43]See SUAREZ, supra, at 526-29.

[44]COMMENTARIUS AD CODICEM, NO. 2.

[45]See ULLMANN, THE MEDIEVAL IDEA OF LAW, supra, at 63-64.

none of them laid down a definite time frame. The time of observance was variously referred to as diuturni mores,[46] diuturna consuetudo,[47] inveterata consuetudo,[48] and "longa consuetudine...observed over many years (plurimos annos)."[49] The last expression was the most definite, but even it provided little guidance to the glossators. Azo complained about it: "Quae sit longa consuetudo? Et ita licet contineatur in rubrica, tamen leges sub ea obscure quaestionem istam prosequantur."[50]

Because the period of time required by Justinian's law books was indeed an "obscure question," it became a point of controversy among the glossators. Some of the early glossators, in language which we will see replicated in the English common lawyers' treatment of custom, said that the time needed was "cuius contrarii non extat memoria."[51] This locution, or a variant of it, was repeated throughout the Middle Ages, and probably explains why the standard English translation of longa, diuturna, and especially inveterata consuetudo has been "immemorial custom." It is clear that the phrase, except perhaps at the very beginning, was not taken literally to mean immemorial by medieval jurists. The big dispute among the glossators,

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[46]Inst. 1.2.9. Diuturnus is normally translated into English as "of long duration," or "lasting."

[47]D. 1.3.33.

[48]D. 1.3.32.1. Inveterus means "inveterate", "old", "of long standing."

[49]D. 1.3.35.

[50]SUMMA CODICIS, C.8.52.2, p. 324 (1966 ed.)

[51]AZO, supra, on C.8.52.2.

at least from the time of Azo, was whether the period of immemorial custom, beyond which no memory to the contrary existed, was ten years or twenty years.

The glossators did not arbitrarily select the periods of ten and twenty years, but as was their common practice, applied the rules from a different branch of Roman law in which they saw parallel issues regarding time. In this case they drew upon the law of property. Under the institutions of usucapio[52] and prescription (praescriptio)[53] acquisition of ownership of property belonging to another might be attained through continuous possession of the property for a period of time fixed by law. In the developed form of longi temporis praescriptio, ten years' possession was required inter praesentes and twenty years' inter absentes.[54] In the later empire the institution of longissimi temporis praescriptio appeared. At first the rule was[55] that regardless of its origin, possession for forty years completely extinguished the claim of the person primarily entitled. Later it was

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[52]In classical times usucapio meant the acquisition of ownership (dominium) of either real property or moveables by continuous possession. The periods were two years for land and one year for everything else. It applied only to those who had commercium (the right to use Roman civil processes), and consequently did not apply to provinical land. In Justinian's time the term only applied to meoveables, and the period was extended to three years. Inst. 2.6.

[53]To allow ownership of provincial land and by possession, longi temporis praescriptio was developed in the later Principate by imperial enactment. One of its great differences from usucapio, in the form know to the glossators, was in the requisite period of possession.

[54]C. 7.33.9 & 12. Presence and absence were determined by whether the parties were domiciled in the same province.

[55]C.7.31.1.

enacted that actiones perpetuae must be brought within thirty years, again with an extinctive effect.[56] Finally, Justinian ordained that if a bona fide purchaser from even a bad faith holder held a thing for ten years or twenty years (depending upon the presence or absence of the parties) and the person entitled to it did not assert his claim, the purchaser would acquire it by usucapio.[57]

This short summary of the law of longa praescriptio indicates that even when the glossators had decided to take the period of time necessary to establish custom from the rules of prescription, they still had to choose from among several prescriptive periods provided for in the Corpus Juris. Azo suggests that the doctors radically differed, some requiring ten or twenty years, some thirty, some forty, and some even fifty.[58]. Azo himself held for either ten or twenty years, depending upon presence or absence.[59] The movement was in the direction of the shorter periods of time, and by the time of Accursius, ten years appears to have been the prevailing view. In any event, Accursius in his definitive Glossa Ordinaria held the period to be ten years.[60] This view was uniformly accepted by the post-glossators, including Bartolus, who took the position that successful objection to a custom must be made within ten years to prevent it from becoming law, reasoning that the distinction drawn in

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[56]C. Theodosius 4.14.1.

[57]Novel 119.9.

[58]SUMMA CODICIS, supra.

[59]Id.

[60]Gloss on the word inveterata as it appeared in D.1.3.32.1.

the law on prescription, and by Azo, between absent and present parties, did not apply in the case of custom since the people (as a whole) are always present, even if some of them are absent.[61]

The development of canonist doctrine on the time necessary to establish customary law closely paralleled civilian doctrine. As with the civilians, some of the earlier writers demanded an immemorial length of time, but that position had been abandoned by the latter part of the Middle Ages. Other canonists[62] required a period of forty years for canonical customs, and this doctrine continued to be held by many, at least regarding customs which contradicted established law. The prevailing doctrine by the fourteenth century, even regarding canonical customs, was that ten years were sufficient for a custom to be deemed ancient and of long standing.[63]

By the time Suarez wrote his great treatise on custom jurists apparently commonly confused custom and prescription, or equated them, for Suarez said, "the two words are often used as completely synonymous because of their likeness in some details."[64] Paraphrasing Luis de Molina Baetico,[65] Suarez identified likenesses between unwritten law and prescription: "...in prescription as well as

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[61]COMMENTARIUS AD CODICEM, supra, No. 16.

[62]For example, Hostiensis (d. 1271), who was both a civilian and a cononist, in his SUMMA ON DECRETALS, BK. I, RUBRIC IV.

[63]For a discussion of the canonist doctrine see SUAREZ, supra, at 567-573.

[64]Id. at 448.

[65]DE HISPANORUM PRIMOGENITORUM ORIGNE ET NATURA, CH. VI, NO. X. This is not Luis Molina, the sixteenth century Spanish theologian.

unwritten law, there enters an element of both fact and law, which is introduced by fact; therefore, prescription requires a certain custom, and unwritten law again sometimes requires a custom which is in a certain sense prescriptive, that is, one that is indubitable and in accordance with law."[66] However, the necessary factual conditions for the establishment of customary law were different from those which establish prescription: "A custom of the people is necessary for legal right; the usage of a private person is sufficient for prescription..."[67] Bartolus had been concerned to make the same point in distinguishing between custom and prescription: "Consuetudo est disponens ex consensu populi vel maioris partis universitas constitutum...praescriptio vero est ius dispositum."[68] In addition, consent of either the people or the prince was necessary to establish customary law, but it was not necessary to obtain the consent of the person against whom a prescriptive right was established.[69]

This discussion of the distinction between custom and prescription has been included primarily in order to illustrate an important difference between the glossators and post-glossators (and their successors). The requirement of time might be considered only as a requirement demanded by several texts of the written law, or it might be considered as a means of showing the people's or the prince's consent. The glossators tended to analyze the question in the former

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[66]SUAREZ at 449.

[67]Id.

[68]Quoted in Ullmann, Bartolus, supra at 275, Note 3.

[69]SUAREZ at 450.

manner; the post-glossators were moving in the direction of the latter. In other words, the post-glossators were moving away from a preoccupation with the authoritative legal text and a concern that elements of the text be interpreted so as to make them appear to be consistent with one another, toward a concern with the coherence of the law as a philosophical system. Under the latter perspective it made sense to conclude, as Suarez did,[70] that custom really had no requirement of fixed time like prescription--that once consent was proved, one way or another, customary law was in effect.

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[70] Id.

CUSTOM AND CASE LAW:
THE ROLE OF JUDICIAL DECISION IN ESTABLISHING CUSTOMARY LAW

When the medieval jurists had settled questions about the definition of customary law, and about the requisite conditions for its establishment, they wanted to know how to recognize it when they saw it. Azo asked this question and gave three tests for recognition: that it be received without contradiction, that no complaint about it be received in the law courts, and that the courts have, after discussion and consideration, decided that it is the custom.[71] Azo's tests were destined to be modified, but a textual basis existed in the Digest of looking to court decisions to establish the proof of a custom's existence. A text attributed to Ulpian said: "When it appears that somebody is relying upon a custom either of a civitas or a province, the very first issue which ought to be explored, according to my opinion, is whether the custom has ever been upheld in a contentious proceeding."[72] On the basis of this text some of the early glossators denied that private proceeding outside a court could create a custom affecting the rights of other persons.[73]

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[71]SUMMA CODICIS, supra. Ex quibus dignoscitur esse inducta? Et quidam ex tribus praecipue. Primum est, quia sic est obtentum sine contradictione. Secundum quia libelli quaerimonarium de re tali non recipiebantur. Tertium, si cum contradiceretur non esse consuetudinem, reprobata contradictione iudicatum est esse consuetudinem.

[72]D. 1. 3. 34. In medieval usage this text's application was not limited to local or provincial customs.

[73]DAWSON, THE ORACLES OF THE LAW 132 (1969).

At some point the idea of the need for a court decision was wedded to the idea that two "acts of usage" within the ten or twenty year time period were necessary and sufficient to prove a custom. The need for two acts of usage was based primarily on D.22.5.12 where it was said, "Where the number of witnesses is not specified, two suffice." Apparently the acts of usage the jurists primarily had in mind were judicial decisions. There was some disagreement[74] over whether judicial decisions were necessary and conclusive, but there was universal agreement that two court decisions in the required time period, purporting to apply the custom in question, would provide at least prima facie proof that the custom existed and was binding on the community.[75] The Glossa Ordinaria of Accursius provides a clear example of this doctrine:[76]

> But how is custom introduced in the ten-year period? I answer: if a judgment was rendered twice within that period, or if a complaint interposed against such a custom was twice rejected by a judge, as in [D.1.3.34, C.1.4.15, and D.1.3.38.] But then we would decide according to examples, against the prohibition of [C.7.45.13]. But one can say: not according to examples but according to custom, which is proved by examples and the lapse of ten years.

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[74]Bartolus on D.1.3.32: "Sometimes the custom is written down in public documents because a judge has adjudged between two parties that the custom is such and such. The question is whether such pronouncement creates evidence as to all persons. Contra are Jacobus, Baldus, Jacobus de Are, Peter and Cynus, on the ground that the rule is that res inter alios does not prejudice others. Nicholas, Matthew, and Martinus de Fano hold to the opinion of Azo that such judgment makes law for all."

[75]See S.BRIE, supra, at 108-112, 145-46, and DAWSON, supra, at 132.

[76]Gloss on D.1.3.32.1. (on the word inveterata).

The glossators took seriously Justinian's maxim non exemplis, under which judges were required to make decisions "in accordance, not with examples, but with the laws."[77] Generally speaking, their doctrine was that a judicial decision would have effect as res judicata in the particular case, but could have no other effect since "other judges must not decide according to that example."[78] In practice, however, they quickly found a way to circumvent this prohibition against the use of judicial precedents. Precedents may have been barred as sources of judicial decisions, but it only took two judicial decisions to establish a legally binding custom, and because a custom was a law, it was, within the language and intention of C.7.45.13, a legitimate ground for judicial decisions.

From the Middle Ages to the twentieth century, judges in civil law jurisdictions have always based their decisions on earlier judicial precedents. It is necessary to do this in any legal system to avoid radical inconsistency in the application of the law. But the civilian judges always denied that they were following precedents, and rationalized their behavior on the ground that they were following customary laws which were only evidenced by the prior decisions. Those who have insisted that one of the most important differences between Roman and common law jurisprudence has lain in Roman law's refusal to follow judicial precedents [79] have paid more attention to

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[77]C.7.45.13. ...non exemplis sed legibus iudicandum est.

[78]PLACENTINUS, QUESTIONES DE IURIS SUBTILITATIBUS III 1-2 (Fitting ed. 1894).

[79]Such an understanding is partially understandable. A 1946 survey of Continental European textbooks found that the textbook writers were agreed that the only sources of French, Italian, and German law were

the civilians' conceptualization, or rationale, than to their practice. And, as we shall see when we turn to common law theories of custom, even that tradition's conceptualizations of precedent appear different only if a scholar's knowledge of the common law doctrine goes back no further than the seventeenth century.

CUSTOM, REASON, AND NATURAL LAW

As we will see, there was widespread disagreement among the medieval jurists over the legal effect of a custom which violated reason or natural law. In principle at least, no such conflict existed. A custom which violated reason or natural law was void and unenforcible as law. In part, this doctrine was based on a constitution of Constantine, contained in Justinian's Code, which while conceding that the authority of long-continued custom was not small, nevertheless held that custom would not overcome either reason or statute.[80] Medieval commentators on that section of the Code uniformly took its prohibition of custom contrary to reason at face value, but their doctrine on the limits imposed by reason and natural law on the content of human law, including customary law, was drawn from a much wider set of sources, chief among which were St. Paul,

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statutes and custom. D.K. Lipstein, The Doctrine of Precedent in Continental Law with Special Reference to French and German Law, 28 J. OF COMP. LEGIS. & INTERN'L LAW 34, 35 (1946). The interesting point, however, is the ease with which judicial decisions could come to be considered customs. We have seen that in the medieval and early modern periods, two court decisions could establish a custom. From the eighteenth century onward writers were agreed, with few exceptions, that a single decision, if followed by other courts, might establish a customary rule of law.

[80]C. 8.52.2. Consuetudinis usuque longaevi non vilis auctoritas est, verum non usuque adeo sui valitura momento, ut aut rationem vincat aut legem.

Cicero, the Digest, the Institutes, Aristotle, and the Fathers.

The picture of ius naturale which the glossators found in the law books of Justinian was anything but coherent. In the first book of the Digest they found three definitions of natural law which were quite different but which were treated by Justinian's compilers as if they were all the same. Ulpian defined ius naturale as "that which nature has taught to all animals, for it is not a law specific to all mankind but is common to all animals..."[81] The jurist Paul defined it as meaning "What is always equitable and good."[82] The most interesting definition for our purposes connects the ideas of natural law and reason: Gaius, who viewed ius gentium and ius naturale as being the same, defined them as "that law which natural reason (naturalis ratio) has established among all human beings..."[83] Justinian's treatment of natural law in the Insititutes is different still:[84]

> Now natural laws which are followed by all nations alike, deriving from divine providence, remain always constant and immutable: those which each civitas establishes for itself are liable to frequent change, whether by tacit consent of the people or by subsequent legislation.

This is as close as the Corpus Juris came to holding that human laws must be consistent with natural law. It remained for medieval jurists to draw the implication that immutable laws could not be abrogated by

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[81]D. 111. and Inst 1.2. This is an old Greek rhetorical idea. It was probably the most common definition given by the glossators of the twelfth and thirteenth centuries.

[82]D. 1. 1. 11.

[83]D. 1. 19. A passage in Justinian's Institutes, in contrast, treats the ius gentium and the ius civile as identical.

[84]Inst. 1. 2. 11.

human law.[85]

The absence of a uniform treatment of the ius naturale in the Corpus Juris made it extremely difficult for the medieval civilians, in contrast to the canonists, to arrive at a clear view of the sense in which the term should be used.[86] Azo, for example, noted that the term could be used in several senses, which, as he outlined them, paralleled the various definitions he found in the Corpus Juris.[87] Although, in contrast to the canonists, the medieval civilians do not constantly mean by ius naturale a body of moral principles which is always recognized by man's reason as binding,[88] this does not mean that they failed consistently to hold that the civil law, including customs, could not abrogate natural law.[89] Bulgarus, the great second-generation Bolognese glossator, was typical in asserting that

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[85]As we shall see, Cicero had drawn this implication much earlier, and his treatment greatly influenced medieval thought.

[86]See II CARLYLE, supra, at 31.

[87]SUMMA INST. 1.2.

[88]II CARLYLE, supra.

[89]All medieval civilians accepted Ulpian's division of private law: "private law is tripartite, being derived from the principles of ius naturale, ius gentium, and ius civile. D.1.1.1.2 and Inst. 1.1.4. Ius gentium, the law of nation, he defined as "that which all human peoples observe." D.1.1.3. The Digest does not contain Ulpian's definition of ius civile. Gaius defines it as "that (law) which is proper to the particular civil society (civitas)." D.1.1.9. In the Roman Republic the name ius civile was used to mark off the rest of the law from that made by the magistrates (i.e., the ius honorarium). For classical lawyers the term had both the latter sense and also served to distinguish the Roman part of the law from the ius gentium.

[90]Commentary on D.50.17.8. Sanguinis, id est congnationis iura, quod naturalia, nullo iure civili, ut emancipatione, adoptione, tolli possunt. Naturalem enim rationem ratio corrumperenon potest... Sunt

natural laws could not be annuled by the civil law.[90] Hugolinus,[91] Albericus,[92] Placentinus, [93] and Azo[94] all held that even a law of the emperor (which most glossators viewed as superior to customary law) which was contrary to natural law was void. Their conclusion was based on the statement of Inst. 1. 2. 11 that natural law was immutable.

Although the medieval civilians did not uniformly identify the natural law with natural reason, they were familiar with Gaius's equation of the two terms and accepted natural reason as one of natural law's proper meanings. They found support for Gaius's treatment of natural law and reason in both Aristotle and Cicero. According to Aristotle, "Law (as the pure voice of God and reason) may thus be defined as 'reason free from passion'."[95] In his De Republica Cicero says that true law is right reason in agreement with nature, being found among all men, summoning them to duty and prohibiting wrongdoing. This law is not one thing in Rome and another in Athens, now or in the future. It is eternal and immutable, and its originator and promulgator is God.[96] "Law," he says elsewhere, "is the highest reason, implanted by nature..."[97] In fact, he says, all civil law is

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tamen quaedem civila iura, ut maxima et media capitis diminutio quae etiam iura cognitionis tollunt.

[91]DISSENSIONES DOMINORUM, 5.

[92]Cited in id.

[93]SUMMA INST. 1.2

[94]SUMMA CODICIS. C. 1. 22. 2.

[95]POLITICS. BK. III, CH. XVI.

[96]DE REPUBLICA, BK. III, CH. XXII.

[97]DE LEGIBUS, BK. I, CH. VI.

but the expression or application of this eternal law of nature; that not derived from it may have the formal character of law but not its true character.[98]

In addition to such ancient authorities for the identification of natural law with reason, medieval jurists may have been aware of a particular insistence by philosophers of the twelfth century, at the time when the great revival of interest in Roman law was beginning, on the equivalence of nature and reason. On the basis, in part, of Plato's Timaeus, nature was seen as a force implanted in things which operated according to the reason of God. Abelard, who was very interested in the subject of nature and reason, distinguished between ius naturale, defined as the reason among men which stipulates what is necessary for all men, and ius positivum, which is instituted by men.[99]

The glossators of the Roman law were not men who were learned and interested in the Corpus Juris and nothing else. They knew Aristotle and Cicero and frequently cited them. At least one of them, in an admittedly unusual work, displayed a strong interest in contemporary philosophy and culture. The most remarkable discussion[100] of natural law and reason by a medieval civilian[101] is the twelfth-century work

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[98]Id.

[99]DIALOGUS INTER PHILOSOPHUM, IUDAEUM ET CHRISTIANUM. For discussion see D.E. Luscombe, Natural Morality and Natural Law, in THE CAMBRIDGE HISTORY OF LATER MEDIEVAL PHILOSOPHY 706 (1982).

[100]Its discoveror, d'Ablaing, called it the "most interesting writing of the twelfth century." H. KANTOROWICZ, supra, at 181 (1938).

[101]It was long attributed to Irnerius, but Kantorowicz has convinced most scholars that its author was Placentinus.

entitled the Questiones de iuris subtilitatibus. This is no dry gloss on Justinian's texts but a poetically written dialogue between two allegorical figures, Interpres and Auditor. The prologue, composed in a philosophical spirit, states the relationship between the various components of the law in an allegorical form. In the temple of justice sits Iustitia, symbolizing not justice but the abstract and positive law of the community.[102] The six civic virtues, taken verbatim and in order from Cicero's De Inventione,[103] are the guardians of Iustitia. In Cicero, they are sisters or cousins of Iustitia, all descended from natura. Aequitas, which is held in the arms of Iustitia, adapts the law to individual cases. Her rulings override the letter of the law. Finally, Ratio, which is identified as the law of nature,[104] sits on the head of Iustitia, above both positive law and equity. This work serves to remind us of the difficulty of scholarship about medieval jurisprudence. Understanding requires not only a detailed and intimate familiarity with Justinian's law books and of the medieval glosses upon them--a requirement forbidding enough for one man in itself--but also a basic knowledge of medieval philosophy and theology, of certain basic works of classical antiquity, and even, in this case, familiarity with the iconography of medieval Italian art. It appears that our author didn't construct his

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[102]For a detailed discussion and analysis of this work see KANTOROWICZ, supra, at 181-205.

[103]Religione, Pietate, Gratia, Vindicatione, Observantia, and Veritate.

[104]Bk. II.

allegory merely out of Roman law, Cicero, and medieval philosophy: in medieval Italy there was a form of painting known as a maesta in which the Virgin Mary sits on a throne held by six angels, with the Child on her lap as on a second throne, and the dove of the Holy Spirit, which in the Middle Ages represented Ratio, hovering over her head.[105]

In contrast to the civilians, who never came to a uniform view[106] of natural law, the canonists quickly came to see it primarily as equivalent to the general principles of the moral law, which were derived directly from God and antecedent and superior to all positive laws.[107] Gratian, whose place as a founder of medieval canon law studies is even more prominent than that of Irnerius in civil law, gave lip service to Isidore of Seville's definition of natural law[108] as the law that is common to all nations, and is set up by a natural instinct, not by any positive constitution. But Gratian took a quite different approach to natural law:[109]

> Mankind is ruled by two things: natural law and custom. Natural law is that which is contained in the law and the Gospel where everyone is commanded to do unto another as he would be done by and forbidden to do to another what he does not wish to have done to himself.

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[105]Again following Cicero.

[106]See KANTOROWICZ, supra.

[107]Like Azo, Stephen of Tournai, a twelfth century canonist, noted that ius naturale could be used in several senses.

[108]ETYMOLOGIES, BK.V. This seventh century definition is clearly based on Ulpian's definition, but where Ulpian had defined ius naturale as that "common to all animals" Isidore wrote" common to all nations".

[109]DECRET. 1.

His statements about the relationship of natural law to human laws were unequivocal: "Whatever has been recognized by custom, or laid down in writing, if it contradicts natural law must be considered null and void."[110] The medieval canonists uniformly took similar positions, sometimes even more emphatically and comprehensively. To take one example, Rufinus, a twelfth century commentator on Gratian, wrote: "Whatever there may be in the laws of the emperors, in the writings of authors, in the examples of the saints, contrary to natural law, we hold to be null and void."[111]

The most thorough medieval treatments of natural law and reason were those of the philosophers and theologians, not of the civilians and canon lawyers. There was considerable variation among the theologian's analyses of natural law. Aquinas,[112] whose doctrine was the most influential, founded his theory of natural law on the teleological principle that all things by their nature have inclinations directing them to the ends proper for them. Human actions arise both from natural instinctive appetites and form the operation of the cognitive faculty. Aquinas distinguished between primary and secondary precepts of natural law in light of what he described as the primary ends of nature (e.g., food, health, procreation) and secondary ends (the regulation of specifically human and rational behavior). The primary precepts were self-evident and

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[110]DECRET. 8.2.

[111]SUMMA DECRET. D.9.

[112]A more detailed discussion of Aquinas's theory of natural law will be found in the chapter, infra, on custom and reason in the medieval common law year Books.

immutable; the secondary ones were deduced by reason from the primary precepts. Natural law as it concerned humans and distinctively human activities, then, involved a participation in the divine reason through the exercise of right reason and the faculty of rational judgment. There was disagreement among medieval theologians over whether, as Aquinas put it, "law pertains not to the reason but to the will."[113] Aquinas, while not denying the importance of divine will, emphasized that a law was "nothing but a dictate of practical reason."[114] In fact, he said, "the whole community of the universe is governed by divine reason."[115] In contrast, Franciscan thinkers tended to base law and moral values on the free will of God, which was limited only by logical possibility. This difference in views among theologians about the relationship of natural law to reason, when added to the incoherent treatment of natural law in the Corpus Juris, may help explain why the medieval civilians did not universally equate natural law and reason. All theologians agreed, however, that in at least some of its modes natural law provided absolutely immutable norms to which human laws, including custom, had to conform. In a statement with which the Franciscans could have found little fault, Aquinas said:[116]

> The natural and divine laws proceed from the divine will...Therefore they cannot be changed by a custom proceeding from the will of man, but only by divine

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[113]SUMMA THEOLOGICA

[114]Id.

[115]Id.

[116]Id, II-II, Q. 97, Art. III.

> authority. Hence it is that no custom can prevail over divine or natural laws...

We have established that medieval civilians, canonists, philosophers, and theologians uniformly indulged in pious talk about the need for human customary law to conform to the requirements of natural law and reason. But how was one to know when a custom violated reason? Some held simply, but not very helpfully, that a custom was to be judged unreasonable if it was contrary to divine or to natural law.[117] Others, both civilians and canonists, held that no general criterion could be laid down on this question: decision must be left to the judgment of a prudent mind.[118] This latter position, insisted Suarez, could be taken without rejecting his own guidelines (which he apparently took from Bartolus) for determining the unreasonableness of a custom, namely, that a custom was unreasonable if it was opposed to the liberty of the Church, would give license or occasion to sin, or was harmful to the general welfare.[119] The writers who set up tests for reasonableness appear to have in mind, although they frequently did not say so, their application by a judge in deciding the issue of whether a customary law existed. I have found no evidence on the question of how frequently, if at all, customs were actually held to be nonbinding because they were held to be unreasonable.

THE EFFECT OF CONSUETUDO ON STATUTORY LAW

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[117]See SUAREZ, supra, at 493.

[118]Both the Gloss on the Decretum and Bartolus took this position.

[119]SUAREZ, supra, at 492-93.

When a custom had passed the tests of popular consent, duration of time or prescription, and reasonableness, and had become customary law, the question of its effect on statutory law remained. It was clear enough from the Digest that custom could serve as law when there was no written law on a question. An excerpt from Julian said, "What ought to be held in those cases where we have no applicable written law is the practice established by custom and usage."[120] In accord, Ulpian had been quoted as saying, "Long-established usage ought to be observed as law and statute in relation to those matters which do not come under the written law."[121] The problem arose in regard to customary rules on subjects already covered by statutory law, and was particularly troublesome regarding customs which were inconsistent with statutes. The crux interpretum for medieval civilians arose over the apparent discrepancy between the jurist Julian's statement, included in the Digest, that "statutes may be repealed not only by vote of the legislature but also by the silent agreement of everyone expressed through desuetude,"[122] and a rescript of Constantine which held that custom "will not carry weight so far as to overcome either reason or statute."[123]

It was in this contradiction between two texts that the theoretical dispute among medieval jurists over where imperium resided (whether the emperor, as a result of a lex regia of the Roman people,

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[120]D. 1. 3. 32.

[121]D. 1. 3. 33.

[122]D. 1. 3. 32. 1.

[123]C. 8. 52(53). 2.

now held a complete monopoly of lawmaking and law-interpreting powers, or whether the people still retained those powers and could exercise them even in the face of opposition by the emperor through the establishment of their customs) became concrete and practical.

Irnerius gave the most accurate explanation of the discrepancy between the two texts: they were written in different historical eras to describe different political circumstances.[124] But medieval jurists were not interested in historical explanations (which might suggest that real contradictions existed). They accepted the books of Justinian as an entirely consistent body of law and believed that it was up to their own ingenuity as practitioners of the scholastic method to find ways to explain and harmonize the texts. The texts were so apparently inconsistent, however, that no universally accepted interpretation was ever developed. Twentieth century civilians still quarrel over these texts.

Medieval doctrine on the matter achieved a state of disarray quite early. The following passage, which outlines various attempted answers to the question "whether custom can overcome or abrogate statute, gives a sense of the disordered doctrinal state of affairs in the early thirteenth century when it was written:[125]

> They [the jurists] differ. Some say that no custom contrary to statute, whether the custom is general or special, abrogates or derogates from the written law...and they say this mostly for this reason, that since it is solely for the princeps today to promulgate law, this means that it is solely for him to interpret law. They say that a written law abrogates a contrary custom and thus where the written

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[124]See KANTOROWICZ, supra, 135.

[125]DISSENSIONES DOMINORUM, quoted in DAWSON, supra, at 129-30.

> law intervenes the custom is abolished...But others say that a custom contrary to statute must be observed to the extent that custom can be established by express agreement, for custom is nothing but a tacit agreement, as appears in D.1.3.35. They say therefore that a custom does not overcome law in cases where an express contract is not permitted. An argument for this view appears in C.4.32.26 and C.5.20. But in these instances the law itself contains an express prohibition. Others distinguish between general and special custom so that if it is a general custom that has been observed by all the people of the empire without distinction, it abrogates the written law; and they say that the Senate today can both promulgate and abrogate law. If, however, the custom is special, as for example, the custom of a municipality or a city, they distinguish between whether it is approved by common consent of the users as may appear when a custom has been confirmed in a contested judgment; otherwise, the custome would not prevail but would be overcome...Others say that a good custom prevails over the law but a bad one does not. Others say that if a people knowingly follow a custom contrary to law, the law is abrogated, but if this occurs in ignorance it is not, because it is rather to be believed that they have erred. But according to this, delinquent persons are in a better state than the innocent...

The list of solutions in this passage is not exhaustive; at least seven were proposed.[126] It is difficult to establish trends in their acceptance. Odofredus, who taught at Bologna in the mid-thirteenth century, tells us that the antiqui took a minimizing interpretation of C.8.52.2, holding that the words used in the text were vincere legem, and abrogare was something different, but that Azo and Johannes Bassianus had rejected this earlier view.[127] Professor Siegfried Brie, however, denied that Irnerius would have allowed custom to abrogate statute,[128] and it is certain that jurists after Azo and Johannes

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[126]See KANTOROWICZ, supra, at 135.

[127]Gloss on D.1.3.39. See DE ZULUETA, supra, at lxxii.

[128]GEWOHNHEITSRECHT supra, at 115.

sought to explain away the apparent meaning of C.8.52.2.

One of the strongest supporters of custom's power to abrogate statutes was the twelfth century glossator Vacarius. Trained at Bologna in the time of the Four Doctors, Vacarius was the man who introduced the Roman law to England:[129]

> [The civil law] was brought into England by Theobald, the Archbishop of Canterbury, and being publickly read in Oxford by Vacarius, it grew so general a study, and other learning was so neglected upon it, that King Stephen incensed thereat, sent forth a peremptory command, that it should be read in England no more, that Vacarius should forbear to teach it any further, nor that it should be lawful for any to keep any books of the Roman laws by them... But King Stephen's prohibition did prevail but little...

Peter Stein has argued that Vacarius had lasting influence on the common law in that his approach to law forced the common lawyers to give their law some structure and to organize it in a coherent way.[130] We will see that influence, later in this work, when we investigate the theory of custom in Glanvil and Bracton. Vacarius set forth the orthodox view that the emperor was the sole legislator and authoritative interpreter of the law.[131] He noted that this meant that the emperor could take account of equity (and hence could modify the law), but the judge's interpretation was limited by the law. Yet Vacarius modified the standard statement of the orthodox view in an important way: to the words "the interpretation of the emperor" he

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[129]R. WISEMAN, THE LAW OF LAWS 125 (1657).

[130]Vacarius and the Civil Law 136, in CHURCH AND GOVERNMENT IN THE MIDDLE AGES (Brooke, et al. ed. 1976).

[131]This doctrine alone was probably enough to make King Stephen interested in stopping the teaching of Roman law in England.

added the words "or custom," and thus equated the modification of the law by custom to that which could be performed by the emperor's interpretation. Vacarius also held that custom had the power to abrogate lex. Having learned this law from Irnerius's own students, he knew that Irnerius had compromised on the question of abrogation: custom could abrogate law if the custom was made with knowledge of the law, but it could not if it was made in ignorance of the law. Vacarius rejected this distinction, saying that custom abrogated law because it derived from the consensus populi.[132] Ignorance or error as to the law did not affect the people's consensus.[133]

In another gloss,[134] Vacarius tried to explain away C.8.52(53).2 by means of a quibble over terminology: that text, he said , stated that custom would not overcome (vincere) either reason or statute. Vincere legem is one thing, abrogare is another. The text only denied the power of custom to vincere legem. Therefore custom may abrogate a statute. As a legal argument this may not be very convincing, but the fact that Vacarius would trouble to make such an argument is testimony to the depth of his commitment to the power of customary law. Indeed, I would argue that no such explicit commitment to the power of customary law will again be found in a jurist in England until the seventeenth century.

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[132]LIBER PAUPERUM, Gloss Generale et nature congruum.

[133]Id., Gloss Legem non ignorancium.

[134]Id., Gloss Sed nec scripta.

Rogerius, an important third-generation Bolognese glossator who was a contemporary of Vacarius, took a different approach to the issue of the power of custom to abrogate statutory law. In a work entitled Quaestiones super Institutis[135] (in which Rogerius attacks the law for its inconsistencies and Jurisprudentia patiently reconciles apparent contradictions) he proposed two different solutions to the contrarias between D. 1. 3. 32 and C. 8. 52(53). 2. In the first, Jurisprudentia says that a law can only be abrogated by a corresponding type of law; therefore, written leges cannot be abrogated by unwritten mores.[136] Jurisprudentia adds a second solution in the form of a distinction: a custom based on ignorance of a conflicting statute had no derogatory power, but a custom produced with consciousness of the statute with which it conflicted embodied the will of the people and therefore had the power to abrogate the statute, because the consent of the people was the ultimate source of the binding force of law. This second solution was opposed by some glossators on the ground that it would favor the conscious breaking of the law, but with modification it became widespread among the post-glossators.

The glossators, when treating of the effect of customary law on statutes, commonly distinguished between consuetudo secundum, praeter, and contra legem. This practice was universally followed by the post-glossators. Bartolus, to take the most prominent, held that consuetudo secundum legem was not new law at all, but only

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[135]For a discussion of this work see H. KANTOROWICZ, STUDIES IN THE GLOSSATORS, supra, at.

[136]Id. at 136.

interpreted, confirmed, or strengthened an existing statute. Consuetudo praeter legem was new law which occured when there was no legislation on a subject. Consuetudo contra legem abrogated an existing statute, but customary law only had this effect when it was not contrary to divine or natural law, the liberty of the Church, or to public welfare.[137]

The post-glossator Lucas de Penna took a more jaundiced view than did most of his contemporaries of the dominance of customary law over statutes. When a legal situation was covered by statute, he wrote, a distinction must be made between several situations: (1) where a statute expressly favors customary rules on a subject, a custom on that subject is valid; (2) where a statute forbids customary rules, a custom is invalid; (3) where the statute is silent on the question of custom, customs may be divided into three additional categories. Consuetudo secundum ius is developed in accord with existing legislation and hence is valid. Consuetudo supra ius supplements legislation and makes it specific; it too is valid. Consuetudo contra ius, however, may only abrogate legislation if the legislator has knowledge of it and consents.[138].

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[137]Ullmann, Bartolus on Customary Law, 52, Juridical Review 265 (1940).

[138]ULLMANN, THE MEDIEVAL IDEA OF LAW 67 (1969).

CHAPTER FOUR

Legislation, Equity, and Interpretation in Medieval Civilian Jurisprudence

Walter Ullmann recently claimed that the central problem in the medieval theory of government had to do with who was entitled to create law.[1] This may be the central problem for modern students of political thought, but it was not the problem that preoccupied medieval civilian jurists. Because they all agreed that the emperor was entitled to create law, the medieval civilians were concerned with the problems of who, besides the emperor, could make law, under what conditions nonimperial law could be made, and how such lawmaking could be justified theoretically. These were central problems for medieval jurists because the Corpus Juris of Justinian, whose authority they accepted without reservation, was permeated with texts proclaiming that the emperor was the sole maker and interpreter of the law,[2] whereas anyone with eyes could see that in Italy and France there was very little imperial lawmaking and a great deal of law-creation by principalities and cities.

The Germanic emperors had accepted and encouraged the study of Roman Law, and its adoption as an international ius commune in Europe, because it furnished the element of universality which they regarded as the mission of the Empire and supported imperial claims of absolute supreme power.[3] By the twelfth century Roman Law was being used everywhere in the interpretation and application of customs and local legislation. It was a kind of universal logic, providing analogies,

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[1]W. ULLMANN, LAW AND POLITICS IN THE MIDDLE AGES 29 (1979).

[2]E.g., C.1.14.11. "...for if, by the present enactment, the emperor alone can make laws, it should also be the province of the Imperial Dignity alone to interpret them... [T]he emperor shall justly be regarded as the sole maker and interpreter of the laws..."

[3]C. CALISSE, HISTORY OF ITALIAN LAW 117, in THE CONTINENTAL LEGAL HISTORY SERIES (1912).

supplementary rules, and interpretive principles.[4] Politically it represented the dominion of the empire over the Italian cities and princes who were seeking independence.[5]

Civilian jurists saw the Roman law as imperial legislation, the force of which had continued unabated from the time of Justinian. Although a minority of jurists held that local statutory power was founded on some principle of popular sovereignty or natural law,[6] most civilians saw local law as existing merely by consent or delegation from imperial authority. In cases of conflict between Roman law and local law, nearly all civilians--even those who did not hold that the power of local law depended upon imperial delegation--regarded the Roman law as controlling because they saw it as ratio scripta, the embodiment of right reason.[7] This was the civilian theory, stated in the broadest terms, of the relationship of Roman law to local law. But because the political facts of medieval Italy and France appeared, on their face, to conflict with the theory, medieval jurists were compelled to construct a considerably more complex theory in order to accomodate those facts.

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[4]J. BRISSAUD, HISTORY OF FRENCH LAW 207, in THE CONTINENTAL LEGAL HISTORY SERIES (1912).

[5] See CALISSE, supra, at 121.

[6]Baldus, for example, argued that it was a principle of natural law that a community without law was inconceivable, and that therefore the very existence of a community required it to have a law of its own. This idea eventually found its way into modern international legal doctrine, and a variant of it appeared in Justice George Sutherland's argument in United States v. Curtiss-Wright Export Corp. (1936) that any member of the community of nations had an inherent power to conduct foreign affairs, whether or not its own constitution said it had such a power.

[7]See CALISSE, supra, at 121.

By the time of the great revival of Roman legal studies at Bologna near the end of the eleventh century, the cities of northern and central Italy had already achieved a large measure of independence from higher political authorities, both national and imperial. In fact, if not in civilian theory, they also achieved legislative independence. The independence that the cities won from the German emperors included the right to make their own laws. This right was fully recognized by the Empire in 1183 in the Treaty of Constance.[8]

In its first stage, the Italian legislation of the late Middle Ages consisted primarily of the ordinances of the independent cities or communes; in its second stage it also came from dukedoms, principalities, and later, from kingdoms. Local custom was the primary source of the local municipal legislation, and at first the written statutes were intended merely to prove the customs, not to replace or change them.[9] But soon the statuti became legislation in the strict sense, changing old customs and providing for new needs.[10] In cities that were entirely independent, statuti were compiled by commissioners appointed by the council (credenze), and the council or popular assembly afterwards approved them. In cities under the rule of some prince or of another city, the statuti were either drafted as usual and then submitted for the ruler's approval or the ruler drafted them and then

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[8]Id. at 160. The very fact of such a concession by the Empire could, however, be used by the Roman jurists as proof that the lawmaking power of the cities was a delegated power.

[9]Id. at 161.

[10]Id.

recognized some right of the people to ratify them.[11]

At least in theory the cities were, down to the 1700s, always part of some larger political entity. Thus there were always potentially some other sources of legislation which would be binding on the cities--the Empire itself or various other semi-sovereign principalities.[12] Until the fourteenth century (after which no imperial legislation affected Italy) the legislation of the Empire was promulgated by being sent to the faculties of law to be taught from the chair and included in the manuscript texts of the Corpus Juri. On the model of Justinian's Novels, these imperial laws were collected in two additional books, and some were inserted in the Code itself at the place where they modified it, in summary notes.[13]

The political and legal situation was different in France. There, between the sixth and the ninth centuries, as a feudal society evolved, the principle that each person was governed by his personal or tribal law was replaced by the principle of the territoriality of customary law.[14] Generally, regional customary laws emerged from the multiplicity of local laws.[15] By the twelfth century, the legal map of France could be divided into two basic regions, which did not basically change until the Revolution. The Midi, south of a line extending from Geneva to LaRochelle, was known as the "region of written law." It lived under a

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[11]Id. at 163.

[12]Id. at 169.

[13]Id. at 170.

[14]R. DAVID, FRENCH LAW 4 (1972).

[15]Id. at 5.

single customary law, based on Roman law, which was relatively uniform, stable, and ascertainable. Upon the medieval revival of Roman legal study, the general Roman customary law of the Midi was gradually replaced by rules based on the Corpus Juris of Justinian.[16] The north of France was known as the "region of customary law." There mixed remnants of Roman law, Germanic law, canon law, and local customs combined to make a variety of customary laws.[17] These laws were neither uniform throughout the North nor were they stable. Sovereignty was split up among a large number of territories, and the area of authority of any one customary law was very limited.[18]

Even in the south of France, the Roman law was never regarded as having legislative force. Despite the fact that it was written, its authority derived not from promulgation but from its character as a local custom.[19] Meanwhile, the doctors at Bologna and the other schools of the Roman law were teaching their students that the Roman law was the product of the legislative will of the Roman Emperor, and that under the doctrine of the Corpus Juris the king of France was the subject of the Holy Roman Emperor.[20] This teaching did not sit well with the French kings who, in conformity with the dictum that "the king reigns supreme in his kingdom," refused to countenance the doctrine that laws

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[16]Id. at 6.

[17]BRISSAUD, supra, at 204.

[18]DAVID, supra, at 7.

[19]BRISSAUD at 206.

[20]Id. at 212.

promulgated by a foreign sovereign were binding in France.[21] Because the written Roman law, even in the South of France, was understood as local custom and not as the legislation of a political superior, local customs and municipal ordinances were free to depart from it.

Faced with the political reality of widespread local lawmaking in France and in northern Italy, the medieval civilians had the choice of denouncing such nonimperial legislation as ultra vires or of explaining how it was licit in terms of the jurisprudence of the Corpus Juris. Most jurists who addressed the problem chose the second option. The problem they faced in doing so was that of applying and adapting a theory of a single omnicompetent worldwide state with a monopoly on lawmaking power to a world in which the Holy Roman Empire made claims of universal sovereignty but in practice had little political power. For Aquinas and all those who took Aristotle's Politics as the basis of their political speculation, the state was the Civitas or the Regnum. For the civilians, the state was essentially the Imperium, and it was difficult for them to find a place in the Corpus Juris for independent sovereign kings and cities.[22] The theoretical problem was to attach to the civitas rights and privileges which seemed in the Corpus Juris to be applicable only to the Imperium.[23]

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[21]See DAVID, supra, at 5. The teaching of Roman law at the universities went on everywhere and in all periods after the medieval revival of Roman legal study. Even in the North, Roman law and canon law were the only types of law taught in the universities. The only exception was the prohibition of Roman law teaching at Paris in the thirteenth century. This prohibition, like the similar one at Oxford in England, can no doubt be explained by the support to be found in Roman jurisprudence for imperial claims of political supremacy.

[22]See C.N.S. WOOLF, BARTOLUS OF SASSOFERRATO 112-13 (1913).

[23]Id. at 115.

We first encounter glossatorial attacks on the problem in the works of the great jurist Azo and of the thirteenth century glossator Odofredus. Odofredus reports a famous controversy between Azo and Lothair, another glossator:[24]

> Master Azo and Master Lothair were teaching in the city and the Emperor (Henry VI) summoned them to him on a matter of business, and, while he was one day riding with them, he propounded this question, "My lords, tell me to whom belongs merum imperium." Master Lothair said, "Since Master Azo wishes that I speak first, I declare that to you alone belongs merum imperium and to no other." And Master Azo said, "In our laws it is said that judges other than yourself have the power of the sword but that you have it per excellentiam nevertheless other judges also have it such as praesides provinciarum and still more so others who are even greater than these. Whence it is that you cannot revoke the jurisdiction of magistrates..." When they had returned to the palace the Lord Emperor sent to Master Lothair a horse and to Master Azo nothing. Whereupon Master Azo states in his commentary on this title: "I state that merum imperium belongs to the emperor alone per excellentiam but that others like praesides provinciarum and still higher judges also have the merum imperium. If on account of these words I have lost a horse (equum), yet it was not just (aequum), because rightly did I declare the law and not Master Lothair."

Azo, in his Summa Codicis, said of the controversy:[25]

> Some say that merum imperium belongs to the emperor alone and that he alone has it... But certainly it is obvious that higher magistrates have the merum imperium as well... I say that the full or fullest jurisdiction belongs to the emperor alone, since by the Hortensian law the people have transferred all their imperium and potestas to him...so that he alone can decree general equity...
> I maintain, however, that any magistrate whatsoever can decree new law in his city (civitas). And I also maintain that merum imperium belongs to others of the higher powers, although on account of this I lost a horse, which was most unjust.

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[24]ODOFREDUS, Matura diligentissimeque repetita interpretatio in undecim primos Pandectarum libros... (Lyons 1550). Quoted in M. GILMORE, ARGUMENT FROM ROMAN LAW IN POLITICAL THOUGHT 1200-1600 18 (1941).

[25]Commentary on C.3.13. The translation is from M. GILMORE, ARGUMENT FROM ROMAN LAW, supra, at 19.

The foregoing passages refer to two of three Roman legal concepts in terms of which medieval civilians analyzed the problem of how to apply the governmental theory of the Corpus Juris to the political facts of their time in northern Italy. These concepts were imperium and iurisdictio. The idea of delegation was a third. The Corpus Juris is not a model of clarity on the subjects of jurisdictio and imperium, and of the relationship between them. Its doctrine is obscure even on the modern scholar's assumption that the texts dealing with iurisdictio and imperium represent several stages of Roman constitutional history, and that the theories of government and governmental power held in some of those stages were incompatible with the theories held at other stages. Walter Ullmann's suggestion that jurisdiction (iurisdictio) was the power to fix in a final manner what was the law[26]--to create law[27]--and that it was a species of imperium which conferred enforceability on the law,[28] represents in an over-simplified way one medieval interpretation of the two concepts. There were other interpretations, however, and it is a measure of the concepts' obscurity that Bartolus reversed the order and saw imperium as a species of iurisdictio.[29] It will be necessary, in order to understand the civilians' treatment of the concepts of iurisdictio and imperium, to examine several of the texts on which the medieval jurists based their doctrines. Because these texts were

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[26]LAW AND POLITICS, supra, at 33.

[27]PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES 20 (1961).

[28]LAW AND POLITICS, supra, at 56.

[29]COMMENTARIA IN PRIMAM DIGESTI VETUS (Lyons 1552).

assembled by Justinian's compilers from several periods of Roman history, I shall first try to trace, in a rough way, the historical development of the concept of imperium.

The word imperium had no single meaning in the Latin language or in Roman law. It could mean merely an order or command; it could mean the right to give orders, or the power over a small group such as a family; it could mean, as in the texts we have examined on the lex regia (or lex de imperio), the supreme power or sovereignty of the Roman people; it could mean, in a technical sense, the official power of the higher magistrates under the Republic and of the emperor under the Empire; finally, it could refer to the Empire itself or to its territory.[30] We are most interested here in its technical meaning as the official power possessed by the higher magistrates and the emperor.

When ancient Rome changed from a monarchy to a republic, two magistrates (consuls) were elected in place of the King, but they retained the undiluted royal powers. Eventually these powers were somewhat restricted by statute, but even then there remained a large residue of power undefined by strict law. The name given to this undefined power was imperium.[31] Like the royal power, the consular imperium extended to all areas of government, including leadership of the army, jurisdiction, and the right to put business before the assembly and the senate.[32] The power to place business before the senate

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[30]See ADOLF BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW (1953).

[31]H. F. JOLOWICZ AND B. NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 8-9 (3rd ed. 1972).

[32]Id. at 45.

was not the same as the power to enact law; the consuls were not lawmakers but, in effect, the chief executive officers and agents of the all-powerful senate.[33] In principle the consuls had a general iurisdictio, but when a special jurisdictional magistracy, the praetorship, was created in 367 B.C., the consuls no longer had any concern with civil litigation.[34]

In Roman law, the term iurisdictio covered all judicial activity in civil matters and indeed all activity connected with the administration of justice. It included the power and activity of ius dicere, that is, of settling the legal principles which governed the outcome of legal controversies.[35] In republican Rome, iurisdictio in the latter sense was not understood to include the power to create new law--to alter the law openly and directly as the sovereign assembly could by a lex or a plebiscitum. Later, when auctoritas, imperium, iurisdictio, and the sole power of legislation were understood to be combined in the person of the emperor, the distinctions between these terms were not always carefully maintained.

The power possessed by the praetor, and by all higher magistrates whose duties included jurisdiction, was the power to issue edicts, i.e., proclamations which notified the people of what he would do in certain circumstances, and of the way in which he would carry out his

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[33]Id. at 46.

[34]Id. at 47, 48.

[35]BERGER, supra.

[36]JOLOWICZ & NICHOLAS, supra, at 97,98.

jurisdiction.[36] From such edicts there arose the ius honorarium[37] or magisterial law, which came to have equal status with the ius civile and was interwoven with it.[38] It was the practice for praetors and other jurisdictional magistrates[39] to publish their edicts each year when they entered upon their office.[40]

The praetors were not judges in the modern sense. They presided over the first stage of a civil trial--the stage in which the issue between the parties was settled and in which the principles of law that would govern the case were laid down. The praetors also had full imperium. They were in principle capable of all the duties performed by the consul, whether military, administrative, or judicial. There were two limits on the exercise of imperium by a praetor. The consul's intercessio prevailed against his act, and he was always given a definite sphere (provincia) in which to exercise his imperium.[41]

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[37]From honor (magistracy).

[38]Papinian defined the ius civile as "that which comes in the form of statutes (leges), plebiscites, senatus consulta, imperial decrees, or authoritative juristic statements." He adds that ius praetorium "is that which in the public interest the praetors have introduced in aid or supplementation or correction of the ius civile." D. 1. 1. 7.

[39]For example, the provincial governors, the curule aediles, and the quaestors.

[40]JOLOWICZ & NICHOLAS, supra, at 98.

[41]Id. at 49. In Roman jurisprudence the word provincia means "the sphere of authority of a magistrate"--that is, a sphere of authority with territorial limits which is assigned to a magistrate who has imperium.

[42]The Empire is dated from 27 B.C. to 476 A.D.

In the first period of the Empire,[42] commonly called the principate (27 B.C. to A.D. 235), republican forms were preserved but imperial authority grew in all areas of government. Originally, the emperor (princeps) was regarded as a citizen who, like all citizens, was subject to the laws.[43] The senate could, however, grant him exceptions, called dispensations, from the operation of particular legal rules. Domitian and his successors frequently usurped this privilege of dispensation and it finally was recognized as an imperial right.[44]

More important than the dispensing power was the lawmaking power of the emperor. Over time, the powers of the people diminished and those of the senate increased. As the senate came to replace the comitia, senatus consulta became an important source of new law. The legislative initiative, however, normally came from the emperor. In the next development, the senate merely confirmed the emperor's proposal, and finally, by the middle of the second century, the jurists recognized that the emperor himself could actually make law by constitutiones principum.[45] Meanwhile, the imperial civil service had almost completely superseded the hierarchy of magistrates. The magistrates continued to issue edicts, but legal changes by edict were less frequent, and the power to alter the edict ended in the reign of Hadrian. Thereafter the edict was no longer a source of new law.[46] Thus, by the late principate,

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[43]JOLOWICZ & NICHOLAS, supra, at 325.

[44]Id.

[45]Id. at 365; Roman Law, in D. WALKER, THE OXFORD COMPANION TO LAW (1980).

[46]WALKER, supra, at 1081.

the emperor had in fact become the sole legislator.[47]

When medieval jurists set out to apply the Corpus Juris theory of imperium, iurisdictio, and lawmaking power to the political situations they found in France and northern Italy, they were not totally in the dark as to the Roman constitutional history I have just summarized. In the first book of the Digest they found a short historical survey of the development of Roman law and of the Roman magistracies. An important passage made it clear that the lawmaking power in Rome had not always been the sole province of the emperor, but had gradually grown more and more remote from the people:[48]

> Next, because it grew hard for the plebs to assemble, and to be sure, for the entire citizenry to assemble, being now such a vast crowd of men, the very necessity of the case imposed upon the senate trusteeship of the commonwealth. And thus did the senate come to exercise authority, and whatever it resolved upon was respected, and such a law was called a senatus consultum. 10. At the same time, the magistrates were also settling matters of legal right, and in order to let the citizens know and allow for the jurisdiction which each magistrate would be exercising over any given matter, they took to publishing edicts. These edicts, in the case of the praetors, constituted the ius honorarium: "honorary" is the term used, because the law in question had come from the high honor of praetorian office. 11. Most recently, just as there was seen to have been a transition toward fewer ways of establishing law, a transition effected by stages under dictation of circumstances, it has come about that affairs of state have had to be entrusted to one man (for the senate had been unable latterly to govern all the provinces honestly). An emperor, therefore, having been appointed, to him was given the right that what he had decided be deemed law.

The Digest also provided a whirlwind tour of the origins and nature of the various Roman magistracies. From the beginning of the civitas, Pomponius asserted, "the kings had entire power (omnem potestatem) in

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[47]JOLOWICZ & NICHOLAS, supra, at 366.

[48]D. 1. 2. 9-11.

all that now pertains to magistrates."[49] then, after the ejection of the kings, it was established that there be two consuls in whom a statute laid down that the summum ius should be vested."[50] Lest the consuls should claim for themselves kingly power over all things, legislation provided that an appeal lay from their decisions and that they had no power to impose the death penalty on a Roman citizen except by order of the whole citizen body. Nevertheless, they alone had the power of physical coercion.[51] Then, under the pressure of wars and other circumstances, it was decided to establish a magistrate with greater power (maioris potestatis). "Accordingly, dictators (dictatores) were put in office from whom there was no right of appeal and to whom even the capital penalty was entrusted. It was not lawful for this magistrate to be kept in office longer than six months, since he had supreme power (summam potestatem)."[52] About the seventeenth year after the expulsion of the kings, the plebs seceded from the patricians and established for itself plebian magistrates called tribunes.[53] Also, two members of the plebs (called aediles) were appointed to be in charge of the houses in which the plebs deposited its plebiscites. Quaestors were appointed to have charge of the money in the public treasury.[54] Because no one was left to attend to legal business when the consuls were out of

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[49]D. 1. 2. 14.

[50]D. 1. 2. 16.

[51]Id.

[52]D. 1. 2. 18.

[53]D. 1. 2. 20.

[54]D. 1. 2. 22.

the civitas conducting wars, a magistrate called the urban praetor was created.[55] Other praetors were added as needed until finally there were in total "ten tribunes of the plebs, two consuls, eighteen praetors, and six aediles to administer justice in the civitas."[56]

The Digest discussion of the historical origins and development of the Roman magistracies breaks off without saying anything about the nature of the magistracies under the Empire. This was a critical omission for medieval jurists who were trying to figure out to apply the Corpus Juris theory of government to medieval Europe. It is true that they could read in D. 1. 2. 10 that magistrates with jurisdictio could publish edicts which became law ius honorarium, and in D. 1. 1. 7 that the law so introduced could even correct the ius civile. These texts might have suggested a promising approach to locating the widespread medieval local lawmaking in the Roman jurisprudential and political universe except for the fact that there were also prominent texts in the Corpus Juris that insisted that the emperor alone could make law. If these latter texts were thought to be controlling, the edicts of magistrates could not be considered to be sources of law.

Another problem the glossators faced in regard to drawing implications for medieval Europe from the magistracies they found described in Justinian's law books was that despite their assumption that the legal system described in those books was immediately applicable to their own time and place (as if the Western Roman Empire had not fallen and Roman law had not fallen into disuse for several

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[55]D. 1. 2. 27.

[56]D. 1. 2. 34.

centuries), the old Roman system of government and governmental offices no longer existed, and there was no recognizable connection or even convincing analogy between medieval officials and the old Roman magistrates. Professor Myron Gilmore rightly noted that in the glossators writings on Roman law, and particularly in Azo's writings, "we hear much of consuls and proconsuls, praesides provinciarum and municipal magistrates, but almost nothing of counts and bishops."[57] Like most scholars whose study of Roman jurisprudence focuses on the works of the post-glossators or of the sixteenth-century legal humanists, Gilmore appeared to conclude that this absence of an attempt to draw explicit connections between ancient Roman and medieval magistrates betrayed a lack of interest on the part of the glossators in applying Roman legal principles to the needs of actual life. This "facile and commonly drawn distinction," as Professor Samuel Thorne impatiently called the widespread idea that the post-glossators saw the Roman law as a living system that could be applied to contemporary life while the glossators were interested in it only as an abstract and ideal system, is an error traceable to the legal humanists.[58] In fact, the great impetus behind the astonishingly laborious and difficult studies undertaken by the glossators was precisely the desire to understand and systematize the body of Roman law so that it could be applied to contemporary life. The best explanation for the failure of the glossators to draw parallels between the Roman consuls mentioned in the first book of the Digest and the counts of medieval Italy is simply that the glossators rightly saw

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[57]ARGUMENT FROM ROMAN LAW, supra, at 26.

[58]Thorne, Statuti in the Post-Glossators, 11 SPECULUM 452 (1936).

that the natures of the two titles and offices were so different as to preclude any convincing analogy between them.

I entered on this discussion of the Corpus Juris treatment of the magistracies in ancient Rome with the purpose of showing why I believe the medieval jurists, when they set out to analyze contemporary problems of government and lawmaking in terms of concepts and doctrines found in the law books of Justinian, tended to concentrate on such abstract concepts as imperium, iurisdictio, and delegation rather than attempting to draw analogies between particular ancient and medieval magistracies. The point is not that the medieval jurists made no use of what they read about the Roman magistracies; it is that their references to those magistracies were almost always made in the course of a discussion of wider concepts like imperium. This was the case with the statement by Azo in his Summa Codicis, quoted earlier, that "any magistrate whatsoever can decree new law." In making this claim he was interested not in proving that any particular medieval magistrate had the power to decree new law but in justifying his claim that other magistrates besides the emperor had something called merum imperium.

It is not entirely clear to me that when, in response to Henry VI's question, Azo replied that magistrates other than the emperor had merum imperium, he and Henry had exactly the same things in mind. I suspect that Henry only wanted confirmation, in a general way, that according to Roman law local kings, princes, counts, etc. only held political, legal, judicial, or military power or authority through the emperor and not independently by virtue of their office or station. Henry had every right to expect, based on the generally imperialist orientation of the

Corpus Juris, that he would receive the answers provided by Lothair. But Azo, as student of the technicalities of the Roman texts, responded on the basis of what those texts had to say about imperium. Professor Myron Gilmore, the modern authority on the medieval understanding of the concept of imperium, took the position that Azo based his case that other magistrates besides the emperor have the merum imperium simply on the fact that the Corpus Juris is clear that the provincial governors (praesides provinciarum) also had the merum imperium.[59] Professor Gilmore contrasted what he regarded as Azo's simplistic interpretation with that of later civilians who tended to rely instead on the concept of delegation in their discussions of imperium. Professor Gilmore had a point here: Azo did not discuss imperium in terms of the power of delegation. But Azo did refer to imperium as a form of jurisdiction, and as we will see, the concept of iurisdictio is intimately associated with the concepts of imperium and delegation (mandatus). Since this is so, it is interesting that a great weakness of Professor Gilmore's own magisterial treatment of the medieval civilians' understanding of the concept of imperium lies in his failure to systematically relate the civilians' treatment of imperium to their treatment of iurisdictio and delegation. One simply cannot understand what the civilians thought about imperium without also knowing what they thought about iurisdictio and delegation.

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[59]ARGUMENT FROM ROMAN LAW, supra, at 27.

[60]RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650 30 (1982).

As Professor Brian Tierney has noted.[60] although today "jurisdiction" is used primarily to describe the authority of a judge, as late as the seventeenth century it commonly meant the power of ruling in general. For the medieval civilians "jurisdiction" was one of a cluster of terms used to define the idea of rulership. Among them were power, authority, prelacy, and imperium.[61]

When Henry VI asked Azo who had merum imperium, Azo gave an answer in which he shifted his discussion from imperium to iurisdictio and back again to imperium:

> Some say that merum imperium belongs to the emperor alone... But certainly it is obvious that the higher magistrates have the merum imperium as well... and say that the full or fullest iurisdictio belongs to the emperor alone, since by the Hortensian law [the lex regia] the people have transferred all their imperium and potestas to him...so that he alone can decree general equity... I maintain, however, that any magistrate can decree new law in his civitas... And I also maintain that merum imperium belongs to other of the higher powers...

Azo is saying that the emperor does not have a monopoly on merum imperium but that plenissima iurisdictio does belong to the emperor alone. This clearly means that Azo, unlike Accursius later,[62] does not define merum imperium as "the fullest jurisdiction". To understand the problems of the glossators faced in relating imperium to iurisdictio we will need to examine more closely a few basic Digest texts. In D. 2.1.1, iurisdictio is identified with the powers of pronouncing the law (ius dicere) and those powers are said to be of the widest (latissimum) scope. The next Digest text[63] proclaims that one who has iurisdictio

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[61] Id.

[62] Gloss ad D. 1.16.7.

[63] D. 2.1.2.

has all the powers without which iurisdictio cannot be exercised. The third text of Book II of the Digest is where matters begin to get confusing. It provides that:[64]

> Imperium is pure or mixed (merum aut mixtum). To have merum imperium is to have the power of the sword to punish the wicked and this is also called potestas. Imperium is mixed when it also carries jurisdiction (iurisdictio) to grant bonorum possessio. Such jurisdiction includes also the powers to appoint a judge.

The fourth text in this series adds:[65]

> To order security to be given by means of a praetorian stipulation and missio in possessionem are matters pertaining more to imperium than to iurisdictio.

Let us see if we can sort out what these texts tell us about imperium and iurisdictio and their relationship to each other. First, it seems that although iurisdictio and imperium both refer to aspects of rulership, they do not refer to the same aspects and are not interchangeable terms. Iurisdictio has to do with the power to pronounce law (ius dicere) and pure imperium refers to "the power of the sword (potestas gladii) to punish the wicked." Roman legal scholars have differed over what the potestas gladii entailed,[66] but the glossators tended to understand it as referring to the power of inflicting capital punishments.[67] In any event, the Digest texts we are examining appear to identify iurisdictio with the power to establish law, and merum imperium with the power to compel obedience and punish

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[64]D. 2.1.3.

[65]D. 2.1.4.

[66]See GILMORE, supra, at 22-29.

[67]See GLOSSA ORDINARIA at D. 2.1.3.

offenses.

With this basic understanding, let us consider a few more Digest texts. No openminded reader of the first two books of the Digest can fail to reach the conclusion that other magistrates besides the emperor had iurisdictio. One text even ascribes to a proconsul the fullest jurisdiction:[68]

> Since a proconsul has the most complete jurisdiction (plenissimam iurisdictionem), there belong to him in person the powers of all those who exercise jurisdiction at Rome whether as magistrates or on an extraordinary commission.

In view of this text, what could Azo have been thinking about when he asserted that the fullest jurisdiction belonged to the emperor alone? There were apparently two separate bases for this conclusion. First, Azo had in mind the lex de imperio (or lex regia) whereby by the Roman people supposedly transferred all of their power and imperium to the emperor. The conclusion to be drawn from this was that no one could possibly have a more complete iurisdictio. This idea was made explicit by the 12th century glossator Pillius, who wrote, "Some jurisdiction is complete (plena) as in the human emperor (princeps) since the Roman people conferred in him all its power and imperium."[69] The second basis for Azo's conclusion that the emperor alone had the fullest jurisdiction may be found in his statement that the emperor alone can decree general equity. Here the idea is that although jurisdiction involves the power to decree new law, and other magistrates besides the emperor have that power, only the emperor has the right to decree both law and equity, and

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[68]D 1.16.7.1.

[69]Quoted in TIERNEY, supra, at 31.

thus the emperor's jurisdiction is fuller than that of any other magistrate. There were several Corpus Juris texts that supported the location of the power to declare equity in the emperor.[70] Later jurists did not always follow this analysis of the emperor's jurisdiction. Accursius, for example, in his great gloss defined jurisdiction in a way that completely undercut this part of Azo's argument. Jurisdiction, he said, was "a power publicly introduced with responsibility for pronouncing ius and enacting aequitas."[71]

Azo's statement that other magistrates besides the emperor had merum imperium had strong textual support in the Digest. To reach Azo's conclusion on this point one had only to move from the D. 2. 1. 3 identification of merum imperium with the ius gladii to the statement in D. 1. 18. 6. 8 that "those who rule entire provinces have full power of the sword (ius gladii)..."

The most difficult Digest texts on iurisdictio and imperium are concerned with the problem of delegation. A number of texts make it clear enough that iurisdictio may be delegated. For example, a Digest excerpt from the jurist Julian states: [72]

> It has been provided by ancestral custom that a person may delegate (mandare) jurisdiction to another only when he has it in his own right and not by power of another....

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[70]E. g., C. 1. 14. 1.

[71]Gloss ad D. 2. 1. 1.

[72]D. 2. 1. 5.

This and parallel texts indicated, however, that only powers that officials held by right of their office, and not by special commission, could be delegated:[73]

> Any powers specially conferred by statute or senatus consultum or imperial enactment are not transferable by delegation of a jurisdiction. But the competence attached to a magistracy as of right is capable of delegation... One who has undertaken a delegated jurisdiction has no competence of his own but exercises the jurisdiction belonging to the officer who gave him him mandate. It is all too true that by the custom of our fathers iurisdictio is transferable, but not merum imperium which is conferred by a statute.

This was a very important text for medieval jurists like Accursius who sought to approach the problem of imperium through the concept of delegation. Professor Gilmore suggested that the important point, given the principle announced in this text, was to decide what powers an officer had by right of his office.[74] Let us be clear about this: the issue is not whether the emperor had merum imperium by right of office and hence could delegate it to lesser magistrates, but whether any magistrates besides the emperor had merum imperium by right of office. The glossators' approach was to try to figure out whether any particular magistrate had merum imperium by looking to see if he could delegate powers equivalent to those of merum imperium. It is unclear why anyone thou h a circuitous analysis could produce any answers which could not i. ı obtained by simply asking directly whether a particular magist. d powers that were equivalent to merum imperium, and in fact the nalyses produced by this approach are not very impressive. For example, Accursius declared that no judge who had either merum or

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[73]D. 1. 21. 1.

[74]GILMORE, supra, at 27.

mixtum imperium could delegate it, and he added that powers which belong to judges in right of their magistracy could be delegated.[75] It might seem that the logical conclusion from this would be that merum and mixtum imperium do not belong to judges by right of office, but this is not the conclusion that Accursius drew. He merely reiterated that merum and mixtum imperium could not be delegated. In the end he agreed with Azo that other magistrates besides the emperor had merum imperium, but he reached this conclusion not through any analysis of the powers of delegation, but because, like Azo, he found texts in the Digest which stated that all praesides had the potestas gladii.

Even if Accursius's consideration of the problem of delegation turned out not to be particularly helpful in deciding the location of merum imperium, it did lead to a more detailed analysis, which greatly influenced the post-glossators, of the concept of jurisdiction. Accursius maintained that there were four degrees of jurisdiction: merum imperium, mixtum imperium, modica coercitio, and iurisdictio.[76] He taught that only the last two of these classes of jurisdiction could be delegated, although he noted that Placentinus, among others, had accused

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[75]For discussion see GILMORE, supra, at 28.

[76]Gilmore summarized those degrees in the following way: "Under merum imperium are those cases which concern our person, our citizenship, or our liberty. The concept of the mixtum imperium is vaguely said to be determined by two conditions, that it is not one of the three cases just mentioned and that the jurisdiction over the case be accompanied with the full powers of acting which the issue of the case implies, as missio in possessionem... Under jurisdiction are those powers which belong to the magistrate in right of his office, which include the cognizance of both civil and minor criminal cases. Modica coercitio coexists with this jurisdiction as the right of the magistrate to enforce his decisions or to compel respect for his authority." ARGUMENT FROM ROMAN LAW, supra, at 30.

him of teaching that mixtum imperium and iurisdictio were the same, and that therefore mixtum imperium could be delegated.

We are observing, in this greater elaboration of the concepts of imperium and iurisdictio which evolved in civilian jurisprudence in the Middle Ages, a movement farther and farther away from any statements about the two concepts in the law books of Justinian. Azo, in the passages we examined, slipped easily from talking about imperium to speaking of iurisdictio, without seeming to notice that he had changed his terminology. This suggests that in his mind the two terms were somehow related, but he never explains their relationship. It is impossible to know whether this omission came about because Azo simply took for granted a common glossatorial understanding of the terms' relationship, or because the glossators, himself included, had not yet felt the need to articulate a precise relationship between the terms. I lean to the latter interpretation, if only because the juristic analysis of the two terms become noticably more and more detailed as time passed. Azo spoke of merum imperium and iurisdictio in the same breath, without distinguishing between them. At the end of the glossatorial period, Accursius divided iurisdictio into four degrees, one of which was merum imperium. In the fourteenth century, Bartolus, the greatest of the post-glossators, carried the trend toward greater elaboration to its greatest height. Iurisdictio, he announced, was a genus made up of two species, imperium and iurisdictio simplex. Iurisdictio simplex he further divided into six degrees: maxima, major, magna, parva, minor, and minima. He divided imperium into merum and mixtum imperium, and each of these he sub-divided into the same six degrees into which he had

divided *iurisdictio simplex*. These eighteen degrees of *iurisdictio* were intended to be a comprehensive taxonomy: no civil power to rule, govern, legislate, adjudicate, coerce obedience, or punish was not comprehended among them.

I can find little textual warrant in the law books of Justinian for even Accursius's four degrees of *iurisdictio*, I see none at all for Bartolus's divisions, either in the old Roman legal texts or in Roman constitutional history. The proliferation of degrees of juristiction grew out of the medieval jurists' love of making distinctions and their desire to explain and justify the existence and practices of the independent Italian cities within a framework of Roman jurisprudence. This was a problem because in Justinian's law books the state was identified with the empire. There was no place in those books for independent cities that legislated for themselves without any pretence that they did so by means of a *iurisdictio* or *imperium* delegated to them by the emperor.

When Azo responded to Henry VI's question about who had *merum imperium* by saying that the emperor had it *per excellentiam* but other magistrates had it as well, he undoubtedly was thinking of the independent Italian cities. That this was what he had in mind is supported by the fact that later, when he recounted what he had said to Henry, he added, "I maintain, however, that any magistrate whatsoever can decree new laws in his city (*civitas*)."[77] Azo announced his conclusion that the magistrates of the civitates had *merum imperium* (including a power to legislate) and that it could not be withdrawn by

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[77]Summa Codicis 3. 13.

the emperor. He did not reveal the reasoning by which he reached this conclusion.

The fact that the glossators were unsuccessful in finding a place for the independent sovereign cities of Italy in the Corpus Juris did not, as some scholars have suggested, stem from their lack of interest in making Roman law applicable to actual conditions of medieval Italian life. Their continuing preoccupation with the question whether other officials besides the emperor had merum imperium suggests that they were aware that the facts of political life in Italy did not always comport with the political doctrines they found in their law books, and that they were struggling to reconcile the facts with the law as they understood it. If they were not successful in resolving the problem, they at least developed some conceptual tools which their successors, the post-glossators, thought enabled them to reconcile doctrine and practice.

Two of these conceptual tools proved to be of particular importance in the political theories of the post-glossators. First, Bartolus and others found Accursius's division of iurisdictio into several classes or degrees to be very helpful because it suggested a way to finesse the problem of who had merum imperium (and thus who had the power to make new law). We have seen that Bartolus was so stricken with the possibilities that such a division offered that he came up with eighteen species of iurisdictio and six degrees of merum imperium. When one has that many degrees of a power to play with, one can reconcile any number of positions that previously appeared to be antithetical. When Lothair said that only the emperor had merum imperium, and Azo insisted that

other officials also had it, they were not contradicting each other if there is a degree of merum imperium (merum imperium maximum) which only the emperor has and which involves the power to make general laws for the whole empire, and yet there are also degrees of merum imperium which lower magistrates have, and which allow those lower officials to legislate for their universitas.

The second important conceptual tool the post-glossators took over from their predecessors was the idea of a corporation (universitas). The glossators had expanded the conception of a universitas from that of an entity which existed only in private law to one in which the empire was understood to be a particular kind of corporation -- one which embraced the whole world.[78] The conception of the empire as a kind of universitas was an important development because it suggested to Bartolus a way of fitting the independent Italian civitas into the political theory of the Corpus Juris. The glossators had found only the empire, the province, and the municipium mentioned in their law books. This was a problem because an independent city like Florence did not seem to fit any of these categories. It was also a problem because the empire, province, and municipium were understood to be different in kind as well as in degree. When the empire was conceived of as a kind of universitas, it became possible to look at the difference between the empire and a civitas as merely one of degree. That is precisely what Bartolus did -- he divided all civil political communities into four degrees of universitas with differences in the rights and powers each possessed. Beneath the empire, in descending order, are the "larga

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[78]C.N.S. WOOLF, BARTOLUS, supra, at 113, 114.

universitas" (the provincia), the "minus larga universitas" (the civitas), and the "minima universitas" (the castrum or villa).[79] Bartolus began his analysis of the lawmaking power of the civitates with the general rule that the person who heads a universitas of the order of a province has merum imperium, but the head of a universitas of the order of a civitas does not.[80] Because the medieval civilians agreed that the power to legislate was located in the merum imperium, this general rule was an obstacle to be overcome for anyone who wanted to justify the exercise of legislative power by the independent Italian cities.

There was another general rule of law widely accepted by the medieval civilians, however, that once the civitas was understood to be a kind of universitas, showed promise as a means of justifying the practice of lawmaking by the independent civitates. Any collegium approbatum[81] had the power to legislate, at least for its own purposes if not for its own members.[82] Bartolus' division of merum imperium into six degrees allowed him to reconcile these two general rules, and also be able to hold that the imperial principle that only the emperor could

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[79] Id. at 123-124. In Bartolus' division of the world there are two broad classes of political communities below the level of the empire: the provincia on the one hand, and the civitas, castrum, and villa on the other. The castrum and villa were dependent on some civitas.

[80] GILMORE, ARGUMENT FROM ROMAN LAW, supra, at 39.

[81] Although the most commonly used generic term for "corporation" was universitas, several other terms used to designate forms of corporations; among them was collegium. See J.P. Canning, The Corporation in the Political thought of the Italian Jurists of the Thirteenth and Fourteenth Centuries, 1 HISTORY OF POLITICAL THOUGHT 1 (1980).

[82] WOOLF, supra, at 146, 153.

make law was consistent with the actual exercise of legislative power by the civitates.

Bartolus, following the general rule of corporation law, held that any approved and licit corporation could make statutes, but added that the scope of its legislative power was limited by its jurisdiction: "Quaero utrum collegia possint facere statuta: videtur dicendum, quod collegia licita et approbata in his in quibus habent iurisdictionem et quo ad ea quae ad ipsos collegiatos pertinent, possunt facere statuta."[83] After the empire itself, the province, as a larga universitas, had the highest and widest jurisdiction: it had both merum and mixtum imperium by iure communi and not by any concession from the emperor. As a general rule the civitas did not have the right to exercise merum or mixtum imperium. De iure it had only iurisdictio simplex, a considerably more limited jurisdiction which did not include the power to make laws.[84]

The problem Bartolus faced was how to explain and justify the exceptions to this general rule to be found in the practices of the medieval Italian cities. He attacked the problem by dividing the cities into three classes, according to the kind and extent of the jurisdiction they exercised. The castrum or villa, (a universitas minima) a small city dependent on some other civitas, had no jurisdiction at all. Even so, it had the power to make a statute "pertinens ad administrationem

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[83]BARTOLUS, COMMENT. ON DIG. VET. D.1.1.9.

[84]BARTOLUS, COMMENT. ON CODEX C.1.4.16: "Defensores civitatum de jure communi non habent nec merum nec mixtum imperium..."

rerum ipsius populi."[85] The ordinary civitas (a universitas minus larga) which had iurisdictio simplex, de iure communi, likewise could only make statutes "in his in quibus habent administrationem, seu iurisdictionem...in aliis non sine superioris auctoritate."[86] Finally, the kind of civitas which admitted to no superior, which had "all jurisdiction," and which was a "free people" could make statutes "prout sibi placet."[87] This, in effect, is to say that the independent civitas has the same power to make laws, within the limits of its territory, as emperor had in his territory.

How could this third class of civitas have this kind of power in a legal system which held that only the emperor could make laws, and which insisted that all the Italian civitates were de iure part of the empire? Because, said Bartolus, there are six degrees of merum imperium. When the law books of Justinian said that only the emperor could make laws, that meant general laws applicable throughout the empire. This was the jurisdictional power found in the highest grade of merum imperium -- merum imperium maximum.[88] The independent city only had the lower grades of merum imperium which permitted the making of laws governing its own citizens and territory.

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[85]WOOLF, supra, at 153.

[86] Id.

[87]BARTOLUS, COMMENT. ON CODEX C.1.1.9: "Nam quidem est populus liber, qui habet omnem iurisdictionem et tunc potest facere legem et statutum prout sibi placet..." Quoted in WOOLF, supra, at 154, Footnote 1.

[88] Id. at 147.

But how could a city have any kind of merum imperium, given the general rule that only a universitas of the order of the empire or of a province has that power? Bartolus answered that there were only two ways a civitas could legally justify exercising merum imperium: by proving imperial concession (e.g. by the peace of Constance), or by proving usurpation made legitimate by the operation of prescription and "longissimum tempus."[89]

How did Bartolus know that there were six degrees of merum imperium, particularly since neither the Corpus Juris nor the glossators who had preceded him had mentioned them? What he said he did was to return to the rule of Papinian, and figure out what powers each magistrate could delegate.[90] This rule holds, as we have seen, that a magistrate may delegate only those powers which he holds by right of office. In applying this rule to the different kinds of powers he found being actually exercised in medieval Italy, he concluded that the two lowest grades of merum imperium were held by right of office and hence could be delegated; the four highest degrees could not. How did he know that the powers contained in the two lowest grades were held by right of office, or indeed that they were part of merum imperium at all? To ask this question is to call attention to Bartolus's methodology and style of reasoning. His ingenious solutions to the problem of lawmaking by the Italian cities involved making a multitude of distinctions that were only in the most tenuous way connected with Justinian's texts. The standard description of the Roman law style of reasoning as being a

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[89] Id. at 137.

[90] Gilmore, supra, at 40.

method of strict, rather literal, deduction from an authoritative legal text clearly does not reflect Bartolus's style, which might be described as so rich an improvisation on a theme that the theme is hardly discernible. But it is a mistake, I think, to conceive of Bartolus as inventing upon a theme from the Corpus Juris. What he really was concerned with was not the Roman law codified by Justinian but the edifice of doctrine that had been erected by his medieval predecessors upon a few obscure terms found in that codification. The problems about lawmaking power he was trying to solve were not problems inherent in the ancient Roman texts but problems in the doctrine the glossators had created after reading those texts. This is a real difference between tasks the glossators and the post-glossators set for themselves and the way they approached those tasks: the glossators, particularly in the beginning, always argued from the original texts, and were concerned with their correct interpretation. But the difference between the two schools is overstated if it is cast in terms of literalness of interpretation. Bartolus would never have been faced with the doctrinal problems I have been discussing had the glossators been strict, literal interpreters of their texts and not richly inventive themselves.

II

Even the medieval civilians who held that the emperor was not alone in his right to legislate did not deny that he had the power to make law that was binding on all persons in the empire. The question I now wish to consider is whether the glossators and post-glossators believed there were any limits on the emperor's lawmaking power.

As we have seen, the Corpus Juris gave considerable cause for perplexity and disagreement on this question. A prominent maxim, found in several places in the Corpus Juris, provided that "what has pleased the emperor has the force of law."[91] This maxim, when read in conjunction with a second favorite absolutist text, "The emperor is not bound by the laws,"[92] provided a very plausible basis for concluding that there were no limits on the emperor's lawmaking power. Each of these maxims had counterparts--texts that cast doubt on the idea that imperial lawmaking was as simple as the mere announcement by the emperor of his desires.[93] According to these texts, before the emperor could promulgate a new general law he had to observe certain forms and obtain senatorial counsel and consent. In addition, there was the problem of the maxim Digna vox, which proclaimed:[94]

> It is a statement worthy of the majesty of the ruler for the emperor to profess himself bound by the law, so much is our authority dependent upon that of the law. And indeed it is

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[91]E.g., Inst. 1.2.6; D. 1.4.1.

[92]D. 1.3.31.

[93]Inst. 1.2.6; C. 1.14.8; C. 7.45.7.

[94]C. 1. 14.4.

the greatest attribute of the imperio to submit the principate to the laws.

Professor Brian Tierney has suggested that faced with this collection of not-entirely consistent authorities, the medieval jurist had to decide whether he favored an absolutist or constitutionalist theory of law.[95] A civilian clearly did have to decide whether the emperor was in any way limited in his actions, particularly in his right and power to make law, but to call any theory "constitutionalist" which held that he was in some respects limited is stretching the point.

As early as the second generation after Irnerius, the leading jurists at Bologna disagreed over whether there were any procedural requirements for valid imperial legislation. The texts at issue were those holding that what the emperor pleased was law, and C. 1.14.8, which stated:

> We think it is proper, Conscript Fathers, that where some exigency arises with reference to a matter, in either a public or a private case, which demands a general law, and not one included among those which are ancient, this should first be discussed by all the great nobles of our palace, as well as your most illustrious Assembly, and if it is approved by all of them, as well as by you, it should be then revised, and again examined by all met together, and if they agree to it, it should be read in the sacred consistory and be confirmed by the consent of all as well as by our authority.

Irnerius, in a gloss on C. 1.14.3, said that the true method of legislation required laws to be made in the manner set forth in the passage just quoted because law is an ordinance of the people, promulgated with the advice of the wise men of the community.[96] Among

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[95]"The Prince is Not Bound by the Laws." Accursius and the Origins of the Modern State, 5 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 379, 387 (1963).

[96]IRNERIUS, SUMMA CODICIS C. 1.14.3. In contendis legibus spectandum

later leading civilians, Rogerius and Azo agreed with Irnerius on this point, but the great second-generation Bolognese glossator Bulgarus argued that the Emperor Theodosius, in laying down the procedural requirements for general legislation, could not bind the emperors who succeeded him.[97] Accursius, in his Gloss on the Code, directly confronted this argument and took the view that the law requiring counsel and consent could not be changed except by a law adopted by a procedure in accordance with its own terms.[98]

The idea that the legislative action of the ruler was limited by the need for the counsel and consent of the great men of the community was not universally accepted by medieval civilians, because the law books of Justinian did not speak with one voice on the subject. But the idea was powerful for reasons outside the legal texts. In the Middle Ages, the conception developed that the ruler never received his authority without the election or recognition of the great men of the community (or of the community as a whole).[99] This idea, of course, fits neatly with the principle that valid legislation requires the counsel

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est, a quo et quomodo condi debeant...Quomodo contendae sint, hoc designat constitutio Theodosii et Valentiniani missa ad senatum (C. 1.14.8). Aliter enim hodie leges nisi secundum tenorum eius constitutionis. Iubet enim legis non aliter promulgandas esse, nisi causa necessaria hoc exposcat et antiquis sanctionibus non inserta. Et hoc faciendum est causa in auditorio a proceribus discussa, maxime a senatoribus, et cum eorum consilio ordinata. Et hoc recte, quia lex est constitutio populi cum virorum prudentium consulto promulgata. For discussion see R. W. CARLYLE & A. J. CARLYLE, 2 A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST 67-70 (1909).

[97]Gloss on C. 1.14.3.

[98]Tierney, Accursius..., supra, at 398.

[99]A. J. CARYLE, 3 A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST 147-148 (1915).

and consent of the great men. Even the emperors asserted the latter as a principle of government when it suited their purposes. Frederic Barbarossa, for example, in replying to certain demands of the pope, said that he could not give a complete answer until he had consulted the princes.[100]

We will examine the requirement of counsel and consent in greater detail when we consider the political and legal theory of the great common law jurist, Henry de Bracton.

If the medieval civilians were unable to agree about the proper resolution of the apparent contradiction between Quod principi placuit and the text requiring counsel and consent, they were at least as much at odds over the tension between Princeps legibus solutus est and the lex Digna. The first text said without equivocation that the emperor was not bound by the laws;[101] the lex Digna proclaimed it worthy of the majesty of the emperor for him to profess himself bound by the laws. The question the glossators had to address was whether the lex Digna meant that the emperor was legally obliged to act in accordance with established law or whether he was only morally obliged to do so.[102]

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[100]Id. at 154.

[101]Fritz Schulz demonstrated that in the classical period (until Diocletian) Roman law knew no general imperial dispensation from the law in general, only express statutory exemptions from specific legal rules. The emperors generally made it a matter of policy to observe the law even in those exceptional cases. Schulz argued that the classical law was not superseded on this point until the compilers of the Digest remodeled a classical text of Ulpian to make it appear that the emperor was universally exempted from the law. Bracton on Kingship, 60 ENGLISH HISTORICAL REVIEW 136, 158-162 (1945). Schulz suggested that the glossators knew nothing of the text's history and could only read it as holding that the emperor was not legally subject to the laws.

[102]For a discussion of the historical origins and meaning of the lex Digna see Schulz, supra, at 160-162.

There is a substantial modern literature on this question, and modern scholars are almost as divided over what the predominant medieval view was as the glossators were over what the problem texts meant. Fritz Schulz, for example, argued that the medieval civilians consistently taught that the emperor was only morally, not legally, bound by the laws:[103]

> The Bolognese legists of the twelfth and thirteenth century possessed such a thorough knowledge of the Corpus iuris civilis that they grasped Justinian's purpose without any difficulty. Accordingly their doctrine was: the emperor is legally not subjected to the law though he is morally bound to observe it. Differences of opinion apparently did not exist.

Brain Tierney, in contrast, has argued that the glossators did not take the position that the maxim Princeps legibus solutus est, read in conjunction with the lex Digna, freed the emperor from any legal obligation to obey the laws; they only held that he had no equal or superior who could coerce him into carrying out his legal obligations.[104] It is difficult to adjudicate between Professors Schulz and Tierney on this question. To some degree this is because the medieval glosses do not explicitly analyze the texts in the terms described by Schulz and Tierney. For example, the glossators may not explicitly interpret the lex Digna to mean that the emperor has a moral duty to act in accordance with the law, but it is difficult to read their glosses on the lex Digna and to avoid the impression that they did indeed think that the emperor had such a moral obligation. One gets

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[103]F. Schulz, Bracton on Kingship, supra, at 162-163.

[104]B. Tierney, Bracton on Government, 38 SPECULUM 295, 300-303 (1956).

that impression from Azo's gloss on the clause, "so much does our authority depend upon the authority of the law," in which he commented that because the emperor's authority was derived from the law (i.e, the lex regia), he should repay the law by keeping it.[105] Whether Azo intended this gloss to suggest that the emperor had a legal obligation to the law as well as a moral one is difficult to tell. Certainly there is no reason logically or theoretically why jurists might not hold a duty to be both moral and legal. I have found no gloss, and Schulz does not cite one, which explicitly took the position that the emperor's duty to obey the law was only moral and not legal.

Tierney is certainly correct to point out that the glossators frequently argued that the emperor had no superior who could coerce him into acting in accordance with the law, or punish him if he failed to do so.[106] It would be perfectly consistent with such an argument to also hold that the emperor was not legally bound to obey the law. Tierney appears to think, however, that because Accursius in his gloss on the maxim Princeps legibus solutus est refers to Digest 4.8.4,[107] the glossators held that the emperor was "loosed from the laws" only in the sense that legal machinery did not exist to bring him to justice if he

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[105]AZO, SUMMA CODICIS. "Imperator tamen unus successori suo imperare non potest sed suadere ut leges servet et suasionis causam proponere: ut quia de lege scilicet regia pendet auctoritas principalis: quia per eam populus transtulit omne imperium in principem, merito et ipse hoc retribuat legi ut servet eam."

[106]We will consider this argument more fully when we examine medieval doctrine on the emperor's duty to act in accordance with natural law.

[107]"For magistrates possessing higher or equal authority can in no way be coerced."

broke them,[108] and not in the sense that he had no legal duty to observe them. What Accursius says in full in the legibus solutus text is:[109]

> The prince is loosed from the laws. That is, from laws founded by another as at D. 4.8.4, or by himself as at D. 4. 8.51. Nevertheless by his own will he subjects himself as at C. 1.14.4 and Inst. 2.17.8 and also relevant are C. 6.23.3, C. 6, 61.7, D. 32.1.23 and Dist. C. 2 of the Decretum.

By putting all the interpretive weight on Accursius's citation of D. 4.8.4, Tierney's misreads this gloss. The focus should be on Accursius's comments and how he uses his legal authorities rather than on one of several cited texts. Accursius quotes the text at issue (the prince is loosed from the laws) and then he glosses it: the emperor is not bound by two kinds of laws, those made by others and those made by the emperor himself. Accursius did not, as Tierney supposes, cite D.4.8.4 for the proposition that equal or lesser magistrates would not compel the emperor to fulfill his duty to obey the law. Instead, he used that text as an application of the principle that the emperor was not bound by any laws made by someone other than himself, and particularly by laws made by someone who was his equal or inferior. In the next clause Accursius cited another Digest text, D. 4.8.51,[110] in support of his conclusion that Princips legibus solutus est also meant that the emperor was not bound by laws he himself had made. There is not the slightest hint that he thought that D.4.8.4 was the key passage

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[108]Tierney, "The Prince is Not Bound by the Laws," supra, at 390; Bracton on Government, supra, at 302-303.

[109]Gloss in D. 1.3.31. I am using Tierney's own translation.

[110]"But no one can either give an order or issue a prohibition to himself."

in understanding the legibus solutus maxim, or that he intended to distinguish between having a legal duty to obey the law and being subject to legal coercion. Furthermore, there is not the slightest hint that he thought that the emperor was in any way legally bound to obey the law. There is no need to draw inferences about his understanding of the lex Digna from his citation of D.4.8.4 because he explicitly states his understanding: the emperor by his own will subjects himself to the law. His submission to the law, then, is not something that is legally required of him, but something that he freely chooses to offer.

This understanding of the emperor's relationship to the law was not peculiar to Accursius, although it was perhaps more common for civilians to stress that the emperor should acknowledge the authority of the laws.[111] An even stronger statement of the emperor's freedom from the laws was not unknown. The fifteenth century civilian Jason de Mayno quoted Baldus[112] as having said that the emperor could do anything "supra ius, et contra ius, et extra ius".[113]

Thus far I have limited my discussion to the question of the emperor's duty to act in accordance with human law. That was not the only question the medieval jurists raised in regard to the meaning of the legibus solutus principle. Accursius, for example, in the gloss on D.1.3.31 that I quoted earlier, said that Distinction 8.c.2 of the Decretium was relevant to the legibus solutus maxium. This Distinction

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[111] For example, Odofredus, Comm, on D. 1.3.31.

[112]The great fourteenth-century student of Bartolus.

[113]Quoted in A. J. Carlyle, 6 A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST 83 (1936).

was a passage from Augustine, included by Gratian in the Decretum, which stated that "no one is allowed to act against natural law." Although this was a canon law text, it expresses quite accurately the universal civilian understanding of the authority of natural law. In fact, the medieval civilians' understanding of natural law owed more to Cicero, St. Paul, The Church Fathers, and the canonists than to the Roman legal texts.

It is true but misleading to claim, as some recent scholars have, that the Digest does not establish natural law as a law able to override the laws of the courts.[114] For purposes of political theory, the important Corpus Juris text on natural law was found not in the Digest but in the Institutes:[115]

> Now natural laws which are followed by all nations alike, deriving from divine providence, remain always constant and immutable (firma atque immutabilia): but those which each state establishes for itself are liable to frequent change whether by the tacit consent of the people or by subsequent legislation.

This text was consistent with (and probably influenced by) passages in Cicero which medieval jurists also knew. For example in DE REPUBLICA Cicero wrote of natural law:[116]

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting...It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed of its obligations by senate or people and we need not look outside ourselves for an expounder

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[114]See, eg., D. E. Luscombe, Natural Morality and Natural Law in THE CAMBRIDGE HISTORY OF LATER MEDIEVAL PHILOSOPHY 704 (1982).

[115]Inst. 1.2.11.

[116]DE REPUBLICA 3.22.

> or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, for he is the author of this law, its promulgator, and its enforcing judge.

These passages from the Institutes and Cicero express quite well the universal juristic understanding in the Middle Ages, both by canonists[117] and civilians, of the relationship of human law to natural law. No medieval jurist argued that the emperor, or anyone else, had the right to make law contrary to divine or natural law. That is not quite the same as saying, however, that if such laws were made by the emperor, the judges and other town magistrates were free to disregard them. As we have seen, Brian Tierney has argued that although natural law provided a moral basis for deciding whether a particular enactment was a good or a just law, it did not provide grounds for deciding that the enactment was invalid.[118] Tierney is undoubtedly correct in his view that the medieval civilians generally would have held that no judge had the right to annul even an immoral statute of the emperor, but he is wrong to suggest that the civilians believed such laws to be valid. Medieval jurists repeatedly said that laws contrary to divine or natural law were void.[119] The question that perplexed the medieval jurists was

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[117]Gratian, the father of the jurisprutence of the canon law wrote that "Natural law prevails in antiquity and in diquity over all laws." DEC. 5.1. He added, "whatever has been recognized by custom, or laid down in writing, if it contradicts natural law, must be considered null and void (vana et irrita)." DEC 8.2.

[118]B. Tierney, The Prince is Not Bound by the Laws." Accursius and the Origins of the Modern State, 5 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 378, 388 (1963).

[119]E.g., AZO, SUMMA CODICIS 1.22.2. "...si quiden laedatur in eu, quod competir de iure naturali, nullum est..."

not whether such imperial legislation was valid or legitimate but whether any political inferior to the emperor could repudiate it. When a judge handed down his legal decisions, for example, would he have to apply and enforce legislation that conflicted with natural law even though theoretically that legislation was invalid? Most medieval jurists held that magistrates and judges did not have the right to repudiate imperial legislation.

III

LEGISLATION, EQUITY AND INTERPRETATION

Professor Stephan Kuttner has written that the title (Concordia discordantium canonum) that Gratian, the father of the discipline of the canon law, chose for his compilation of authoritative texts, may be considered "a motto which sums up the signal achievements of the medieval mind in organizing the law of the Church into a harmonious system out of an infinite variety of diverse, even contradictary elements."[120] As we have seen, the medieval civilians were no less interested than the canonists in harmonizing their own authoritative legal texts, and the task facing them in doing so was no less daunting. Their goal of harmonization was not made easier by the fact that the Roman texts on statutes and their interpretation were themselves inconsistent. One of the most commonly used tools for achieving harmony between Justinian's texts was the concept of equity, but because the glossators could not agree about what equity was and the relationship it had to law and justice, its usefulness was limited as an aid to acheiving that end.

In one of the few discussions of the glossators' conception of equity in English, Professor Hessel Yntema asserted that in their view equity was superior to both justice and law--the fons et origo justitiae.[121] Professor Yntema cited no jurist for this proposition. If

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[120]S. Kuttner, Harmony from Dissonance: An Interpretation of Medieval Canon Law 3, in THE HISTORY OF DOCTRINES AND IDEAS IN THE MIDDLE AGES (1980).

[121]Equity in the Civil Law and the Common Law, 15 Am. J. Comp. L. 60, 75 (1967).

glossators had a clear understanding of the relation of equity to justice and law they typically did not express it.

Placentinus's unusally complete glossatorial treatment of this relationship is presented in the form of an allegory.[122] Iustitia is described as having Ratio (natural law) resting on her head, equity in her arms, and as being attended by the six civic virtues. Natural law, in this scheme, is higher than both Iustitia and Aequitas. It is not entirely clear whether Placentinus intends Iustitia to allegorize justice or the positive law.[123] Neither interpretation of the allegory supports Professor Yntema's assertions that the glossators viewed equity as superior to justice. Instead, it is equity's job to adapt Iustitia to individual cases: "her rulings override the letter of the law..."[124]

The fourteenth-century jurist Lucas de Penna had a different understanding of the relationship of justice, equity, and law, but Yntema's summary of medieval views did not reflect it either. Lucas derived the idea of law from justice, though not directly.[125] He saw equity as an epiphenomenon of justice. Justice was an ethical ideal not always easily realized in practice. It set a rather rigid standard and the actual conditions of human life were manifold. If applied rigidly,

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[122]QUAESTIONES DE IURIS SUBTILITATIBUS. The author is thought to be Placentinus, a mid-twelfth century student of Bulgarus. See H. KANOROWICZ, supra, at 181; J. A. CLARENCE SMITH, MEDIEVAL LAW TEACHERS AND WRITERS 26-27 (1975).

[123]Professor Kantorowicz thought that the figure was intended to allegorize the positive law of the community. STUDIES, supra, at 184.

[124]Id. at 185.

[125]My discussion of Lucas's theory of justice and equity is based on W. ULLMANN, THE MEDIEVAL IDEA OF LAW 35-43 (1949).

its requirements disturbed rather than harmonized human relations.[126] Therefore it could only be realized in actual life when joined with charity. Justice is transformed by charity into equity, which is the immediate source of law. Law that is not equitable is not law at all.[127] Because this is so, "equity is the criterion of all judicial and scientific interpretation" of law.[128] Equity, depriving strict law of its rigidity, operates as a safeguard against a mechanical, literal interpretation of law.

The treatments of equity by Placentinus and Lucas were more philosophical than those of the typical medieval civilian, and hence probably had more in common with discussions of equity by their contemporary philosopher-theologians than with those of their fellow jurists. This may be another way of saying that their understanding of equity owed more to Aristotle than to the legal texts of Justinian.

The most important medieval philosophical treatment of equity was undoubtedly that of Aquinas, who wrote:[129]

> As for epieikeia[130] being, as Aristotle says <u>one form of justice</u>, it is part of justice taken in the widest sense. In this way it clearly is a subjective part. And it is called justice in a wider sense than legal justice, because <u>epieikeia</u> is a norm over and above legal justice. <u>Epieikeia</u> thus stands as a kind of higher rule for legal actions.

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[126] <u>Id.</u> at 41.

[127] <u>Id.</u> at 42.

[128] <u>ID</u> at 43.

[129] SUMMA THEOLOGIAE, Q. 120, trans. T. C. O'Brien (1972).

[130] Aquinas earlier had said that <u>epieikeia</u> was the same as equity (<u>aequitas</u>).

> Hence: 1. Epieikeia is properly allied to legal justice, under which in one sense it is contained and which in another, it transcends. If we mean by legal justice one that obeys the law as to both the letter and the intent of the legislator--the more important factor--then epieikeia is the principal form of legal justice. If we restrict justice to obedience for the letter of the law, then epieikeia is not its part but is a part of justice in the broad sense and is divided against legal justice as supporting it.
>
> 2. As Aristotle says, Epieikeia is better than some forms of justice, i.e. a legal justice that observes the letter of the law. Since it is itself a form of justice, however, it is not better than all forms of justice.
>
> 3. It is the part of epieikeia to moderate something, i.e., the observance of the letter of the law.... Possibly with the Greeks the term epieikeia came to be transferred by way of simile to all forms of moderation.

In comparing equity (epieikeia) with justice (dikaiosune) Aquinas is directly following Aristotle in Nicomachean Ethics, Book V, Ch. 10.[131] He follows Aristotle in seeing equity a as a "form of the just, but a form superior to the legally just."[132] He expands the point in In V Ethic, lect. 16, asserting that the equitable is a form of the just, but better than legally just (iustum legale) and contained under the naturally just (iustum naturale) from which the legally just derives.[133] Because equity is contained in the naturally just it surpasses legal justice when legal justice departs from natural justice, but is identical to legal justice to the extent that legal justice conforms to natural justice.

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[131] Id., Appendix 2, at 321.

[132] Id.

[133] Id.

If, as Aquinas said, equity surpassed legal justice when law did not conform with natural justice, did that mean that men in general, and judges in particular, were to act according to equity rather than law when the two differed? Law, according to Aquinas, when in conformity to natural justice and equity, always worked toward the common good. But even when in the majority of cases it was advantageous for the common welfare for a law to be observed, in some cases it was harmful for it to be observed.[134]

> Since he cannot envisage every individual case, the legislator forms a law to fit the majority of cases, his purpose being to serve the common welfare. So that if a case crops up where observance would be damaging to that common interest, then it is not to be observed...
>
> All the same notice this: if observing the letter of the law does not involve a sudden risk calling for instant decision and to be dealt with at once, it is not for anybody to construe the law and decide what is or what is not of service to the city. This is only for the governing authorities who, because of exceptional cases, have the power to grant dispensations from the laws. If, however, the danger is urgent, and admits of no delay, or time for recourse to higher authority, the very necessity carries a dispensation with it for necessity knows no law.

Aquinas assumes that the legislator intends that every law serves the common interest but, like Aristotle, he concludes that it simply is not possible to frame a statute that will accomplish that end in every case. When in Q. 120, Aquinas says that equity and legal justice are not the same when justice is restricted to observance of the letter of the law, and does not include the intent of the legislator, the intent he has in mind is the assumed general interest to act for the common good. As a general principle, he makes it clear that where following

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[134]SUMMA THEOLOGIAE, Q. 96, 11.6.

the letter of a statute would avoid the accomplishment of the intention to serve the public good, the letter is not to be followed. Thus he follows Aristotle in holding that it is the particular function of equity to moderate the observance of the letter of the law, and that the "governing authorities" should prefer equity to the strict letter of the law.[135]

> Thus in these and similar cases to follow the word of law would be an evil; a good to follow what the meaning of justice and the public good deserved, letting the letter of the law be set aside. Epieikeia--we call it equity (aequitas)--is addressed to this end....

It has been argued that Aquinas was able to construct a coherent theory of equity because, writing as he did in the second half of the thirteenth century, he had the advantage of having available the inconsistent approaches of a variety of predecessors, including the early Bolognese civilians, and could weave their efforts into a blended tapestry.[136] Aquinas undoubtly benefited from the fact that others had traveled the road before him, but that cannot be the primary explanation for the coherence of his treatment of equity as compared with that of the civilians. After all, there were thirteenth and fourteenth century civilians who, like Aquinas, had the advantage of earlier efforts. The difference between Aquinas and the later Scholastics and the civilians is better explained by the nature of the tasks they had set for themselves and the constraints that each group understood applied to its enterprise. The civilians were concerned with exploring particular

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[135]SUMMA THEOLOGIAE II, II Q. 120, Art. 1, at 279.

[136]Raymond B. Marcin, Epieikeia: Equitable Lawmaking in the Construction of Statutes, 10. CONN. L. REV. 377, 390 (1978).

Roman legal texts, and with harmonizing them with other texts that touched on the same subject. They did not discuss equity in the abstract but as the term appeared in particular Roman texts. Their glosses were always constrained by the need to take into account texts that, at least on their face, appeared to be contradictory. Finally, the Roman texts on equity were not philosophical in nature. They were cryptic statements which were, in Justinian's collection, frequently abstracted from their original context. Even in their original context it is unlikely that they were imbedded in a general theory of justice, law, and interpretation.

By contrast, Aquinas was much freer to attempt a coherent theory of justice and law into which equity fit. It is true that he too based his theory on certain texts, but those were the texts of a philosopher who was attempting to construct a theory of law. Aquinas drew upon Roman legal texts, but he drew upon them selectively, quoting those that supported his point of view.[137]

Bound as they were to the texts of the Corpus Juris, it is not surprising that the glossators came to different conclusions about the nature and process of statutory interpretation, and the role that equity was supposed to play in that process. As early as the first generation after Irnerius at Bologna a division developed between two of the four leading doctors, Bulgarus and Martinus Gosi, over strict and equitable

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[137] For example, he quoted C. 1.14.5 ("...he doubtless acts contrary to the law who by obeying the letter goes against the legislator's intention (voluntas)...") but ignored texts such as D. 33.10.7 and D. 40.9.12.1 that did not support his point. The civilians could be selective too, but always did so at the risk that other jurists who knew the law books as well as they did would catch them out.

interpretation. This dispute polarized the medieval civilians; their contemporaries and later jurists tended to fall into one camp or the other. Considering the amount of heat that the dispute generated between the followers of the two men, the precise nature of the disagreement is not entirely clear. Both his contemporaries and modern scholars have sometimes talked as if Bulgarus had defended the strict letter of the law (ius strictum), allowing no place at all for equity, whereas Martinus was a committed champion of a free, equitable interpretation that was unfettered by what the law actually said. To a considerable extent our knowledge of this dispute is colored by the fact that the school supportive of Bulgarus quickly gained the ascendency. The followers of Bulgarus (who included Johannes, Azo, Accursius, and usually Jacobus, Hugolinus, and Odofredus) referred to themselves as nostri doctores and to the followers of Martinus Gosi (who included Vacarius, Rogerius, Placentinus, Pillius) as the Gosiani. The nostri doctores attacked the aequitas Martiana, calling it "ficta", "bursalis", "capitanea" - contemptuous expressions meaning "arbitrary".[138] The Gosiani defended their interpretation by maintaining that to stick to the strict letter of the law would be to do an injustice in the case at hand. In other words, the argument at least at this level of polemics, was still being conducted in the same terms taught to all students of rhetoric more than a thousand years earlier. Beneath the superficial invective, however, lay a more serious and thoughtful dispute about the nature and relationship of law and equity, and more agreement than frequently appears on the surface of the dispute.

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[138]H. KANTOROWICZ, supra at 88.

Let us begin with Irnerius, the supposed founder of the law school at Bologna and the teacher of both Bulgarus and Martinus. In his Summa Codicis Irnerius had set forth the general principle that statues must be given an equitable reading by judges:[139]

> Written laws are more richly understood when one pays heed to the insight they possess, and not when they are read out of harmony and equity. For it is only when the written laws are adjusted to the principle of equity that true legal rules can be gleaned from them by the judge.

Bulgarus, who is known to the modern legal scholar as the great medieval opponent of equity and equitable interpretation and defender of the ius strictum, did not always sound like an enemy of equity. In commenting on D.50.17.90, a quotation from the jurist Paulus that said that "In all matters and particularly those relating to the law equity is to be considered," Bulgarus followed Irnerius, and in doing so, appeared to take a position on equity that Martinus could have found no fault with. We must always, he asserted, consider carefully whether any law is equitable, and if not, it must be abolished. The judge must prefer equity to strict law.[140]

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[139]SUMMA CODICIS 1.14.6. "Conditae leges intelligendae sunt benignius ut mens earum servetur et ne ab aequitate discrepent: legitima enim praecepta tunc demum a iudice admittuntur, cum ad aequitas rationem accomodantur."

[140] "Aequitas in singulis causis et negotiis spectanda est, maxime tamen in iure, hoc est, inquirendum an decem pro decem reddi, vel aliquid simile, sit aequum. Verba gratia, lex Fusia, lex Papyia, quae quia aequitatem non habet, tolluntur: lex Falcidia, quae, quia continet aequitatem, confirmatur. Vel dicit, in omnibus professionibus et artibus, maxime in iuris professione.... Maxime autem in iuris professione, ut dixi, spectatur aequitas, ut iudex eam stricto iuri praeforat..." Quoted in II CARLYLE, supra, at 15-16.

One well might wonder, in view of this statement, why Bulgarus was considered by his contemporaries to have been the enemy of equity and equitable interpretation. In fact, Bulgarus' central dispute with Martinus was not over whether equity was important but over what it was and how it was to be known and understood. Irnerius had, in early glosses, distinguished between two kinds of equity, and this distinction, which had no textual basis in the law books of Justinian, was to dominate civilian discussions of equity for centuries. First, he said, there was aequitas constituta -- equity reduced to writing in the law. Second, there was aequitas rudis -- equity which had not yet been enacted into law.[141] Equity which had not yet been enacted into law, said Irnerius, was natural law. Because not all law was aequitas constituta, the law was sometimes inequitable and even unjust. In such a case the law had no force and the lawmaker was required immediately to abrogate it. The judge, however, had no power to modify law to make it accord with equity. Following C.1.14.1, Irnerius concluded that "[t]he interpretation that reconciles these differences (between equity and law), making equity into law, is reserved to the princes only."[142]

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[141]Apparently the concept of aequitas constituta came from Cicero, TOPICA 2.9. "Ius civile est aequitas constituta..."

[142]This gloss is reproduced as Appendix IV in P. VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE 148 (1968 ed.). The full gloss reads: " Cum equitas et jus in hisdem rebus versentur, differunt tamen. Equitatis enim proprium est id quod justum est simpliciter proponere. Juris autem idem proponere volendo, scilicet aliquantum auctoritate subnecti. Quod propter hominum lapsus multum ab ea distare contingit, partim minus quam equitas dictaverit continendo, partim plus quam operteat proponendo. Multis quoque aliis modis equitas et jus inter se differunt, cujus dissensus interpretatio, ut lex fiat, solis principibus destinatur."

Both Bulgarus and Martinus accepted their master's distinction between aequitas constituta and aequitas rudis, but Bulgarus' application of the distinction was much closer to the spirit of the Irnerian glosses, particularly on the question of who had the right to effect an equitable correction of the law through interpretation, and how and under what circumstances such correction might be done. When Bulgarus and his followers proclaimed that equity should prevail over strict law, they had in mind equitas constituta, not aequitas rudis. Thus for Bulgarus to say that the judge was to prefer equity to strict law was in no way to suggest that a judge was to modify or correct the law to conform to his understanding of what natural law or natural justice (aequitas rudis) required.[143] Instead, he began with the assumption that the Corpus Juris already was aequitas constituta. Because this was so, the task of seeing that equity prevailed over strict law could be accomplished by identifying the ratio legis (or purpose) of the text being interpreted.

Professor Peter Stein has argued that Martinus did not disagree with Bulgarus over whether judges or jurists could use aequitas rudis as a standard for the interpretation of written law; he agreed that jurists and judges were limited to the aequitas constituta in passing on the equity of a legal rule. The difference between them, Stein suggests, was that Martinus was willing to derive the equity pertaining to a given rule from the entire body of established law whereas Bulgarus wanted to narrow the issue down to the ratio legis for that particular rule.[144]

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[143]See P. Stein, Vacarius and the Civil Law in BROOKE, LUSCOMBE, et al, ed. CHURCH AND GOVERNMENT IN THE MIDDLE AGES 119, 124 (1976).

[144]Id. at 124, 125, 129.

Unfortunately, Professor Stein does not cite any texts in support of his understanding of the dispute. Scholars have differed over whether Martinus held that C.3.1.8[144] meant that a judge, as well as the emperor, could apply aequitas rudis in preference to the strict law.[146] No one, to my knowledge, has been able to produce a gloss of Martinus which specifically says that judges may correct or modify the written law on the basis of their understanding of the requirements of aequitas rudis.[147] Meijers based his conclusion that Martinus held that aequitas rudis was available to judges as a standard for interpreting the written law on a passage from Rogerius, the great student of Bulgarus, attacking "the stulti who would set their own opinion over the authority of the emperors clearly declared by law."[148] Meijers concluded that this passage could only have been directed at Martinus. Hermann Lange, on the other hand, took the view that Martinus did not teach that aequitas rudis could be applied by a judge. There was no gloss of Martinus, he said, supporting that view, and furthermore, Martinus's equitable interpretations were based on legal texts.[149]

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[144]Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem.

[146]Yntema, supra, at 76.

[147]See Id.

[148]Id.

[149]Ius aequum und ius strictum bei den Glossatoren 71 Zeitschrift der Savigny-Stiftunq fur Rechtsgeschichte 319, 328 et seq.

If Meijer's and Lange's evidence were all we had on this subject, a choice between these conclusions would have to be quite arbitrary. Even if we agreed with Meijers that Rogerius directed his strictures at Martinus, of itself this would not suggest that Martinus taught that judges might resort to aequitas rudis in interpreting legal texts. Martinus could have taught that jurists and judges were limited to aequitas constituta and still have drawn Rogerius' attack by his own liberal practice of interpretation. But the fact, if it is a fact, that there is no known text of Martinus upholding aequitas rudis as a standard of interpretation does not permit us safely to conclude that he did not teach that it could be used as such a standard. His extant glosses on the subject of equity are simply too few and too sketchy to permit a confident conclusion from the absence of a statement in the subject.

Evidence from other medieval jurists, however, inclines me toward the view that Martinus held that even unenacted equity could be a source of legal interpretation. The followers of Bulgarus--the nostri doctores -- developed a standard invective against Martinus and other jurists who accepted his views on equity (the Gosiani). Martinus' equity was said to be "capitanea", "bursalis", and "ficta". Sometimes only one of the contemptuous expressions was used,[150] sometimes two or more were used in combination.[151] The substantive point repeatedly made by this particular

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[150]For example, AZO, SUMMA CODICIS: "licet M. dedit ei ex sua ficta aequitate actionem."

[151]E.g., ODOFREDUS. DIG. VETUS 50.4.5. "Dixit Martinus, de sua ficta aequitate et bursali..." HOSTIENSIS, COMM. DECRET. C.9.10. "...et dicunt: hae est aequitas capitanea, aequites bursalis, martiniana." Quoted in F.C. VON SAVIGNY 4 GESCHICHTE DES ROMISCHEN RECHTS IM MITTELALTER 130, 131, Footnotes G and H. (1956 ed.).

invective directed at Martinus was that although it is true that equity is to be preferred to strict law, it is aequitas constituta -- a written equity devised by law -- and not some principle that a man may find in his heart or which comes from his own private judgment.[152] In other words, the standard understanding of jurists near Martinus's own time was that Marinus had taught that strict law was to be judged by aequitas rudis.

One of the most interesting medieval treatments of the relationship between equity and law was that of Vacarius, the 12th century glossator who brought the Bolognese learning on the civil law to England. Some scholars have suggested that Vacarius wavered between the positions of Bulgarus and Martinus; on the one hand, they say,[153] he stated the broad abstract principle "that even rude equity, where it is clear, is to be preferred to law."[154] But in his discussion of a particular case he sides with Bulgarus: "The interpretation of the judge, though it resolves the case between the parties, should not attempt to reconcile equity and law for fear of prejudicing the cases of others."[155]

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[152] AZO, SUMMA INST. 4.17.2: "Item in pronunciando potius debet servare aequitatem, quam ius scriptam. Quod est intelligendum de aequitate scripta, non de ea quam quis ex corde sua inveniat...BROCARDICA, RUB. lxxvi:" Certum est, aequitatem stricto iuri esse praeferendam . . . Aequitatem dico, lege, non cuiusquam ingenio excogitatam . . ." Quoted in II CARLYLE, supra, at 18, Footnotes 2 and 3.

[153] E.g., W. Cahill, Development by the Medieval Canonists of the Concept of Equity, 7 CATH. LAW. 112, 115 (1961).

[154] VACARIUS, LIBER PAUPERUM (De Zulueta, ed. 1929).

[155] Id. at 16.

The argument could be made that there is no need to read these two glosses as being inconsistent. Bulgarus, it quite correctly might be said, would have been perfectly happy to grant that aequitas rudis was superior to law. The question for him was whether the emperor alone could apply rude equity to the law or whether judges also had that power. Since Vacarius clearly said that judges were not to try to reconcile equity and the law, the case can be made that he said nothing inconsistent with the position of Bulgarus.

A plausible case might also be made, however, that in the two glosses Vacarius was taking a consistent Gosian position - one which accorded judges the right to interpret legal texts on the basis of rude equity. Vacarius did not simply state the abstract proposition, with which no medieval civilian would have disagreed, that rude equity (natural law) was superior to written human law; he added the clause "where it is clear". This, it might be argued, is a critical addition because it would be pointless, and even misleading, were it not contemplated that someone would actually, when rude equity was "clear," attempt to subject the written law to it. Equity could never be clear in the abstract; it could only be clear in a concrete case. This reading is abetted by the fact that Vacarius did not say that rude equity was superior to law, he said that it was to be preferred to law. "Preference" suggests action in a particular case rather than an abstract judgment about the merits of equity.

The second gloss presents more difficulty for an attempted Gosian interpretation, but it may not altogether resist one. A Gosian interpretation of the gloss would see it not as an attempt to bar judges

from resorting to equity in their interpretation the law but as a statement of the maxim non exemplis,[156] which proclaimed that judicial decisions were to be based on the law and not on precedents. The theory that developed from this maxim was that the interpretation of a judge in a case established the rule for that case, but for that case only, and in future cases the judge would again need to refer directly to the law to find the rule for the case; he could not rely on earlier interpretations. This interpretation of the second gloss becomes more convincing when the whole gloss is examined.[157] Vacarius begins by saying that the Emperor is the sole author and interpreter of the laws. The law comes from his will, but others (e.g. judges) may have to lay down the law by necessity. When a judge interprets the law his interpretation binds only the litigants before him, and then only to the extent that they have no legal remedy against him. So when Vacarius goes on to say that the interpretation of the judge should not attempt to remove any discrepancy between equity and law, his point is not that the judge may not take rough equity into account in deciding cases but that judicial interpretations bind no one but the present litigants.

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[156]C. 7.45.13. "Non exemplis sed legibus iudicandum est."

[157]Quoted in P. VINOGRADOFF, supra, Appendix V at 149.

"1. Conditor autem et interpres legum solus est imperator. Obseruare (1) autem leges debent tam ceteri quam imperator. Sed ipse ex propria uoluntate, ceteri ex necessitate. Item, iudicis interpretatio nulla intelligitur, preterquam si nullo ab his inter quos iudicat iuris remedio infirmetur, quo casu inter eos tantum tenet. 2. Generale (2) et nature congruum est ut eo modo soluatur quid quo constructum est. Imperatoris autem constitutionem inuito populo, immo etiam reclamante interdum, fieri contingit et ualet. Ergo et durat ut nec per consuetudinem abrogari possit, nisi prius imperium et potestatem a principe amotam populus recipiat."

Vacarius supplements this point in another gloss:[158] "Sed iudicis interpretatio unius de qua cognoscit tantum cause, imperatoris uero et consuetudinis interpretatio perpetua est..."

On balance, the second set of readings of the Vacarian glosses on equity seem more persuasive to me than the first. I have taken the trouble to suggest alternative readings in order to make clear some of the difficulties a modern scholar who seeks an accurate understanding of the jurisprudence of the medieval civilians. One of the most troubling aspects of modern scholarship on medieval jurisprudence is the widespread willingness of its practitioners to pronounce unequivocally "the" view of some jurist or school when in fact the evidential basis for the pronouncement is scanty and ambiguous.

Several commentators[159] have singled out as Vacarius's most original contribution to jurisprudence and political theory his two brief glosses on the word "alone" (solis) in C. 1. 14. 1 (which said that it was for the superior alone to interpret between law and equity).[160] C. 1. 14. 1 stated the orthodox glossatorial position on who could interpret the law in the light of aequitas rudis: the emperor alone. Vacerius read this text in a way that equated interpretation by custom with interpretation by the emperor.[161] The fact that the only important

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[158]LIBER PAUPERUM, supra, at 13.

[159]See F. DE ZULUETA, supra at lxxiv-lxxv; P. STEIN, supra at 129.

[160]"Inter aequitatem iusque interpositam interpretationem nobis solis et opertet licet inspicere."

[161]LIBER PAUPERUM, BK. I, TIT. 8: "(ii) Solis, id est, non alia persona propter consuetudinem. (iii)... 'solis' sq.: et non alie personae, nam et consuetudo optima est eguum interpres."

civilian who spent his scholarly career in England made customary interpretation of the law equivalent in authority to interpretation by the emperor is in itself significant, given England's reliance on unwritten, customary law. It is not the suggestion that custom could have a part in interpreting the law that makes this an important gloss; all medieval civilians knew and accepted the passage from the Roman jurist Paul in Digest 1.3.37 which said that "custom is the best interpreter of statutes." It is the implication that customary interpretation is on the same legal footing as imperial interpretation that gives the two Vacarius glosses their interest and significance.

Vacarius's greater younger contemporary, Azo, gave a much more orthodox reading of the place of custom in interpretation:[162]

> Who interprets laws? All who can make them; so, also, custom (consuetudo) interprets the law... So, likewise, a teacher (magister) of law interprets it. But that interpretation is not binding...So, likewise, a judge (iudex) interprets a law in a cause; and this, whether the doubt be on the words of the law, and how they are to be understood, or whether it is to be on a case which is not comprehended in the law. Nor is this inconsistent with the words of the Institutes, that it is lawful and proper for the emperor only to judge of the interpretation to be interposed between the strictness of the law and the wider rules of equity; for it is his sole prerogative to render an interpretation which shall be general and binding, and reckoned a part of the written law. But while customary interpretation is general and binding (necessaria), it is not to be reckoned a part of the written law, though anyone may by choice and for his profit reduce it to writing that it may be remembered.

Azo argued that interpretation by custom did not have the same status as the interpretation of the emperor because even though customary interpretation, unlike interpretation by the teachers of the law, was

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[162]SUMMA CODICIS 1.14.12. The translation is that of Hammond, Note B, Appendix, of F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS (3rd ed. 1880).

binding, it was not considered to be part of the written law. Customary interpretation was not a part of the written law, moreover, even when it had been reduced to writing. It was only a part of the written law if it had been promulgated as a statute by the emperor. By contrast, the emperor's interpretation was fully law. Pointing out that customary interpretation was not a part of the written law was another way of saying that customary interpretation had lower authority than interpretation by the emperor.

INTERPRETATION OF THE WRITTEN LAW

The glossators knew that interpretation of the written law was sometimes necessary; a series of Digest texts had said so categorically.[163] The Glossa Ordinaria of Accursius commented that the incompleteness of the written law was the result of the poverty of human invention, the mutability of human affairs, or the multiplicity of ways of wrongdoing.[164]

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[163]D. 1. 3. 10-13. "Neither statutes nor senatus consulta can be written in such a way that all cases which at any time occurs are covered; it is however sufficient that the things which happen very often are embraced. And, therefore, as to matters in which decisions of first impression have been made, more exact provision must be made either by interpretation or by a legislative act of our most excellent emperor. It is not possible for every point to be specifically dealt with either in statutes or in senatus consulta but whenever in any case their sense is clear, the president of the tribunal ought to proceed by analogical reasoning and declare the law accordingly. For, as Pedius says, whenever some particular thing or another has been brought within statute law, there is good ground for other things which further the same interest to be added in supplementation, whether this be done by interpretation or a fortiori by judicial decision."

[164]GLOSS AD D. 1. 3. 10. Scribi possunt. propter humani igenii exiguitatem...vel propter nimiam negotiorum mutabilitatem...vel propter hommum fidelitatem incognitam...vel propter delictorum multiplicitatem...

The need for interpretation was not always easily accepted in the Middle Ages, any more than it had been by the Emperor Justinian, who had attempted to ban any interpretation of his compilation of laws. In England, interpretation was classified with covin and fraud in one statute.[165] In Italy in the same period attempts were made by express statutory provision to prohibit interpretation.[166]

The glossators accepted the need for interpretation but, generally speaking, gave priority in interpretation to the lawmaker--to what we would call "authentic" interpretation. Interpretation by judge or jurist could only be justified by a delegation of authority from the emperor.[167] In his Summa Codicis, Azo moved from a discussion of the emperor and the law to the subject of interpretation in general. The emperor, he said, dealt with the settled law in four modes: by interpreting, by correcting, by restricting, and by enlarging it.[168] He added, "And the word 'interpreting' is a general one covering all those above mentioned, for he who corrects is said to interpret."[169] He gave examples of the use of the term interpretation, not only in regard to the settled law but also regarding wills, contracts, and other private

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[165] 10 Edw. III, stat. 3. "And every man...shall keep and observe the aforesaid ordinances and statutes...without addition, or fraud, by covin, evasion, and or contrivance ou par interpretation des paroles." Quoted in S. Thorne, Statuti in the Postglossators, 2 SPECULUM 452, 454 (1936).

[166] Thorne, supra.

[167] See Hammond, Authentic Interpretation, Note E, 254 in F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS (3rd ed. 1880).

[168] Hammond, On the Divisions of Interpretation by Various Authors, Note B, 233, 235 in LIEBER, supra.

[169] SUMMA CODICIS 1.1

instruments.[170] After noting that the emperor, customs, judges, and jurists may all interpret laws, he attempted to establish the proper place for interpretation by these respective instrumentalities:[171]

> "And it is well to consider when recourse may be had to any of the aforementioned methods. The doubt sometimes arrives upon some new state of facts, and sometimes upon a law. In the former case, the emperor must be consulted, provided he is at hand and accessible. But if not accessible, we must proceed by analogy. (De similibus ad similia.) If, however, the doubt be on the law, and there has been a certain understanding of it by custom, that understanding must be adhered to. But if the sense of the law has not been made clear by custom, then in this case also recourse must be had to the emperor, if accessible; otherwise the more favorable interpretation is to be taken. No interpretation is to be made against the party in whose favor any law has been made; but if any doubt arise which be the more favorable interpretation, we must adhere to the sense of the words. It might seem that this sense should take precedence of the other considerations, but this is not so, as has been shown. And the last resort is analogy."

Azo suggests that interpretation may be required in two classes of cases, when doubt arises about a new state of facts or a law. The first class is concerned with the fact, mentioned by Aristotle and in the Digest, that it is impossible for statutes to take into account every possible factual contingency. So, regarding the situation in which a particular set of facts is not specifically covered by the statutory language, Azo followed D.1.3.12 and declared that the interpreter should proceed by analogical reasoning -- the last resort.

The glossators generally distinguished between extending the words of a statute by analogy to cover the unforeseen case, and restricting an overbroad statute to permit exceptions to the general rule. Extension

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[170] Id. at 236.

[171] Id. at 237.

by analogy was regarded as an acceptable judicial function; carving exceptions out of the statutory rule was not. Rogerius, for example, in his Enodationes quaestionum super Codice held that restriction of a statute was reserved to the emperor.[172] The general rule for the analogical extension of a legal rule was expressed in a series of maxims, which were widely quoted by the civilians. Several of them passed unchanged into the English common law at some point in the Middle Ages. The glossators variously said that where there was the same reason (ratio), the same equity (aequitas),[173] or the same utility (utilitas), there was the same law. Azo limited the analogical extension of statutes to cases involving "eadem aequitatis ratio."[174] Accursius, in his Glossa Ordinaria, the great Gloss at the end of the period of the glossators, which pulled together important glosses from the time of Irnerius, stated the rule in terms of the ratio legis: "Quod ubi est eadem ratio, et idem ius."[175] A second variation of this maxium, still in common use in both civil and common law juristrictions, holds that "ubi eadem legis ratio, eadem legis disposito." On the other hand, it was held that "cessante ratione legis, cessat lex ipsa."

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[172]H. KANTOROWICZ, supra, at 140. Rogerius (d. 1170), a very important third generation glossator, is said to have been a student of Bulgarus but his thought had a districtly Gosian cast. His point about restrictions was repeated in his Summa, which was the first Summa on the Code according to tradition.

[173]As we will see, the concept of the "equity of a statute" gained great currency in discussions of statutory construction in the English common law of the sixteenth century.

[174]H. Kantorowicz, supra, at 140.

[175]R. SIMONDS, PHILOSOPHY AND LEGAL TRADITIONS: REFLECTIONS ON THE JURISPRUDENCE OF THE GLOSSATORS 7 (1973).

Although the general rule was that interpretation which extended the scope of a statute by analogy should be based on the reason of the statute, a provision of the Digest cautioned that "it is not possible to find an underlying reason for everything which was settled by our forebears."[176] Accordingly, the Glossa Ordinaria on this text stated: "A reason should be such as to be general and necessary, and wherever the reason applies so should the law...and [sometimes] on the other hand the law applies and not the reason..."[177]

As the medieval period came to an end, juristic recognition of the need for statutory interpretation grew. The Post-Glossators were practical jurists, interested at least as much in the everyday usefulness of law as in its perfect reason. Although the Corpus iuris civilis had attained recognition as a body of binding law in Northern Italy, the communes had developed an equally binding mass of legislative regulations.[178] These local statuti were frequently inconsistent with the Corpus Juris, and the Post-Glossators were compelled to develop an elaborate set of rules of statutory interpretation and construction in order not only to establish the meaning of particular statutes but also to establish their relation to the common law.

The Post-Glossators began with the assumption that the common law (the Corpus Juris) was subsidiary to the local statute law: only where there was no statutory provision was the matter left to the ius

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[176]D. 1. 3. 20.

[177]SIMONDS, supra, at 7.

[178]Thorne, Statuti in the Post-Glossators, supra, at 5.

commune[179] The normal civil law rule that permitted extension of a law by analogy when it did not cover the case at hand was not applied to the statuti. When the exact words of local statute did not cover the case the interpreter was not to proceed de similibus but to look to the ius commune for a solution. Casus omissus debet relinqui dispositioni iuris communis, casus omissus habetur pro omisso.[180] But because many statutes merely affirmed the ius commune, the general rule eventually developed "that statutes in derogation of the common law are to be literally and strictly construed, those which do not contradict common law may be interpreted other than strictly and exturbed beyond their literal word content."[181] Professor Thorne has shown how this rule, strictly applied, could lead to harsh results:[182]

> [A] statute fixed the punishment for adultery at 200 l, but fixed no punishment for fornication; at common law the punishment for adultery was death, for fornication the confiscation of half the offender's goods. In other words, at common law fornication was considered the less serious crime and therefore subject to the less drastic penalty, yet this milder punishment itself was still more severe than the statute's punishment for adultery, the graver offense. Should this statute, clearly contradictory to the common law, be interpreted literally, and the unprovided case left to the disposition of the common law, the lesser crime would lead to an absurdly large penalty.

Troublesome anomolies such as this led to a modification of the general rule that statutes in derogation of the ius commune were to be strictly construed and not extended beyond the literal meaning of their

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[179]Id. at 6.

[180]Baldus, D. 1. 1. Quoted in Thorne, supra, at 6.

[181]Thorne, supra, at 7.

[182]Id.

words: such statutes might be extended if their literal meaning led to absurdity.[183] Like many modern jurists who preach the doctrine of strict interpretation but somehow manage to reach the results they desire, the Post-Glossators did not admit that they were carving out an exception to their general rule. They distinguished between the permissible interpretatio declarativa, which supposedly merely declared what the statute meant solely from an analytical examination of its words, and the impermissible interpretatio extensiva, which extended the words of a statute by analogy.[184] Despite the fact that the Post-Glossators generally agreed that the purpose of a statute could be used by the interpreter only if it were written into the statute, even interpretatio declarativa had to look beyond the statute's words to its purpose if it was to have any hope of avoiding absurd interpretations.

The Post-Glossators referred to interpretion which extended a statute to cover an omitted case as interpretatio activa. Interpretation which read the words of a statute more narrowly than their apparent meaning they called interpretatio passiva. They did not describe the latter approach as one of restricting the words of the statute; instead, they saw it as a question whether the ius commune and its policy would be read into loosely written statutes.[185] They all agreed that it was necessary to read common law policy into such statutes. Incidentally, this was exactly the same fundamental rule of statutory interpretation that was to guide English common lawyers for

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[183] Id. at 8.

[184] Id.

[185] Id. at 9.

centuries, with the difference that the ius commune the English had in mind was not the law of Justinian.[186]

Among the glossators the predominant view had been that the statutes were to be interpreted strictly, and that close attention was to be paid to the verba legis. The post-glossators reacted to this approach to interpretation and stressed the importance of the ratio legis, pushing the wording and text into the background.[187] More than one post-glossator even took the position that it was permissible for an interpreter to ignore the words of a law so long as the meaning was preserved.[188]

Not all post-glossators went to this extreme. Professor Walter Ullmann has described in considerable detail the theory of legislation and interpretation of Lucas de Penna, who sought to give both the mens legis and the verba legis their due. Lucas, a post-glossator with a turn of mind more than normally philosophical for jurists of his time, developed a theory of interpretation as sophisticated as nearly anything produced by twentieth-century jurists. Though his theory was not free from problems, he demonstrated a depth of understanding about judicial interpretation that proponents of both strict construction and judicial activism on the United States Supreme Court might envy.

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[186] See, e.g., SIR EDWARD COKE, 1 INSTIT. Sect. 464: "...the surest construction of a statute, is by the rule and reason of the common law."

[187] ULLMANN, THE MEDIEVAL IDEA OF LAW, supra, at 119.

[188] Id. at 119, 120.

Lucas was careful to distinguish between legislation and judging. Legislation had to do with creating abstract rules of law; judgment involved applying rules that already existed to concrete factual situations.[189] Judges should not usurp the role of the legislators and make law themselves. Like all proponents of the ius strictum, Lucas held that it was the job of the interpreter to discover and apply the will of the legislator,[190] but he did not confine judges and other interpreters to a simple-minded literalism. He agreed with his contemporaries that finding justice by legal interpretation required "going behind the letter of the law and proceeding to its fundamental purpose and its principles."[191] He took account of a number of reasons why a rigid, literal interpretation would not work or do justice. In the first place, no law meets all situations.[192] This is the problem with statutory classifications that thoughtful jurists have recognized at least since the time of Aristotle: however faithfully the interpreter seeks to carry out the intention of the legislator, cases will arise in which it is unclear from the way the statute is written whether the legislator intended the statute to deal with the situation. This may be because the language of the law, read literally, does not include the case at issue even though there may be reason to think that the legislator intended to include just such a case. On the other hand, it may be that a literal reading would include a case that there is

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[189] Id. at 105.

[190] Id. at 112.

[191] Id. at 107.

[192] Id. at 107.

reason to believe the legislator did not wish to include. One reason such problems in interpretation arise is that the legislator may not have thought about the factual situation with which the interpreter now has to deal.[193] Alternatively, a legislator might have chosen to establish a legal rule by giving examples of the kinds of situations the rule was intended to cover.[194] This could leave the interpreter with the problem of deciding whether the factual situation he faced was of the type the legislator had intended to cover.

A different set of problems with literal interpretation stemmed from the nature of words and language. Words, according to Lucas, were only symbols of thoughts;[195] the interpreter's job was to get at the idea behind the word. Words are important for the interpreter because without them nothing can be known of the legislator's intention,[196] but they are not the interpreter's quarry -- the idea and intention behind them are. The problem is that words and language, however necessary to the interpreter, are treacherous. The legislator, lacking a perfect facility with language, may have used inartful expressions which did not exactly convey his intentions.[197] Even if the legislator had chosen precise and accurate words, the meaning of those words may have changed since the law was made.[198] These difficulties are magnified by the fact

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[193] Id. at 118. Lucas took the position that the judge could not refuse to decide a case because the law was silent on the matter.

[194] Id.

[195] Id. at 113.

[196] See id.

[197] See id. at 114.

[198] See id.

that legislators from time to time must use language that is indirect and subtle "in order to cover a wide range of conditions."[199]

We have here the makings of a major problem for Lucas's theory of judicial interpretation. On the one hand, Lucas was concerned to establish that only the legislator has the powers to make new law; the judicial interpreter must take the law as he finds it and lacks discretion to correct or amend it.[200] On the other hand, the logic of Lucas's description of the nature and problems of interpretation suggests that judges unavoidably must engage in something very much like law-creation. Lucas's solution is to fall back on the standard post-glossatorial theme of the ratio legis. He assumed that every law has lying beneath it basic reasons, ideas, and intentions. The job of the judicial interpreter is to uncover and apply them to the case before him. The trick is for the interpreter to find the mens legis and not to invent it.

As I understand Lucas, he proposed several means which, used in concert, might accomplish this end. First, an interpretation which reflects the mind and intention of the legislator and not of the interpreter must necessarily be constructed out of the words used by the legislator; this is perhaps the most important check on interpretive invention. But something more is needed because, as Lucas is at pains to show, words are not self-interpreting and at times can be misleading. Lucas believed not merely that individual laws had ideas, reasons, and

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[199]Id. at 116.

[200]Id. at 118.

intentions behind them; the entire body of law was a tissue of reason, and it was the job of the interpreter to make evident the "shining harmony" (consonantia luculenta) of the legal system.[201] As I understand Lucas, his idea was that the interpreter could use the reason that ran through the entire body of law to check the meaning of particular passages. If a particular interpretation was out of harmony with the reason of the law as a whole, it could be presumed inaccurate.

There is undoubtedly some merit in this solution. It may be seen as an elaboration of the canon of interpretation, which goes back at least to the ancient Roman rhetoricians, that particular passages should be read in the light of the work as a whole. But the solution also raises as many questions as it answers. If it is difficult to discover the idea or reason behind the words of a single passage, how is one to describe the task of knowing the reason behind an entire legal system? The idea that such an encompassing reason exists is counterintuitive for anyone who knows anything about the way legal systems develop. Lucas himself noticed that perplexities in the law naturally resulted from the fact that the body of law at any time consisted of particular enactments made at different times and places by different legislators.[202] What reason is there to suppose that all those bits of legislation, made for differing purposes and to solve different problems, could all mesh together in a shining harmony accessible to the human mind? Lucas' insistence that interpreters should be scientifically trained,[203]

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[201] Id. at 115.

[202] Id. at 115.

[203] Id. at 107.

knowledgeable about the recognized principles of interpretation,[204] and "fully versed in contemporary doctrine,"[205] suggests that he had a strong sense of the difficult nature of what he was proposing that interpreters do. Still, I am not at all sure that he fully grasped the nature of the kind of interpretation he was proposing.

This is particularly true if Ullmann's reading is correct, (and I think it is) and that Lucas was really proposing that interpreters should impose a harmony on the law.[206] This task undoubtedly would be more feasible than finding a harmony in the entire existing body of law, but it raises the question whether such an interpreter is not really engaging in law making. If a system of interpretation is to succeed in harmonizing an entire body of law, it necessarily will require bending and warping many individual enactments beyond their makers' recognition. In other words, amendment and correction will have to be done under the name of harmonization.

This flaw in Lucas' theory of law and interpretation applies to all medieval civilians. In fact, I think that it reveals the greatest blind-spot in all of medieval civilian jurisprudence. The civilians began with the assumption that the entire body of law was consistent, coherent, and harmonious. It clearly wasn't, and the only way it could be made to take on even a semblance of harmony was to amend, twist, or ignore parts of it. At the same time, the civilians insisted that only the legislators could amend or delete parts of the law. Their blind

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[204] Id. at 112.

[205] Id. at 107.

[206] Id. at 115.

spot was in failing to see that the great task they set for themselves--harmonizing the law--could not be accomplished without at the same time violating their great principle of the nature of human law: that law could only be made, changed, or abrogated by the legislator, and not by the judge or interpreter.

PART TWO

THE JURISPRUDENCE OF THE COMMON LAWYERS

INTRODUCTION

THE COMMON LAW

In a recent book the philosopher Alasdair MacIntyre asked his readers to imagine that a know-nothing political movement had taken power and abolished the teaching of science, executing all scientists and destroying all, or nearly all, scientific books and instruments. Later, people sought to revive science but all they possessed were fragments: parts of theories unrelated to other bits, instruments whose use had been forgotten, half-chapters from books, single pages from articles. All these fragments were reembodied in a set of practices under the old names of chemistry, physics, and biology. Men would use expressions such as "neutrino" in ways which would resemble in some degree the ways in which they had been used before scientific knowledge had been lost, but the fragments which remained of the former conceptual scheme would have irretrievably lost the context from which their significance derived.

The scholar who today seeks to reconstitute medieval common law thought is scarcely better situated than MacIntyre's hypothetical men trying to patch together the former system of scientific thought from half-remembered fragments. The problem, though, in respect to medieval common law is not that its literature was destroyed, but that with very few exceptions it never existed. As John Dawson observed with slight exaggeration, "From 1256, when Bracton stopped writing, until 1758 when Blackstone started his lectures at Oxford, there was scarcely a single book in English law that could be described as

literature."[1] Plucknett, only a little less comprehensively, also wrote of the late medieval period that, "Beside Littleton there is nothing whatever that can be called a law-book, to represent professional writing in his age. The Year Books alone remain...."[2] It is therefore with more than a little trepidation that I hazard this study of common law jurisprudence.

In the twentieth century, students of the common law attempting to identify the most distinctive characteristics of that legal system have tended to state some variation of the following formula: in contrast to civil law systems, which purport to be coherent bodies of rules deduced from general principles and arranged systematically in codes having fixed and authoritative texts, the common law is, and has been, a set of rules inferred from decisions in particular cases. It is frequently added that the legal reasoning employed in the common law is inductive, in contrast to the civil law's reliance on deductive reasoning. Finally, it may be said that the common law is judge-made law (or at least an allusion is likely to be made to the central role of judges in its development).

The distinctive character of the common law has not always been described in such terms. Professor J.G.A. Pocock has argued that there have been periods, particularly at the beginning of the seventeenth century, but generally in Stuart England, when nearly

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[1]J. DAWSON, THE ORACLES OF THE LAW 47 (1968). The primary exceptions to this statement are Littleton's TENURES, Fortescue's DE LAUDIBUS LEGUM ANGLIE, St. German's DOCTOR AND STUDENT, Finch's LAW, and Doddridge's THE LAWYER'S LIGHT.

[2]T.F.T. PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE 113-114 (1958).

everyone trained in the common law would have emphasized, instead, that the common law was common custom and that this custom was by definition immemorial (i.e. dating from time beyond memory). In its strictest form this vision of the common law held that this "Common Custome of the Realm" contained nothing that had been "made or created either by Charter, or by Parliament...but being only matter of fact, and consisting in use and practice, it can be registered no-where but in the memory of the people."[3]

I shall contend that there are elements of truth in both of these descriptions of the common law, but that neither will entirely withstand scrutiny as statements of actual historical practice. It is unquestionably true that judges have played a central role in the common law's development. It is also reasonably accurate that common law rules have usually been inferred from decisions in particular cases since the eighteenth century. However, as I shall show, it is not entirely safe to make the latter claim about the sources of the common law before approximately that date. As to common law as custom, scholars at least since Maitland's time, while conceding that the common law contained a large customary element, have insisted that the "common custom of the realm" was the custom or erudition of the central courts, not of the people.

The common law began to take shape in the twelfth century as the result of the centralization and specialization of the institutions of government--particularly of the king's courts--which occurred during the reign of Henry II. From the court coram rege slowly developed the

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[3]SIR J. DAVIES, Preface, IRISH REPORTS 252 (1615).

King's Bench, a regular court of law separate from the king's person and his council, and the Exchequer, out of which in turn grew the common bench or court of common pleas. In the thirteenth century the outstanding feature of these royal courts was that a hearing in them was special or extraordinary. In the ordinary course, justice was regarded as a matter for local communities. The court of common pleas, organized to provide royal remedies in private disputes, had no inherent power to act. An aggrieved party could not apply directly to it for justice, but had to obtain a Chancery writ.

Even though this need for a writ was an accidental result of the earliest business in common pleas being outside the ordinary course of things, the system of writs from remained the almost exclusive focus of legal learning and practice for centuries after the king's justice had ceased to be extraordinary. Originally, writs were drawn up on an individual basis to describe legal claims then commonly accepted. But gradually it became apparent that if the king through his Chancery could create new remedies by granting new writs, he would in effect have the power to make new laws without the concurrence of the estates of the realm. In reaction, it became settled doctrine that no new formula could be introduced except by statute. This meant that no one could bring his cause before the king's courts unless he could fit it within the scope of existing formulas. The result was that procedure determined substance. As Maitland put it, "the register of writs in the Chancery becomes the test of rights and the measure of law.... He who knows what cases can be brought within each formula knows the law

of England."[4] To quote Maitland again, the jurisprudence of England "took an exceedingly rigid and permanent shape; it became a commentary upon formulas."[5]

The predominant focus of the common law continued to be on procedure until at least the sixteenth century. From the time of Bracton until that of Littleton and Fortescue, English legal literature was almost exclusively devoted to helping the practitioner find his way through the artificial procedural thicket of the system of writs. The modern historian has concluded that such substantive rules of law as developed were, in Maine's phrase, slowly "secreted in the interstices of procedure." The insterstices of procedure are not promising as a field for the discovery of consciously-developed legal theory, and in fact the Year Books yield little jurisprudence. I did not merely assume this, however. To obtain a sense of what practicing lawyers and judges were concerned with and talking about I read some 1600 Year Book cases, abstracting anything that appeared to be of theoretical interest. My method was to read all the cases reported for years selected at about ten year intervals. In addition, a few medieval common lawyers did from time to time turn their attention to legal theory, and it is largely from them that we will seek answers about the legal theory of the medieval common lawyers.

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[4]F. W. MAITLAND & F. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 101 (1915).

[5]Id.

For my study of common law jurisprudential thought in the sixteenth and seventeenth centuries, I read every legal treatise and law tract available to me from that period, and nearly all the reported cases of both centuries.

CHAPTER FIVE

THE JURISPRUDENCE OF THE COMMON LAWYERS BEFORE THE FOURTEENTH CENTURY

THE MEDIEVAL TREATISE WRITERS

Given their preoccupation with a quite-consciously created system of writs, it is interesting that English lawyers from Glanvill to Blackstone, when making general theoretical statements about the nature of the common law, frequently described it as "custom." Some historians have concluded that running through these references to custom is a common conception of law--an essentially medieval and feudal view of law as something that is not made or created by the king, or even the people, but which grows up and exists as a part of national life.[1] In this organic conception, law was a body of existing custom which could only be "declared" by kings, judges or Parliament; it came to be looked upon as fundamental in the sense that inconsistent rules were void.[2] More recent historians have held that scholars such as Fritz Kern, McIlwain, and Carlyle misinterpreted medieval and early modern statements about custom in arriving at this view. In large measure this reinterpretation is based on the modern historian's belief that law actually was created throughout the times in question.[3]

My aim here, and in the three following chapters, is to take the most thorough look yet taken at the relation of the common law to custom. I shall proceed chronologically, looking both at what

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[1]See, e.g., 3 R.W. & A.J. CARLYLE, A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST 41-45 (1916).

[2]C.H. McIlwain, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY vii (1910).

[3]See, e.g., Cheyette, Custom, Case Law, and Medieval "Constitutionalism": A Re-Examination, 78 POLITICAL SCIENCE QUARTERLY 362-390 (1963); D. HANSON, FROM KINGDOM TO COMMONWEALTH (1970).

selected leading figures of the common law had to say about the subject in their theoretical writings and at what lawyers and judges said in open court in reported cases. In writing about custom and the common law my larger purpose is to contribute to a better understanding of the history of English legal theory. Because a minimally satisfactory treatment of the place of custom in English law must take into account not only the relation of custom to the common law, but of custom to case law and to legislation, my sections on precedent and statute law are essential to my treatment of custom and the common law.

The earliest textbook on the common law, attributed to Ranulph de Glanvill, was written shortly after 1187.[4] Virtually everything Glanvill had to say of a theoretical nature concerning the common law is set out in a few short paragraphs in his Prologue. These remarks are worth quoting in their entirety:[5]

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[4]TRACTATUS DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE. I have used the 1983 edition edited and translated by G.D.G. Hall.

[5]Id. at 1-3. Regiam potestatem non solum armis contra rebelles et gentes sibi regnoque insurgentes oportet esse decoratam, sed et legibus ad subditos et populos pacificos regendos decet esse ornatam...Legibus namque regni et consuetudinibus de ratione introductis et diu obtentis et, quod laudibilius est, talium uirorum licit subditorum non dedignatur regni consilio, quos morum grauitate in peritia iuris et regni consuetudinibus peritissimos suae sapientiae et eloquenciae praerogativa alios novit praecellere, et ad causas mediante iustitia decedendas et lites dirimendas, nunc severius, nunc mitius agendo, prout viderint expedire, ipsis rei argumentis, comperit cum ratione promptissimos. Leges namque Anglicanus licit non scriptas leges appellari non videatur absurdum, cum hoc ipsum lex sit, "quod principi placet legis habet vigorum," eas silicet quas super dubiis in concilio definiendis, procerum quidem consilio et principis accedente auctoritate, constat esse promulgatas. Si enim ob solum scripturae defectum leges minime censerentur, maioris proculdubio auctoritatis robur ipsis legibus videretur accomodare scriptura quam vel decernentis equitas aut ratio statuentis. Leges autem et iura regni scripto universaliter concludi nostris temporibus omnino quidem

Not only must royal power be furnished with arms against rebels and nations which rise up against the king and the realm, but it is also fitting that it should be adorned with laws for the governance of subject and peaceful peoples... for truly he does not scorn to be guided by the laws and customs of the realm which had their origin in reason and have long prevailed; and, what is more, he is even guided by those of his subjects most learned in the laws and customs of the realm whom he knows to excel all others in sobriety, wisdom and eloquence, and whom he has found to be the most prompt and clear-sighted in deciding cases on the basis of justice and in settling disputes, acting now with severity and now with leniency as seems expedient to them. Although the laws of England are not written, it does not seem absurd to call them laws--those, that is, which are known to have been promulgated about problems settled in council on the advice of the magnates and with the supporting authority of the prince--for this also is a law, that "what pleases the prince has the force of law." For if, merely for lack of writing, they were not deemed to be laws, then surely writing would seem to supply written laws a force of greater authority than either the justice of him who decrees them or the reason of him who establishes them. It is, however, utterly impossible for the laws and legal rules of the realm to be wholly reduced to writing in our time, both because of the ignorance of scribes and because of the confused multiplicity of those same laws and rules. But there are some general rules frequently observed in court which it does not seem to me presumptous to commit to writing, but rather very useful to most people and highly necessary to aid the memory. I have decided to put into writing at least a small part of these general rules, adopting intentionally a commonplace style and words used in court in order to provide knowledge of them for those who are not versed in this kind of inelegant language.

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impossibile est, tum propter scribentium ignoranciam tum propter eorundem multitudinem confusam. Verum sunt quedam in curia generalia et frequentius usitata, que scripto commendare non mihi videtur presumptuosum, sed plerisque perutile et ad iuvandum memoriam admodum necessarium. Horum utique particulam quandam in scripta redigere decrevi, stilo vulgari et verbis curialibus utens ex industria ad eorum noticiam comparandam eis qui in huiusmodi vulgaritate minus sunt exercitati.

There are several problems regarding Glanvill's use of the phrase "the laws and customs of the realm." He does not in terms equate "law" and "custom", but neither is it clear that he means to distinguish between them. In Glanvill's time several terms for law could be used interchangeably, and more to the point, these particular terms were frequently linked together to mean the whole mass of legal rules enforced by the temporal courts.[6]

It is true, as Maitland pointed out, that lex and consuetudo were not in all contexts exactly equivalent words; they each could have specific and technical meanings. The question for us is whether Glanvill gives any indication that, in using the phrase "laws and customs," he intended that either word should have such a limited meaning. It must be kept in mind that the aim of the Prologue is not to present an analysis of the various elements of English law, but to provide a justification for putting a part of the unwritten body of English law into writing. In the course of this very brief justification Glanvill refers to English law in four different ways: first, he states that the king does not scorn to be guided by the leges et consuetudines of the realm; next, he says that the king is guided by those learned in the iura et consuetudines of the realm; third, that the English leges, though not written, still may properly be called leges and finally, that it is impossible that all the leges et iura should be entirely reduced to writing. There is no hint that

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[6]"[T]he whole mass of legal rules enforced by the English temporal courts can be indicated by such phrases as ius regni, lex regni, lex terrae, ius et consuetudo regni, lex et consuetudo, leges et consuetudines, lei de la terre, lei et dreit de la terre." F. POLLOCK & F.W. MAITLAND, 1 THE HISTORY OF ENGLISH LAW 175 (wd ed. 1952).

Glanvill means to distinguish any of the four terms he uses for English law from the others. In using the word consuetudo Glanvill has told us nothing about his understanding of the particular place of custom in the English legal order.

It might be argued, of course, that Glanvill saw all English law as customary since he states categorically that "the laws of England are not written." Such an argument would depend upon the assumption that Glanvill's jurisprudence was taken from Roman models. His jurisprudence clearly did take Roman legal theory as a starting point.[7] When he wrote, "Although the laws of England are not written, it does not seem absurd to call them laws," he was responding not only to the general medieval legal culture outside of England, which assumed that laws were normally to be found in an authoritative written text, but also to several specific texts in the Corpus Juris. Texts are found in both the Digest[8] and the Institutes[9] which divide all law into the written (ius scriptum) and the unwritten (ius non scriptum). By ius non scriptum more is meant in these texts than long-continued usage; the term is used in a literal sense to refer

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[7]The entire Prologue owes much to the Corpus Juris of Justinian. The first sentence of Glanvill is a variation on the first sentence of the INSTITUTES, which reads: "The imperial dignity should not only be supported by arms, but guarded by laws, that the people may be properly governed in time of peace as well as war..." Several of the central ideas of the Prologue are drawn from the INSTITUTES and the DIGEST. The very framing of the discussion of the nature of English law is based on the INSTITUTES: law is discussed in terms of its relation to royal power. Glanvill does not, however, slavishly follow Justinian either in respect to the content of his legal theory or in regard to the arrangement of the rest of his treatise.

[8]D. 1. 1. 6. 3.

[9]Inst. 1. 2. 3.

also to enacted laws and opinions of jurists which are not recorded in writing. Glanvill's claim that "it does not seem absurd to call them [the unwritten English laws] laws" does appear to be based on several passages in the Corpus Juris of Justinian which treat of usage as law. In D.1.3.32.1. it is said that "immemorial custom is observed as a law, not unreasonably; and this is what is called the law according to usage."[10] C.8.53.2 states that "Consuetudinis ususque longaevi non vilis auctoritas est..."[11]

Despite Glanvill's apparent use of these texts on immemorial custom to justify calling English unwritten laws leges, he does not speak of the unwritten laws of England in terms of long usage. Instead, the English laws which he says are entitled to be called leges are those "which are known to have been promulgated about problems settled in council on the advice of the magnates and with the supporting authority of the prince..." This passage, it seems to me, makes untenable the standard interpretation of Glanvill, which holds that when he spoke of the unwritten laws of England, he had in mind immemorial usage. What he seems to have had in mind, instead, were the conscious enactments and decisions of the king, on the advice of the council, which had not been recorded in writing--something different altogether. Glanvill's addition, at the end of the sentence just quoted, of the famous Roman maxim "what pleases the prince has

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[10]Inveterata consuetudo pro lege non immerito custoditur, et hoc est ius, quod dicitur moribus constitutuum.

[11]For additional Roman statements that custom may have the authority of lex see Inst. 1.2.9, C. 8.53.1, and C. 8.53.3.

the force of law,"[12] is only perplexing if one mistakenly assumes (as several distinguished scholars have done) that Glanvill has been talking about an immemorial custom which the king, in or out of council, can neither create nor change.

In place of the criteria of immemorial custom, as McIlwain et al. understood them, Glanvill discussed four criteria for leges: settlement in the council of the magnates, promulgation by the authority of the prince, the justice of the prince in decreeing them, and the reason of the prince in establishing them. There is no textual evidence that Glanvill looked upon custom as fundamental law, either in the sense of making void contrary rules or of controlling the acts of the king. Indeed his quotation from the Institutes suggests that if Glanvill saw custom as a form of law, then its standing was subject to the will of the king, exercised with the advice of his council.

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[12]D. 1.4.1 and Inst. 1.2.6. Quod principi placuit, leges habet vigorem.

BRACTON

The next English treatment of law and custom is to be found in Bracton's great unfinished treatise, On the Laws and Customs of England, on which he stopped work in approximately 1256. Following Glanvill's example, Bracton begins by arguing that although English law is unwritten, it nonetheless deserves the title of law:[13]

> Though in almost all lands use is made of the leges and the jus scriptum, England alone uses unwritten law and custom. There law derives from nothing written [but] from what usage has approved. Nevertheless, it will not be absurd to call English laws leges, though they are unwritten, since whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the res publica, the authority of the king or prince having been first added thereto, has the force of law. England has as well many local customs, varying from place to place, for the English have may things by custom which they do not have by law, as in the various counties, cities, boroughs, and vills, where it will always be necessary to learn what the custom of a place is and how those who allege it use it.

Eminent scholars have disagreed radically over the interpretation of this passage.[14] Historians like McIlwain, who have asserted the

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[13]2 BRACTON. ON THE LAWS AND CUSTOMS OF ENGLAND 19 (S.E. Thorne trans. 1968). "Cum autem fere in omnibus regionibus utatur legibus et iure scripto, solo Anglia usa est in suis finibus iure non scripto et consuetudine. In ea quidem ex non scripto ius venit quod usus comprobavit. Sed non erit absurdum leges Anglicanas licit non scriptas leges, appellare, cum leges cum legis vigorem habeat quidquid de consilio et consensu magnatum et rei publicae communi sponsione, auctoritate regis sive principis praecedente, iuste fuetit definitum et approbatum. Sunt etiam in Anglia consuetudines plures et diversae secundum diversitatem locorum. Habent enim Anglici plura ex consuetudine quae non habent ex lege, sicut in diversis comitatibus, civitatibus, burgis et villis, ubi semper inquirendum erit quae sit illius loci consuetudo et qualiter utantur consuetudine qui consuetudines allegant." Part of this passage is clearly a paraphrase of Glanvill, but there are significant additions and modifications.

[14]The important secondary literature on Bracton's jurisprudence includes J. SELDEN, AD FLETAM DISSERTATIO (D. Ogg ed. 1925); C. GUTERBOCK, BRACTON AND HIS RELATION TO ROMAN LAW (B. Coxe trans.

identity of custom and law in medieval England, have seen this passage as the locus classicus of that doctrine.[15] Others, who believe that the medieval tendency to identify law with custom has been overstated, see in this passage proof of their point of view. Brian Tierney, for example, has argued that Bracton in this passage quite clearly distinguishes between leges and consuetudines: "Leges constituted the body of laws common to the whole kingdom; consuetudines were local customs."[16] Bracton having thus defined his terms, Tierney continues, there is no reason to suppose that he used them in different senses elsewhere in his work. This interpretation has a certain textual plausibility, particularly if one ignores the common law tradition, running at least from the late thirteenth century to Blackstone, of explicitly distinguishing between general and particular (or local) customs--a tradition widely thought to have its foundation in

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1866); F.W. MAITLAND, SELECT PASSAGES FROM THE WORKS OF BRACTON AND AZO (1895); 1 F. POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW (1895); J.N. FIGGIS, THE DIVINE RIGHT OF KINGS (1896); C.H. MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY (1910); F.KERN, KINGSHIP AND LAW IN THE MIDDLE AGES (S.B. Chrimes trans. 1939); 3 A.J. CARLYLE, A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST (1916); L. EHRLICH, PROCEEDINGS AGAINST THE CROWN (1216-1377), 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (P. Vinogradoff ed. 1921); C.H. MCILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST FROM THE GREEKS TO THE END OF THE MIDDLE AGES (1932); C.H. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN (1940); H. KANTOROWICZ, BRACTONIAN PROBLEMS (1941); C.H. McIlwain, The Present Status of the Problem of the Bracton Text, 57 HARV. L. REV. 220 (1943); F. Schulz, Critical Studies on Bracton's Treatise, 59 L.Q. REV. 172 (1943); F. Schulz, Bracton on Kingship, 60 ENGLISH HISTORICAL REV. 136 (1945); G. Lapsley, Bracton and the Authorship of the 'addicio de cartis', 62 ENG. HIST. REV. 1 (1947); T.F.T. PLUCKNETT, THE LEGISLATION OF EDWARD I (1949) G. LAPSLEY, CROWN, COMMUNITY AND PARLIAMENT IN THE LATER MIDDLE AGES (H. Cam & G. Barraclough eds. 1951); E. LEWIS, MEDIEVAL POLITICAL IDEAS (2 vols. 1954); G.L. Haskins, Executive Justice and the Rule of Law, 30 SPECULUM (1955); T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (5th ed. 1956); E. KANTOROWICZ, THE KING'S TWO BODIES (1957); T.F.T. PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE (1958); B. Tierney, Bracton on Government, 38 SPECULUM 295 (1963); F.

Bracton.[17]

However, there is another reading of this passage which seems just as textually plausible and yet conforms to the standard common law treatment of custom. When Bracton writes "England has as well many local customs" there is no reason to suppose that his intention is to provide a limited, technical definition of the word consuetudo. Had this been his intention he could have used, as did his model, Glanvill, in respect ot the word leges, a limiting phrase to point it out.[18]

> Although the laws of England are not written, it does not seem absurd to call them leges--those, that is, which are known to have been promulgated about problems settled in council on the advice of the magnates...

Instead it seems just as plausible to suppose that Bracton was merely making a distinction between general and local custom--that he intended that general customs be understood as included in his

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Cheyette, Custom, Case Law, and Medieval "Constitutionalism", 78 POLITICAL SCIENCE QUARTERLY 1. 362 (1963); E. LEWIS, King Above Law? "Quod Principi Placuit" in Bracton, 39 SPECULUM 240 (1964); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (1969); D. HANSON, FROM KINGDOM TO COMMONWEALTH (1970); C. Nederman, Bracton on Kingship Revisited, 5 HISTORY OF POLITICAL THOUGHT 61 (1984).

[15]See, e.g., CARLYLE, A HISTORY OF MEDIEVAL POLITICAL AND LEGAL THEORY, supra, at 42; MCILWAIN, THE GROWTH OF POLITICAL THOUGHT, supra, at 102, and CONSTITUTIONALISM, supra, at 69-70; Haskins, Executive Justice, supra, at 532.

[16]B. Tierney, Bracton on Government, 38 SPECULUM 295, 309 (1963). This argument is seconded in HANSON, supra, at 107.

[17]Tierney's interpretation does have this in its favor: as we shall see, in almost all instances in which reference is made to "custom" in the Year Books and named law reports, that reference is to local, particular custom.

[18]GLANVILL, supra.

discussion of the unwritten laws of England. On this reading the emphasis in the passage relied on by Tierney should be on the word "local", pointing out a distinction from customs governing the entire realm.

Professor Hanson, one of the strongest adherents of the Tierney interpretation, has in a different context admitted that in the late medieval period four major uses of the word custom were current. The first of these was as a general term synonymous with law; the second referred to local usage.[19] As we have seen, Maitland emphatically held that several words for law, including consuetudo, were used interchangeably: "In practice there is no careful distinction between ius and lex; the whole mass of legal rules enforced by the English temporal courts can be indicated by such phrases as ius regni, lex terrae, ius et consuetudo regni, lex et consuetudo, leges et consuetudines...."[20] Thus it was at least possible in the legal language of Bracton's day to speak of "law" in a way that included custom.

If Tierney misunderstood Bracton's use of the word consuetudo, he was more mistaken regarding the word leges. He argued that Bracton's point in the passage we are considering was to define these two terms. Once the meaning of leges was established, he continued, "there is no reason at all to suppose that Bracton was using the word leges in some quite different sense" in other passages in his work. This argument

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[19]HANSON, supra, at 193.

[20]1 F. POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW 175 (2D ED. 1952).

is not compelling for at least two reasons. First, there is no reason to suppose that Bracton resisted the universal juristic practice of his time in using the word leges in a variety of ways. Second, Bracton included a clearly labeled passage of definitions a few paragraphs farther along:[21]

> What law is and what custom. We must see what law is. Law is a general command, the decision of judicious men, the restraint of offenses knowingly or unwittingly committed, the general agreement of the res publica. Justice proceeds from God, assuming that justice lies in the creator, [jus from man], and thus jus and lex are synonymous. And though law (lex) may be in the broadest sense be said to be everything that is read (legitur) its special meaning is a just sanction ordering virtue and prohibiting its opposite. Custom, in truth, in regions where it is approved by the practice of those who use it, is sometimes observed as, and takes the place of lex. For the authority of custom and long use is not slight.

This passage rests heavily on Roman law. The first part, in which lex is defined, is an almost exact quotation from D.1.3.1, which reads:

> Lex est commune praeceptum, virorum prudentum consultum, delictorum, quae sponte vel ignorantia contrahuntur, coercitio, communis reipublicae sponsio.

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[21]BRACTON, supra, at 22. "Quid sit lex et quid consuetudo. Videndum est etiam quid sit lex. Et sciendum quod lex est commune praeceptum virorum consultum prudentium, delictorum quae sponte vel ignorantia contrahuntur coertio, rei publicae sponsio communis. Item auctor iustitiae est deus, secundum quod iustitia est in creatore. Et secundum hoc ius et lex idem significant. Et licet largissime dicatur lex omne quod legitur, tamen specialiter significat sanctionem iustam, iubentem honesta, prohibentem contraria. Consuetudo vero quandoque pro lege observatur in partibus ubi fuerit more utentium approbata, et vicem legis obtinet. Longaevi enim usus et consuetudinis non est vilis auctoritas.

Bracton's discussion of ius and its connection with lex is taken from Azo: "auctor iuris est homo, acutor iustitiae est deus, et secundum hoc ius et lex idem significant."[22] Bracton's treatment of custom in this passage, while itself not quite a definition, does set forth the relation of custom to lex. In this, too, Bracton is following Roman models. His treatment parallels an excerpt of Julian in the Digest:[23]

> In any kinds of cases in which there are no written laws the rule which ought to be observed is that which has come to prevail by use and custom.... 1. Immemorial (inveterata) custom is observed pro lege, not unreasonably; and this is what is called the law established by usage.

Bracton's Roman models did not limit the use of the term "custom" to local customs, and it seems highly unlikely that he had only local customs in mind in this passage. If the Tierney thesis is accepted, one must ask what Bracton thought about the relationship of general customs to law. That general customs held no place in his legal system seems inconceivable, considering his learning in Roman law[24] and the common medieval association of law with custom. But if it is assumed that he included general customs in the "unwritten law" which Tierney argues that he distinguished from "custom", then the Tierney and Hanson contention becomes relatively trivial. What interest it retains lies largely in its use in rebutting McIlwain's argument that

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[22]AZO, SUMMA INST. 1.1

[23]D.1.3.32. De quibus causis scriptis legibus non utimur, id custodiri opertet, quod moribus et consuetudine inductum est... 1. Inveterata consuetudo pro lege non immerito custoditur et hoc est ius, quod dicitur moribus constitutum." Also see C. 8.53 and INST. 1.2.9.

[24]In my section, infra, on precedent and case law I discuss the evidence that Maitland greatly underestimated Bracton's learning in, and reliance upon Roman law.

because the word consuetudo does not appear in Bracton's passage[25] setting forth the power of the king to cause the "laws statutes and assizes" (leges et constitutiones et assisas) to be observed, custom must therefore be excluded from the king's authority.[26] McIlwain was concerned to establish the standing of custom as fundamental law, beyond the power of the king, but this particular argument from omission has never had high standing. In any event, power of enforcement in no way implies power to alter or abolish.

If the Tierney interpretation cannot be maintained, what may we make of the view of McIlwain and Carlyle that Bracton conceived of all English law as custom? Let us return to our original Bracton text. Bracton follows Glanvill in urging, with implicit Roman authority, that "it will not be absurd to call English laws leges, though they are unwritten." More directly to the point, he also says that "England alone uses unwritten law and custom.[27] There law derives from nothing written [but] from what usage has approved."[28] This last-quoted sentence marks a significant departure from Glanvill, and constitutes the best evidence in De Legibus that Bracton saw all English law as customary in nature. It is not, however, conclusive evidence, for it does not say explicitly that all English law is

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[25]BRACTON, supra, at 166.

[26]See C.H. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 76 (2D ED. 1958); HANSON, supra, at 106-107.

[27]This was a factual error or Bracton's part.

[28]BRACTON, supra, at 19. Compare INST. 1.2.9: "Sine scripto ius venit, quod usus approbavit; nam diuturni mores, consensu utentium comprabati, legem imitantur."

derived from usage. In the absence of other textual evidence for the proposition that Bracton thought that all English laws were unwritten customs, one must ask why such an interpretation should be preferred to one which holds that Bracton's point is only that such English laws as are unwritten, derived from usage, and meet the other specifications set forth, may reasonably be thought of as leges.[29]

The textual basis for questioning McIlwain's interpretation is found in the same Bracton paragraph: "since whatever has been rightly decided (definitum) and approved with the counsel and consent of the magnates and the general agreement of the res publica, the authority of the king or prince having been added thereto, has the force of law."[30] We are faced with a problem: if Bracton saw all English leges as customs, derived from usage, why did he immediately say that to qualify as leges they had to meet several tests which look not only to our eyes like conditions upon legislation, but would have so appeared to the medieval civilians from whom he drew most of his jurisprudence? I believe the answer can only be that Bracton did not mean to include

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[29]McIlwain had a wonderful talent for the bootstrapping argument. He began with the proposition that the medieval conception of law was that of an immemorial custom which could be found but not made. His proof for this sweeping proposition was almost entirely restricted to the very texts we are considering. He knew that his proof texts mean what he said, because that is how medieval lawyers thought. Once he had, in this manner, established his fundamental point, he moved to other Bracton texts, on such matters as the relation of the king to the law, and showed what they must have meant in view of this point. Then he was in a position to show how correct his original interpretation on the question of custom was, because he now had many other texts which were consistent with his original interpretation.

[30]This passage is a close paraphrase of Glanvill, who in turn was quoting a section of the Digest (D. 1.3.1) which defines a lex. Civilians of Bracton's time read this Digest text as having to do with conditions upon the prince's legislative function.

only customs among English leges.

Even if Bracton is understood to have made a smaller claim for custom, namely, that English leges include the general custom of the realm, there is substantial support for the McIlwain thesis about the standing of law in the English government. Several passages appear to support the doctrine of the supremacy of law:

> Since they (English laws and customs have been approved by the consent of those who use them and confirmed by the oath of kings, they cannot be changed without the common consent of all those by whose counsel and consent they were promulgated. They cannot be nullified....[p. 21]
>
> The king must not be under man but under God and under the law, because the law makes the king...for there is no king where the will rules and not the law.[p. 33]
>
> Let him therefore temper his power by law, which is the bridle of his power, that he may live according to the laws...[p. 304]
>
> The king has a superior, namely, God. Also the law by which he is made king. Also his curia, namely the earls and barons, because if he is without bridle, that is without law, they ought to put a bridle on him.[p. 110]

Another set of passages, however, may be read as saying that the king is supreme in his kingdom. For example, "No one may presume to question his acts, much less to contravene them."[31] And, "Private persons cannot question the acts of kings,nor ought the justices to discuss the meaning of the royal charters... No one may pass upon the king's act or his charter so as to nullify it..."[32] Some scholars have concluded that Bracton is hopelessly ambiguous, if not completely inconsistent, in his view of the relationship of the king to the law.

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[31]BRACTON at 33.

[32]Id. at 110.

McIlwain himself, when faced with the array of apparently contradictory texts partially represented above, appeared to despair of any coherence:[33]

> It seems impossible that the same man, if a sane man, could declare that the king has no peer on earth, much less a superior, and that no subject, not even a judge, can question or ought to question the legality of his acts; and could then go on to add that the king's will is not law except in the form of a definition to which the assent of the magnates is absolutely essential.

It was because of this apparent contradiction that McIlwain felt compelled to invent his famous distinction between the spheres of gubernaculum, in which the king's authority was absolute and unlimited, and jurisdictio, in which the king was limited by a law which could be enforced by his magnates. Tierney has conclusively shown that there is not the slightest textual support in Bracton for such a distinction.[34] He and other scholars familiar with Roman and canon law have demonstrated that, properly understood, the passages McIlwain referred to as "absolutist" and "constitutionalist" are neither. What is more, they are consistent with one another.

The major source of confusion for modern scholars has been their assumption that legal obligation can not exist without a forceful sanction.[35] Medieval jurists were not modern positivists.[36] For them,

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[33]CONSTITUTIONALISM, supra, at 76.

[34]Tierney, supra, at 307-309.

[35]For an example of this particular error see HANSON, supra, at 110. Hanson's work in general suffers greatly from an apparent lack of familiarity with Roman legal theory.

[36]Kantorowicz's THE KING'S TWO BODIES is particularly helpful on this question.

the fact that Bracton prescribed no judicial mechanism for holding the king accountable to the law would have seemed no more inconsistent with his clearly expressed view that the king was "under the law" than his failure to provide a human sanction for the king's failure to follow divine law would have seemed inconsistent with his statement that the king was under divine law.[37]

Maitland once wrote that the English lawyers of Bracton's time had "no definite theory as to the relationship between enacted and unenacted law, the relationship between law and custom, the relationship between the law as it is and the law as it ought to be."[38] This is too strong a statement in regard to Bracton himself. But little more can be confidently said of Bracton's explicit discussion of custom than that he holds that it "is sometimes observed as, and takes the place of lex," that its authority "is not slight," and that it cannot be changed or abrogated without the consent of those by whose consent it was adopted. There is no claim that custom stands in a superior position to enacted law, even assuming that custom is always what Bracton has in mind when he refers to ius non scriptum. Bracton is merely concerned to assert that it is "not absurd" to regard it as law.

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[37]The literature on Bracton's theory as to the relationship of king to law is extremely technical and complex, and cannot usefully be treated briefly. Essential literature on this question includes MCILWAIN, CONSTITUTIONALISM supra, at 67-92; THE HIGH COURT OF PARLIAMENT, supra and THE GROWTH OF POLITICAL THOUGHT IN THE WEST, supra, at 149-363; Schulz, Bracton on Kingship, supra KANTOROWICZ, THE KING'S TWO BODIES, supra at 87-192; Tierney, Bracton on Government, supra Lewis, King Above Law?, supra.

[38]1 POLLOCK & MAITLAND, supra, at 176.

BRACTON'S REVISERS

The unsettled state of English legal theory may be seen in the fact that Bracton's successor, Britton, who abbreviated DE LEGIBUS in the time of Edward I, represented the whole law as statutory--that is, as proceeding from the king's mouth:[39]

> Edward by the grace of God...to all his faithful people.... [W]e have caused such laws as have heretofore been used in our realm to be reduced into writing according to that which is here ordained. And we will and command, that throughout England and Ireland they be so used and observed in all points, saving to the power of repealing extending restricting and amending them, whenever we shall see good, by the assent of our earls and barons and others of our Council; saving also to all persons such customs as by prescription of time have been differently used, so far as such customs are not contrary to law.

In this view the law depends upon the king's will, and he can change or even repeal it subject to the assent of his Council. The "custom" mentioned here is clearly that of local, particular usage in derogation of the law of the law of the land. There certainly is no idea here of custom as a fundamental law; instead, custom is subordinate even to the law created by the king's command. The necessary assent of the Council provides some restraint upon the king's actions, but there is no notion of the rule of law in Britton.

At about the same time as Britton, an anonymous royal official wrote the work known as Fleta. His primary purpose appears to have been to revise Bracton in view of the legislation of Edward I. From a jurisprudential point of view, the most significant contribution of

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[39]BRITTON at 1 (F.M. Nichols trans. 1901). This book known as BRITTON was written in French in the form of a code issued by royal authority. Dated at approximately 1290-1292, it was widely used for several centuries.

Fleta is its original treatment of the law courts.[40] Although mostly based on Bracton, its Prologue, containing its most important discussion of the fact that some English laws are unwritten, follows not Bracton but Glanvill:[41]

> [T]he laws of England, although unwritten, it is not unreasonable to call leges--since lex may thus be defined, 'the prince's pleasure has the force of law'--those laws, to wit, which it is agreed should be promulgated upon doubts resolved in council, by the advice, that is to say, of the magnates and with the prior or subsequent authority of the prince; for if, solely for want of being written, laws were not considered to be so, the same laws would seem to be fortified with a greater authority from the mere writing of them than from the justice of him who decrees them or the reason of him who establishes them.

This is so close a paraphrase of Glanvill that nothing by way of analysis or commentary needs to be added here to what was said of Glanvill's treatment of custom.

All the medieval treatise writers whom we have considered (except Britton) have taken pains to claim for English unwritten laws full standing as leges, but none of them have unambiguously claimed that all English law was unwritten or customary. None of them claimed, either, that customary law was fundamental, either in the sense that

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[40]We will examine his description of the courts of law in the chapter, infra, on legislation.

[41]2 FLETA 2-3 (H.G. Richardson and G.O. Sayles eds. and trans. 1955). Leges autem Anglicanas, licit non scriptas, leges appellari non est absurdum, cum hoc ipsum lex sit 'quod principi placet legis habet vigorem,' eas scilicet quas super dubiis in consilio deffiniendis, procerum quidem consilio et principis auctoritate accordante vel antecedente, constat esse promulgatas. Si enim ob solum scripture defectum legis minime censerentur maioris procul dubio auctoritatis robur ipsis legibus videretur accomodare scriptura quam decernentis equitas aut ratio statuentis.

it could not be changed[42] or that contrary actions or enactments were invalid. It is true that all of them held that the king was subject to lex, but they did not restrict lex to custom. There is no support in these works for the doctrine that law could not be created or for the idea that custom was superior to law created by king and council. Thus, in most of its aspects, the doctrine of immemorial custom is not to be found in these writers.

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[42]The claim was not that leges could not be altered or abolished, but that they could be altered or abolished only in a certain manner, upon certain conditions.

If the characteristic medieval and early modern approach to distinguishing English common law from Continental law involved contrasting English lex non scriptum with the Continental lex scriptum, the characteristic approach of present-day scholars asserts a contrast between the common law as a "case law" system, governed by binding precedent, in which the standard mode of reasoning is by induction from particular cases to general rules, and the civil law, whose rules are embodied in fixed and authoritative texts and arrived at by means of deductive reasoning from general principles. Although one recent commentator may emphasize the case law aspect of English law,[43] a second, the role of binding precedent,[44] and a third, the theory of inductive reasoning,[45] most would agree with the above formulation.

Goodhart has rightly observed that precedent in the Oxford Dictionary sense of "a particular instance or case which is or may be taken as an example or role for subsequent cases" is followed in all legal systems.[46] But more is claimed for the role of precedent in the English system of case law. Parke, J., summed up the modern theory of case law in the famous 1833 case of Mirehouse v. Rennell:[47]

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[43]E.g., P. Stein, Logic and Experience in Roman and Common Law, 59 B.U.L. REV. 433, 435 (1979).

[44]E.g., A. L. GOODHART, Precedent in English and Continental Law, 197, L. Q. REV. 40, 42 (1934)

[45]E.g., C. ALLEN, LAW IN THE MAKING 162 (7th ed. 1964).

[46]Goodhart, Precedent, supra, at 41.

[47]1 Cl. & F. 527, 546.

> Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not been judicially applied, because we think the rules are not as reasonable and convenient as we ourselves could have devised.

Once a prior case directly in point has been found, it "is no longer one which may be used as a pattern; it is one which must be followed in the subsequent case."[48]

There has been a small dispute about just when this modern theory took hold in English law. Professor Allen dated it in the nineteenth century,[49] while Holdsworth said that it was "reached substantially by the end of the eighteenth century."[50] Nevertheless, there is little dispute that throughout most of its history the common law operated without a theory of binding precedent.

Except for Bracton, there was virtually no citation of earlier decisions by early English legal treatise writers. Gray found one reference each in Glanvil and and Fleta, none in Britton, and only eleven in Littleton.[51]

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[48]Goodhart, supra, at 41.

[49]LAW IN THE MAKING, supra, at 219.

[50]Case Law, 50 L.Q.R. 180 (1934).

[51]J. C. GRAY, THE NATURE AND SOURCES OF THE LAW 212, 213 (2nd ed. 1921).

Bracton collected some 2,000 cases in his Note Book, and his Treatise contains about 500 references to cases.[52] There is some question whether, in citing cases, he merely followed contemporary practice, or whether he invented such a practice. Plucknett, cautioning us against assuming that Bracton's use of case law was any part of contemporary legal thought, has argued that certainly his use of plea rolls was unique, since access to them was virtually impossible to obtain.[53] Maitland takes an even firmer stance, holding that the thirteenth century is far too early a date to suppose that the law was case law or that a previous judgment was regarded as binding authority; if used at all, a prior decision merely illustrated the custom of the court. On rare occasions precedents (exempla) may have been alleged in court, but as a general rule the judges would regard themselves as having implicit knowledge of the consuetudo curiae and would not feel bound to argue past cases.[54] Allen, on the other hand, has claimed that the evidence is strong that by the last quarter of the thirteenth century the practice of citation was frequent.[55]

Whatever the standard practice of his time, Bracton, in addition to his own custom of citing prior cases, laid down a rule of judicial decision-making that has frequently been taken as the first English statement of the doctrine of precedent and of legal reasoning by

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[52]See, ALLEN, supra, at 188, 189).

[53]T.F.T. PLUCKNETT, A CONCISE HISTORY OF ENGLISH LAW

[54]1 POLLOCK & MAITLAND, supra, at 183, 184.

[55]LAW IN THE MAKING, supra, at 188.

analogy:[56]

> If new and unusual matters arise which have not before been seen in the realm, if like matters arise let them be decided by like (si tamen similia erinerint per simile iudicentur), since the occasion is a good one for proceeding a similibus ad similia.

It is ironic that this passage should be considered the foundation of the doctrine which more than any other distinguishes English common law from Roman law, for it clearly rests heavily on standard Roman legal doctrine. An excerpt of Julian's in Justinian's Digest reads:[57]

> [W]hen a rule is laid down in the first instance, a more precise provision has to be made, either by interpretation or else by direct legislation...
>
> It is impossible for every point to be expressly comprehended in statutes or senatorial decrees; still if in any case that arises, the meaning of the enactment is clear, the presiding magistrate ought to extend the rule to analogous cases to the one expressed and lay down the law accordingly.

Another parallel is found in the Summa of the great Roman glossator Azo:[58]

> Sometimes in court proceedings there is a doubt about how a novel affair is to be settled; sometimes there is a doubt about the meaning of a law. If the doubt concerns a new affair the Emperor is to be consulted, if he is present and if it is possible... If it is not possible, one must proceed de similibus ad similia...

It must be understood that for Bracton's Roman models, proceeding de similibus ad similia does not mean emphasizing the authority of any case in particular, but of a series or group of cases creating a

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[56]DE LEGIBUS, supra, at 21.

[57]D.I.3.11 & 12

[58]SUMMA CODICIS 1.12, quoted in F. Cheyette, Custom, Case Law, and Medieval "Constitutionalism": A Re-examination, supra, at 385, 386.

practice.[59] This, as we have seen, is not true of the modern English notion of case law and precedent, where every court is held to be absolutely bound by all decisions of courts superior to itself and generally bound by the decisions of co-ordinate courts "in the absence of strong reasons to the contrary."[60] We do not know if Bracton entirely accepted the Roman view of precedent, but it is quite clear that he did not hold the modern view, in which the most recent case in point is entitled to the most weight. While he freely used prior cases in his treatise, they were old cases; and he used them for the purpose of criticizing more contemporary cases which he thought had perverted the old law.[61] As Plucknett put it, his cases were carefully selected to show what the law ought to be, not because he thought they had any binding authority.[62] Still, his use of decided cases accustomed lawyers of the thirteenth and early fourteenth centuries to discussing cases, and this was a significant step in the development of a case law system.[63]

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[59]Goodhart, supra, at 42.

[60]Holdsworth, supra, at 181.

[61]See PLUCKNETT, supra, at 343, 344.

[62]Id.

[63]Id. at 180 (1929 ed.).

CHAPTER SIX

THE JURISPRUDENCE OF THE COMMON LAWYERS IN THE YEAR BOOK PERIOD

CUSTOM AND REASON IN THE YEAR BOOKS

I have shown that the medieval common law treatise writers offer little support for the description of medieval common law jurisprudence as a system of thought in which law was seen primarily as custom that obtained its force not from human will but from its mere existence. The common law, according to this description, was understood by the common lawyers to permanent and unchanging and fundamental in several respects: it was above the King, the King could not change it, and when legislation was enacted, it merely declared the preexisting customary law.[1]

I shall now argue that the reported court cases of the late medieval period also offer very little evidence for this conception of the common law. In my reading of approximately 1,600 Year Book cases spanning the period from Edward I to Edward IV,[2] I found much talk among lawyers and judges of common law, old law, and common right, but very little talk of custom. The clear exceptions concerned local, particular custom, often in derogation of the common law. This raises the question why, if the notion of immemorial custom was so central to the jurisprudence of English lawyers of the thirteenth and fourteenth centuries, it was virtually never discussed. One case in the period

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[1]As we have seen, Fritz Kern, A. S. Carlyle, and C. H. McIlwain were among the most prominent defenders of this interpretation of medieval common law jurisprudence. For some of the most recent statements see E. Lewis, MEDIEVAL POLITICAL IDEAS (1954), and G. Haskins, Executive Justice and the Rule of Law: Some Reflections on Thirteenth-Century England, 30 SPECULUM 529 (1955).

[2]Beginning with Year Book 21 Edward I, I read all the cases for the year chosen for years selected at about ten year intervals.

surveyed did connect custom with the common law, but it provides little comfort to the adherents of the doctrine of immemorial custom. In that case[3] counsel conceded that "the custom which he alleges on his behalf was the common law before the Statute of Merton..." He added, however; "but by statute was that altered..." While a custom admittedly may have been part of the common law, the fact that in only one case out of 1,600 did I find custom connected with the common law suggests that identification of the common law with custom was not central to thirteenth and fourteenth century jurisprudence. Even this single case makes it plain that neither common law nor custom was considered permanent and unchanging.

For the English lawyers of this period, moreover, statutes took precedence over the common law in cases of conflict (and conflict was explicitly recognized to exist), or where the statute was in the negative. No one doubted that the common law could be changed or abrogated by statute. In 1344, for instance, Willoughby, J. remarked, "Scire facias was given at common law, but the process is abridged by statute..."[4] In another case later that year, Thorpe argued, "At common law...the judgment was no other but that the voucher should stand, and in that respect the law is changed by statute..."[5]

Cases frequently involved disputes over whether a particular statute abrogates the common law, or whether a party may choose

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[3]Y.B. 21 Edward I 62.

[4]Y.B. 18 Edw. III 241.

[5]Y.B. 18 Edw. III 128,130.

between two remedies. For example, in Sampson v. Grene (1310)[6] we find the following colloquy:

> DENOM: the statute (Westminster) does not abrogate the common law... BEREFORD, CJ: ...you should understand that the statute was not made for nothing, but was made because a remedy accordant with ley was not ordained by the old law. DENOM: We have seen a like case in which diverse remedies were ordained, and a man was allowed to elect... BEREFORD, CJ: Yes, where both are accordant with ley...

In a second version of this case Bereford is reported to have said, "If statute ordains another writ, it abolishes this, for it does not ordain the other without cause. The cause of the statute was that this writ was not founded on any reason (sur nul resoun)." When Bereford said that a remedy accordant with ley was not ordained by the old law, the "old law" he referred to was the common law which existed at the time the statute was enacted.

Denom discusses the abrogation of the "common law"; Bereford of the "old law". These terms were interchangeable in the fourteenth century. The common formula by which a party was put to his choice of remedies was expressed both ways. For example, in one 1304 case a party was asked, "How will you aid yourself for the king, by common law or by statute?"[7] The same formula is put in slightly different words: "How will you aid yourself? by the new law or by the old law?"[8]

If general custom and common law were not regarded as immutable, were they at least regarded as immemorial? They were not, at least through the greatest part of the Year Book period. One should

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[6]Y.B. 4 Edw. II 112-113.

[7]Y.B. 32 Edw. I 28.

[8]Y.B. 321 Edw. I 258.

distinguish, however, between the question of whether most customs were actually regarded as having existed from time immemorial and whether such existence was regarded as theoretically necessary to give general customs the force of law. In regard to the first question, if the Year Book lawyers believed general customs to have existed from time immemorial they did not say so. The first statement I found proclaiming general custom, or the common law, to be immemorial was made in the tenth year of Edward IV.[9] As to the second question, a test of the validity of local, particular customs was, from very early in the Year Book period, that they had existed from time immemorial.[10] But this requirement applied only to particular customs. We know this because of the absence of discussion about the immemorial nature of general customs and because a lawyer once objected that a claim based on the law and custom of the realm failed to allege that the custom had existed from time immemorial. The court rejected the objection out of hand.[11]

I believe this difference in the treatment of general and particular custom to be founded, as Salmond thought,[12] on the canonist distinction between ius commune and consuetudines. Ius commune was the common, general law of the whole church. Consuetudines were

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[9]"Common law has existed since the creation of the world."

[10]See, e.g., Y.B. 17 Edw. III, where Mobray argues that the Bailiff of Lansdale has certain local responsibilities because "such has been the custom from time whereof there is no memory..."

[11]Y.B. 2 Hen. IV 18.

[12]J. SALMOND, JURISPRUDENCE 223 (7th ed. 1924). As we saw in chapter three, the medieval civil law made a similar distinction.

divergent local customs. In the canon law, no consuetudo could derogate from the general law unless it was praescripta, that is, unless it had endured for the legal period of prescription. This period varied, but one standard opinion held the proper period to be time immemorial. "Time immemorial", however, was widely interpreted to mean no more than forty years.

McIlwain and Carlyle, and a host of more recent scholars blindly following them, went wrong in their understanding of English custom because they assumed that English ideas about custom were Germanic in origin. I found no statement about custom or customary law in the medieval common law literature or Year Book reports of cases that was derived from other than civilian or canonist doctrine on customs.

In the thirteenth and fourteenth century cases it is frequently asserted that "every writ brought in the King's Court ought to be framed according to the common law or statute."[13] But if the law of king's courts is understood to be either statute law or common law, then what was the ley of which Chief Justice Bereford spoke in Sampson v. Grene when he conceded that a many might elect between common law and statute if both were in accordance with ley? Have we at last found McIlwain's custom--a higher law to which other laws must conform? We have not, for in Bereford's formulation, if a statute conflicts with ley the result is not that ley is followed at the expense of statute, or that the common law is followed, but that the statute alone will control the case. It is true that such a statute

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[13]See, e.g., Y. B. 22 Edw. I 528 (1294). Another version asserts: "To that you cannot get, unless by (one of) two ways: either by common law or by statute." Y. B. 4 Edw. II 85 (1310).

will be interpreted very strictly, but it will be followed.

The Year Book editor translates "ley" as "legal principle" or "sound doctrine". This is plausible interpretation, but as we shall see, there are other attractive possibilities. In an alternate version of the case, Bereford says that the defect of the common law writ which occasioned the enactment of the statute was that it "was not founded on any reason (sur nul resoun)." The inference is strong that in Sampson v. Grene Bereford used "ley" and "resoun" interchangeably.[14]

There is much talk of resoun in the fourteenth century Year Books, but I am not aware of a case in which counsel or judge makes explicit its meaning for lawyers of the period. This is most unfortunate, for it appears that this concept, as employed by Bereford in Sampson v. Grene, is at least as critical to our understanding of common law jurisprudence of the late medieval period as are the concepts of custom or precedent.

There are several plausible candidates for the ley or resoun to which Bereford referred. Perhaps the least likely is the concept of equity, understood in the sense of a correction of injustice. Common law judges still, at the beginning of the fourteenth century, exercised an equitable function. At least as late as the reign of

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[14]It would be interesting to know whether the two Year Book versions report the same point in the discussion of the case. It was not uncommon for judges and counsel to cover the same point more than once in the discussion of a case, and, in doing so, to vary the language used. When several reporters were taking down what was said in such instances, sometimes one reporter would seize on a variation of a judge's pronouncement given at one point in the discussion and another reporter upon a second variation given at a different point in the discussion.

Edward III one finds counsel, without appearing to surprise either the judges or the reporter, making such arguments as, "Sir, when you see the mischief to be so outrageous in our behalf, if this joinder be not admitted, it seems that you will admit us in amendment of the common law..."[15] Arguments about the "mischief" that will result if the law is strictly followed were not infrequent, and if they did not usually carry the day they at least appeared to be regarded as being entitled to serious consideration. A frequent variation was the claim that if some adjustment was not made in the strict requirements of the law, "it would be hard otherwise."[16] Typically, such equitable claims were not made in terms of resoun, but at least one such argument was tied to the idea of resoun. In 1341, Mobray argued that "law ought to be in accordance with resoun, and to take away mischief..."[17] It is quite possible here, however, that Mobray's intention was to set forth two separate requirements of the law rather than to suggest a connection between reason and taking away mischief.

A more convincing reading of resoun is to take it to be the word the common lawyers used in place of the natural law of the canonist and civilians. Christopher St. German, in the early sixteenth century, stated categorically that where the civilians used the term natural law, the common lawyers referred to "reason". It is not clear that the fourteenth century common lawyers always used resoun in this way, but it is almost certain that they sometimes did.

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[15]Y.B. 17 Edw. III 98.

[16]Y.B. 17 Edw. III 306.

[17]Y.B. 15 Edw. III (R.S.) 126.

There is a tradition, reaching back at least to Aristotle, of tying the idea of true law to that of reason. In Aristotle's POLITICS it is said that:[18]

> He who commands that law should rule may be thus regarded as commanding that God and reason alone should rule... Law (as the pure voice of God and reason) may thus be defined as 'reason free from all passion'.

By the time of Cicero, the law of nature had come to be identified with the idea of the law of right reason. "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting."[19] "Law is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed and fully developed in the human mind, is law."[20] "The first common possession of man and God is reason. But those who have reason in common must also have right reason in common. And since right reason is law, we must believe that men have law also in common with the gods."[21]

These ideas, transmitted and modified by the Church Fathers and medieval theologians, became through the teaching of the Church and the practice of the canon law, a fundamental part of all medieval thinking about law. It is difficult to imagine that the medieval common lawyers and judges, many of whom were churchmen, could have escaped their influence.

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[18]Bk. III, Ch. 16

[19]CICERO, THE REPUBLIC, BK. III, Ch. 22.

[20]CICERO, THE LAWS, Bk. I, Ch. VI.

[21]Id., Bk. I, Ch. VII.

The most important philosophical treatment in the Middle Ages of the connection between natural law and reason was undoubtedly that of Aquinas. In Summa Theologica, responding to the argument that "law pertains not to the reason, but to the will", Aquinas held that while law is "a rule and measure of acts whereby man is induced to act and restrained from acting", the "rule and measure of human acts is the reason, which is the principle of human acts."[22] A law, he says, "is nothing else but a dictate of practical reason..."[23]

At the top of his hierarchy of laws Aquinas places "eternal law" which is, in Augustine's words, "that law which is the Supreme Reason..."[24] The world is ruled by divine providence, and "the whole community of the universe is governed by divine reason."[25]

The rational creature has a share in this divine reason through natural law, which God instills into men's minds.[26]

Finally, from the precepts of natural law, "as from general and indemonstrable principles, ...the human reason needs to proceed to the more particular determination of certain matters."[27] The particular determinations, devised by human reason, are called human laws.[28] While man has a natural participation in the eternal law, this

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[22]SUMMA THEOLOGICA 4 (Hafner Library of Classics 1953).

[23]Id. at 12.

[24]Id. at 11.

[25]Id. 12.

[26]Id. at 9, 13.

[27]Id. at 15.

[28]Id.

participation is imperfect. He knows certain general principles, but does not participate in the eternal reason and law to the extent of knowing how to make particular determinations of individual cases.[29]

Aquinas makes a critical distinction between speculative reason and practical reason. In the case of speculative reason, both the common principles and the special conclusions are necessarily true. In practical reason, which is concerned with contingent matters such as human actions, there are some necessary truths in the common principles, but the more specific and particular we get, the more deviations we find. All men do not draw the same particular conclusions from the principles of practical reason because some men's reason has become distorted by passion or bad habits. The natural law, in its first common principles, is the same among all men, "both as to validity and recognition."[30] However, certain derived norms, which are conclusions of these common principles, are valid and recognized only in a majority of cases.[31]

Lack of universal agreement about the particular requirements of natural law does not, however, detract from the force of natural law. The force of a particular human law as law depends upon the extent of its justice, which in turn involves rightness according to the rule of reason. Since the first rule of reason is the law of nature, to the extent that any human law deflects from the law of nature it is no

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[29] Id.

[30] Id. at 49.

[31] Id. at 50.

longer a law but a perversion of law.[32]

The point in surveying this tradition of speaking of a higher law, to which particular human laws must conform if they be law, in terms of reason, is not to argue that the medieval common lawyers took their general ideas about jurisprudence directly from any of the thinkers here surveyed. We simply do not have enough evidence to be able to reconstruct in any detail a general philosophy of law for them. Indeed, it may be doubted that most medieval common lawyers possessed a coherent, self-conscious general theory of jurisprudence at all. What is clear is that at least some medieval common lawyers held a conception of a higher law which placed constraints on the outcome of particular cases and that they referred to this higher law as "reason". The tradition of thinking about higher law in terms of reason almost surely informed nearly every educated European's understanding of the nature of law in general. It would have been difficult for men even as insular in their thought as the common lawyers appear to have been to have avoided exposure to the natural law ideas of the late medieval Church, even if they knew no civil law and little canon law.[33]

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[32] Id. at 58

[33] The civil law and the canon law (especially the canon law) were important sources of medieval natural law theory. Pollock argued that the reason the common lawyers spoke of "reason" instead of referring to the law of nature by name lay in the facts that the canon law was the principle vehicle of the law of nature, and that the common lawyers felt threatened by, and jealous of, the canon lawyers. (F. POLLOCK, "The History of the Law of Nature," in JURISPRUDENCE AND LEGAL ESSAYS, 1961.) This is sheer speculation.

From the Year Book evidence we are unable to draw many firm conclusions concerning the medieval common lawyers' understanding of the relation of English customs and statutes to resoun, but we can draw a few. First, to the extent that English law was seen as being subject to a fundamental or higher law, this law was understood to be not general custom but resoun. The enactment of statutes abolishing old customary rules and establishing new law was explained precisely on the grounds that the old custom was not in accordance with ley or resoun.[34] The fact that something had been the custom in years past would not save it in the present (at least in theory) if it were not in accord with resoun. "One has heard speak of what Bereford and Herle did in such a case...but nevertheless no precedent is of such force as resoun...[35] Second, I have found no medieval case in which the validity of a statute was questioned on the ground that it was contrary to resoun. Finally, it appears that medieval English doctrine as to the place and force of resoun in the common law was not firmly settled. This is perhaps best illustrated in the 1345 colloquy[36] in which counsel argues, "I think you will do as others have done in the same case, or else we do not know what the law is." Hillary, J., at this point interjects, "It is the will of the justices," but Stonore, the Chief Justice, contradicts this, stating, "No; ley est resoun." Here we have repeated the argument of Question 90 of the SUMMA THEOLOGICA, where Aquinas decisively rejects the

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[34]Y.B. 4 Edw. II 112-113.

[35]Y.B. 19 Edw. III 376.

[36]Y.B. 19 Edw. III 378.

objection that "law pertains not to the reason, but to the will." The reporter of our case leaves the dispute unresolved.

I suspect that the most common understanding of the place of reason in medieval English law is best expressed in the argument of Mobray quoted above. "Law," he said, "ought to be in accordance with reason, and to take away mischief, except where the contrary practice has been used as law."[37] Reason, while an ideal for the law, in most cases will not be allowed to stand in the way of established practice. From time to time, however, judges will be inclined to modify the old law, and reason will provide a convenient justification for such an action.

A final candidate for the resoun of Bereford remains. One cannot read extensively in the Year Books of the thirteenth and fourteenth centuries without getting a sense that judges felt some constraint to maintain coherence in the law. I am not suggesting that they already held Coke's doctrine of the artificial reason of the law--the idea that through their long study and common erudition the common lawyers were enabled to see the law as an artificial perfection of reason. I find no evidence that common lawyers of the late medieval period consciously held such a doctrine. But the attempt to maintain the "reasonableness" of the law in the sense of internal coherence is evident in the earliest Year Books.

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[37]Y.B. 15 Edw. III (R.S.) 126. It is possible, of course, to read the qualifying clause "except where the contrary practice has been in use," as limiting only the taking away of mischief and not affecting the demand that law be in accordance with reason. I suspect, though, that a qualification both of the demands of reason and of the relief of hardship better reflects standard judicial practice of the time.

In sum, the Year Books simply do not support the McIlwainian view of custom as paramount in medieval English law. The identification of the common law with custom was not a central feature of thirteenth and fourteenth century English jurisprudence. Neither custom nor common law was seen as immutable; one finds frequent Year Book statements that they had been changed. Neither custom nor the common law was regarded as fundamental in the sense that contrary laws were invalid. Instead, the law was very clear that when custom and statute were in conflict, statute prevailed. To the extent that the Year Books recognized a higher law which set bounds on English law, that law was identified with reason, not with immemorial custom. Finally, there is no Year Book evidence, until the very end of the period, that the medieval common lawyers saw either the common law or general custom as immemorial.

CASE LAW AND PRECEDENT

Bracton brought a broad grasp of general legal theory to his study of English law, for, contrary to Maitland's view,[38] he was a highly trained Romanist.[39] Indeed, Holdsworth suggested that much of the vigorous growth of English law in the thirteenth century was due to a wide knowledge of Roman legal principles among English lawyers.[40] In the fourteenth and fifteenth centuries, however, the common lawyers appear to have stopped caring about general principles, and the common law grew more and more technical and oriented toward procedure.[41] In the latter part of the reign of Edward I, legal writing came almost entirely to take the form of little tracts upon procedure and pleading.[42]

By the end of the reign of Edward I, Holdsworth observed, "the only way the student or the practitioner could learn modern law was by attending court, taking or borrowing notes, and discussion."[43] The Year Books originated in the efforts of some student or lawyer to take notes of the proceedings of the court. Unlike the Continental reporters of cases, who appear consciously to have been engaged in collecting "authorities"--decisions which tell unmistakably the rules

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[38]1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 208 (2nd ed. 1968).

[39]Professor Thorne has given the evidence for this claim in the Introduction to his edition of DE LEGIBUS.

[40]2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 287 (4th ed. 1966).

[41]Id.

[42]2 HOLDSWORTH, supra, at 322; T.F.T. PLUCKNETT, A CONCISE HISTORY OF ENGLISH LAW 186-187 (1929 ed.).

[43]2 HOLDSWORTH, supra, at 536.

of law--the Year Book reporters seem indifferent to the decision; they are not looking for authority or substantive law. Their great object was the instruction of students and practicing lawyers in the art of pleading and procedure.[44] To modern lawyers unfamiliar with the intricate "skillful and recondite game" of oral pleading, the Year Books are bound to seem largely unintelligible; they "appear in many cases to be merely reports of desultory conversations between judge and counsel, which often terminate without reaching a distinct issue of fact or law."[45] In reporting the oral debate which preceded the formulation of the issue, the line between argument and decision tended to be obliterated. Indeed, the Year Books were really reports of arguments; it was the argument rather than the decision that interested the profession.[46] "What the judgment was nobody knew and nobody cared."[47] Naturally this made the use of Year Book cases as legal authority nearly impossible,[48] and yet it remains true that the Year Books are the foundation of the modern system of case law.

Even in the cases reported in the early Year Books, counsel and judges did from time to time cite past decisions, and this fact, as Allen points out, at least shows that the profession considered them a relevent part of legal argument.[49] Judges sometimes made it clear,

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[44]T.F.T. PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE 102 (1958).

[45]2 HOLDSWORTH, supra, at 553; also see PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE, supra, at 103

[46]2 HOLDSWORTH, supra, at 555-556.

[47]PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE, supra, at 103.

[48]Id. at 104.

[49]LAW IN THE MAKING, supra, at 190.

however, that the citing of a case in point was not sufficient to win the day. In one of the earlier Year Book cases the following exchange took place:[50]

> Plays: We have seen a case where the Admeasurement was not had until he had warranted or was ousted by judgment.
>
> Metingham, J.: Never mind your instances; grant the Admeasurement.

The fault did not lie in Plays's lack of specificity in citing his precedent. In seventy four of the 1564 Year Book cases that I read, someone--counsel, judge, or reporter--made a reference to an earlier case. In only 43 cases were the precedents cited with any specificity--for example, by name of one of the parties, or by regnal year, or even narrowed down to the tenure of a particular justice. The most common forms of referring to a precedent were "I have seen that...,"[51] where the authority is the personal memory of the speaker, or more frequently, "we have seen that...",[52] where the authority for the precedent appears to have been the collective memory of the lawyers and judges. Toward the middle of the fourteenth century the more indefinite statement "it has been seen that..." also came into common use.[53] Although Sir Edward Coke was in many instances an

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[50]Y.B. 21 Edw. I 80 (1292).

[51]E.g., Y.B. 22 Edw. I 502 (1294); Y.B. 32 Edw. I 300 (1304); Y.B. 33 Edw. I 378 (1305).

[52]E.g., Y.B. 22 Edw. I 468 (1294); Y.B. 32 Edw. I 36 (1304); Y.B. 32 Edw. I 248 (1304); Y.B. 4 Edw. II 67-69 (1310); Y.B. 4 Edw. II 112-113 (1310); Y.B. Y.B. 11 Edw. II 97 (1317); Y.B. 11 Edw. II 256 (1317); Y.B. 11 Edw. II 323 (1318).

[53]See, e.g., Y.B. 17 Edw. III 172, 186 (1343); Y.B. 18 Edw. III 444, 446, 452 (1343); Y.B. 18 Edw. III 18 (1344).

unreliable historian of English law, his description of the medieval practice of case citation was on the mark:[54]

> The ancient order of arrangements by our Serjeants and apprentices of law at the bar is altogether altered. 1. They never cited any book, case, or authority in particular... 2. Then was the citing general...

Because of the indefinite form of citation of earlier cases, and the absence of any standard reports of cases on which agreement could be based, a lawyer's citation of a precedent from his own memory was vulnerable to a rejoinder by a judge or opposing counsel that "We never before saw a case such as this."[55] When the authority of a precedent lay in the memories of bench and bar, the memories of the judges naturally prevailed.

The citation of an earlier case was also subject to being countered with another case in which the opposite had been done or held:[56]

> Scrope [Counsel]: We have seen a case which was pleaded without the other writ.
>
> Stanton [Judge]: I can find you the contrary in the handwriting of Sir [Ralph de Hegham].
>
> Toudeby [Counsel]: I could also find the same, for I myself have pleaded [in that way] before now.

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[54]Preface 10 Co. Rep. (1793 ed.).

[55]Y.B. 32 Edw. I 248 (1304); other examples of this form of rebuttal are found in Y.B. 17 Edw. III 22 (1342-43); Y.B. 19 Edw. III 446, 448 (1344-45); Y.B. 19 Edw. III 490, 492 (1344-45).

[56]Y.B. 4 Edw. II 109 (1310). Similar rejoiners are to be found in Y.B. 19 Edw. III 408 (1344-45) and Y.B. 19 Edw. III 490, 492 (1344-45). Sometimes neither judge nor counsel cites the contrary case but the Year Book reporter does, as in 4 Edw. II 138-39 (1310), 17 Edw. III 52 (1343), and 18 Edw. III 634 (1343-44).

Perhaps the most frequent response to an inconvenient precedent was not to reject it without giving a reason, to deny its existence, or to cite a contrary authority, but to argue that it was different from the case at hand. The standard formula for so distinguishing the alleged precedent was "Non est simile":[57]

> Toudeby: Moreover we have seen that aid was granted in a case like this between Tybaud of Verdone, &c.
>
> Herle: Non est simile. For in the case of Tybaud the tenements were given in frank-marriage, &c.

I have been describing what happened in medieval law cases when someone alleged a precedent, but it is worth remembering that according to my count such an allegation was made in fewer than one out of twenty cases. The percentage of cases in which the claimed precedents were dispositive, or even regarded as helpful, was much smaller. One must ask, then, in view of these facts, if citing an earlier case was considered relevant to the business of the court in deciding cases, what was it relevant to show? Unfortunately, it is easier to demonstrate what precedents were not used for than to establish the purpose of their citation. They clearly were not used because there was a theory of the binding authority of a single case. Such a theory would have been reflected in a universal practice of citing precedents.

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[57]Y.B. 6 Edw. II 189, 190; other examples may be found in Y.B. 32 Edw. I 28 (1304); Y.B. 4 Edw. II 127 (1310); Y.B. 4 Edw. II 164 (1310); Y.B. 17 Edw. III 172, 186 (1343; Y.B. 18 Edw. III 538, 540 (1343-44); 18 Edw. III 282 (1344); 13 Rich II 123, 124 (1390).

But the evidence for the absence of such a theory of precedent does not depend on this inference alone. We have already seen one example of a judge rejecting an alleged precedent out of hand, without giving a reason for doing so. In other cases, the judges did not deny the existence of precedent, cite contrary precedents, nor distinguish the case, and yet they rejected the alleged precedent's binding authority. In one such case, decided in the nineteenth year of Edward III, the judge made a distinction between precedents and the law.[58] Counsel in the case alleged previous precedents, saying: "The reverse has often been adjudged..." The judge, however, denied them any weight: "I tell you that this is certainly law, and always has been, and will be...whatever you may say about precedents [ensaumples]."

This returns us to the question of what the medieval comman lawyers understood law to be, and how they knew what it was when they saw it. My discussion of custom and reason in the Year Book period advanced one plausible answer, but probably the most accurate answer is that the theory of the definitive basis for legal decisions was not firmly settled during the Year Book period. The colloquy of counsel and judges in Langbridge's Case suggests that this was certainly the case in 1345:[59]

> Sharshulle [Judge]: One has often hears speak of that which Bereford and Herle JJ. did in such a case...but nevertheless no precedent is of such force as resoun.
>
> Thorpe [Counsel]: I think you will do as others have done in the same case, or else we do not know what the law is.

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[58]Y.B. 19 Edw. III 490, 492 (1344-45).

[59]Y.B. 19 Edw. III 375-378.

Hillary [Judge]: It is the will of the Justices.

Stonore [Chief Justice]: No, law is resoun.

We have here three theories as to the basis of the ley on which the decision of cases is to be founded: precedent, the will of the judges, and resoun. Even though two judges agreed that resoun was determinative, members of the tiny legal elite expressed two dissenting views. All the judges did unite in rejecting the theory of binding precedent, yet only two years earlier, Hillary, who now asserts that the law is whatever the judges decide, had insisted that the judges were bound by what had been done before:[60]

> Hillary [Judge]: But our hands are tied, so we cannot do anything.
> Poulteney [Counsel]: Yes, you always can as long as the record is in this Court.
> Stonore [Chief Justice]: It is a bad precedent for any judgment of this Court ever to fail to be put into execution.
> Hillary: What of that? Our hands are tied, so that we cannot effect any execution, nor will we contrary to the law heretofore practiced.

Being bound by "the law heretofore practiced" is not necessarily identical with being bound by precedent. It strikes me as more likely that Hillary's phrase does not resonate with the citation of particular precedents as much as it does with assertions, such as the following, of the need to abide by ancient practices and the opinions of the wise men of the past:[61]

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[60]Y.B. 17 Edw. III 12 (1343).

[61]Y.B. 21 & 22 Edw. I 430. Quoted in T. E. Lewis, The History of Judicial Precedent, supra, at 349, 350.

> Saham: In which are we to put trust, in ancient opinions and in the justices who were before us and from whom we learned the law, or in your modern notions? I think in the ancient opinions...

In another example of this mode of thought, Hillary himself announced, "We will not and cannot change the ancient usages..."[62] It might reasonably be asked regarding this line of authority whether McIlwain is not finally being proven correct in such statements as:

> The substantive law was mainly custom, declared, not created, and not to be essentially altered; but now declared as the "common" custom of the realm by the King's judges.[63]

> Such customary laws as these, declared by inquest or by Council, hardly ever ostensibly altered, with no assignable beginning, must almost of necessity in process of time acquire a character of inviolability...[64]

I still believe that McIlwain was mistaken. When Hillary, J., proclaimed a duty on the part of the courts to act in accordance with "the law heretofore practiced" and with the "ancient usages," he was not referring to the doctrine of immemorial custom as McIlwain understood it. The usages Hillary referred to were the usages and common learning--erudition was the term it come to be known by--of the very small elite group of lawyers and judges who tried cases in the King's courts. This common erudition was carried forward mainly through oral tradition. That this was possible is perhaps made more understandable by the fact that from 1200 to 1800 "the permanent judges of the central courts of common law and Chancery, all taken

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[62]Y.B. 16 Edw. III 90.

[63]C.H. MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 44 (1910).

[64]Id. at 51.

together, seldom exceeded fifteen."[65] The active bar was also small in number. For example, during the reign of Edward II the number of lawyers pleading in any given year varied from 17 to 34[66] Judges and serjeants traveled, ate, and lived together, and refined their "common erudition."[67] Conversations of judges and serjeants at dinner were sometimes reported in the Year Books along with actual cases.[68] This would not have made much sense had the modern theory of precedent been operating, but would be quite consistent with a view of law as the learned tradition of courts, that is, of the judges and serjeants who-made up the court system. The phrase "learned tradition" seems more adequately to capture the idea of the common law as preserved in "ancient opinions" than does the word "custom." The idea of custom connotes habitual behaviors rather than wisdom and learning accumulated and refined through teaching, discussion and argument; it focuses on what is actually done rather than on the reason that justifies what is done. Sir Edward Coke, in the seventeenth century, was really onto something essential about the common law in his preoccupation with the "artificial reason" of the law, "fined and

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[65]J. DAWSON, THE ORACLES OF THE LAW 3 (1978 ed.)

[66]Id. at 10.

[67]Id. at 63-64. Professor Dawson found explicit references to "common erudition" in the following cases: Y.B. 20 Hen. VI 5 (1441); Y.B. 11 Edw. IV 10 (1472); Y.B. 4 Hen. VII 1 (1489); Y.B. 16 Hen. VIII 16 (1501). It is my distinct impression that although the idea encapsulated in the phrase "common erudition" existed throughout the Year Book period, the phrase itself gained widespread currency only in the last half of the fifteenth century.

[68]Id. For example in Y.B. 1 Hen. VII 3 (1485)
Y.B. 1 Hen. VII 10 (1486).

refined in a succession of ages." He saw, dimly perhaps, that there was an intimate connection between the idea of antiquity and the idea of reason. The connection was this: Antiquity produced the reason, or more accurately, the experience represented by the antiquity; accumulated knowledge produced by trial and error, discussion and debate, and common reflection gave reason to the law. That, I think, may have been what the experienced Chief Justice Stonore had in mind in Langbridge's Case when he refused to concede that mere earlier practice was enough to establish law. Stonore's great predecessor, Chief Justice Bereford, in Whiteacre v. Marmion,[69] also had refused to accept the principle that simply because the court had done something before, law was thereby established: "It was once said by Henry de Berth, "Non exemplis sed rationibus adiudicandum est." Bereford was referring to Bracton here but misquoted him. Bracton had used the famous civil law maxim, "non exemplis sed legibus iudicandum est" (judgments should be rendered not in accordance with examples but with the laws), but Bereford changed it to: "judgments should be based not on examples but on reason." In quoting Bracton, Bereford apparently was relying on his memory, and the fact that where Bracton had referred to "law," his memory had substituted "reason" is a telling indication of just how strongly he identified law with reason.

If the "ancient opinions" were to be trusted, not blindly because they were old but because of the reason they presumptively represented, then it is not necessary to read expressions of faith in them as logically incompatible with a series of Year Book cases in

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[69]Y.B. 8 Edw. II 273-4.

which judges announced, in a straight-forward manner, that the decision they were now making created new law. In Venor v. Blind, for example, Chief Justice Bereford announced:[70]

> And by [a decision] on this avowry we shall make a law throughout the land. A bad rascal of a bailiff or hayward might cause a poor man to do suit, and thereby he would remain charged for all time through this false possession...For twenty years past there has not come into England so good a law for poor people.

All that is needed to make this proclamation of the creation of new law compatible with a respect for ancient opinions is a decision by Bereford and the other judges that in this particular instance the presumption that the ancient usages reflected reason failed.

It is one thing, however, to conclude that some of the most important common lawyers in the Year Book period understood law this way, and another to infer from that that medieval common lawyers uniformly held this conception of law. I have yet to find a period in either the common law or civil law traditions in which all the lawyers agreed on anything. A generation after Bereford proudly made new law in Venor v. Blind, another judge emphatically refused to do so, saying, "It was law before we were born...we cannot change it...so sue to Parliament to make a new law."[71]

I do not doubt that medieval common lawyers differed about the nature of the common law and how it was to be known. For almost any statement in the medieval legal literature about common law jurisprudence one can find others that appear to contradict it. I

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[70]Y.B. 3 & 4 Edw. II 161.

[71]Y.B. 8 Edw. III; quoted in T. E. Lewis, supra, at 350.

have tried to give reasons for thinking that at least some of those differences were more apparent than real. But when, in a single case, three leading jurists expressed three different opinions about the nature of the common law, one cannot deny that real differences existed. In the end, therefore, any attempt by a modern legal scholar to claim that in the conception of medieval lawyers, the common law was <u>essentially</u> common custom, or case law, or reason, or the common erudition of the legal elite, will be to try to impose a theory from the outside rather than to find the medieval "common law mind."

SIR JOHN FORTESCUE

Fortescue, the next major commentator on English law after Britton, maintained and developed the idea that the king was not completely unlimited in respect to the law, but the limitation he prescribed was not that of custom as a fundamental law. Fortescue introduced a famous distinction between dominium regale and dominium politicum et regale:[72]

> Ther bith ii kyndes off kyndomes, of the wich that on is a lordship callid in laten dominium regale, and that other is callid dominium politicum et regale. And thai diuseren in that the first kynge mey rule his peple by such lawes as he makyth hym self. And therfore he mey sett vppon thaim tayles and other imposicions, such as he wol hym self, withowt thair assent. The secounde kynge may not rule his people by other laws than such as thai assenten unto.

England, he taught, was a kingdom politicum et regale:[73]

> For the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only regal but also political. If he were to preside over them with a power entirely regal, he would be able to change the laws of his realm and also impose upon them tallages and other burdens without consulting them; this is the sort of dominium which the civil laws indicate when they state that What pleased the prince has the force of law. But the case is far otherwise with the king ruling his people politically, because he is not able himself to change the laws without the assent of his subjects...

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[72]SIR JOHN FORTESCUE, THE GOVERNANCE OF ENGLAND 109 (C. Plummer ed. 1885).

[73]DE LAUDIBUS LEGUM ANGLIE 25 (S.B. Chrimes ed. 1942).

[74]C. H.McILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST 359 (1932). In his last published discussion of Fortescue (CONSTITUTIONALISM: ANCIENT AND MODERN 86-90 (1958), McIlwain asserted that the central conception of the medieval English constitution was Bracton's distinction between gubernaculum and jurisdictio. He added that Fortescue's intention, in using the phrase regimen politicum et regale, was to identify his politicum with Bracton's jurisdictio and his regale with Bracton's gubernaculum. The problem with this analysis is, as we have seen, that there is no textual support in

McIlwain[74] and Chrimes[75] read Fortescue's dominium politicum et regale not as a constitutional monarchy in which the king was controlled in his government by the coexistent power of parliament[76] but as a typically medieval theory of a king limited by law. A case can be made for both interpretations. To say that a king may not change the laws or impose taxes without his people's consent is not exactly to say that that he himself is bound by the law or is under the law (as Bracton explicitly did), although such an inference is plausible. Yet if the "consent of the people" is emphasized it is understandable how Plummer, and later, Hinton[77] could have concluded that what Fortescue really had in mind was parliamentary control.

Without more, we have little basis for choosing one interpretation over the other. If it could be established that the "law" Fortescue had in mind was customary law, the Chrimes and McIlwain position might be strengthened. As Ullmann has pointed out in another context, customary law (a rule binding as the result of uses and practices) is the opposite of positive (more correctly, "posited" law). Its material ingredient is "the will and consent of the relevant group of people to adhere to a particular practice and

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Bracton for McIlwain's distinction between jurisdictio and gubernaculum. Since McIlwain's analysis of Fortescue assumes at every turn that Fortescue is merely following an intellectual tradition derived from Bracton, his interpretation is substantially undermined.

[75]S.B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 319, 321, 339 (1936).

[76]This view was made famous by Plummer in his 1885 introduction to THE GOVERNANCE OF ENGLAND.

[77]Hinton, English Constitutional Theories from Sir John Fortescue to Sir John Eliot, 75 ENGLISH HISTORICAL REVIEW 410, 412-417 (1960).

thus turn it into a binding rule."[78] If law is primarily thought of as customary, then the "assent of the people" might be expected to be manifested not through the acts of parliament but through a change in usages and practices. Fortescue stated that:[79]

> [A]ll human laws are either laws of nature, customs, or statutes, which are also called constitutions. But customs and the rule of the law of nature, after they have been reduced to writing, and promulgated by the sufficient authority of the prince, and commanded to be kept, are changed into a constitution or something of the nature of statutes; and thereby oblige the prince's subjects to keep them under greater penalty than before....

After identifying three sources of law, Fortescue took on the task of demonstrating that England had the best laws of any kingdom. Since the law of nature is the same everywhere, the points of English law sanctioned by it were no better than other laws so sanctioned.[80] This leaves customs and statutes. English customs, he argued, are proved the best because they are the most ancient of all customs; and if they had not been the best, some of the long succession of kings would have abolished them "for the sake of justice or by the impulse of caprice."[81] English statutes were the best because "they are made not only by the prince's will, but by the assent of the whole realm"

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[78]W. ULLMANN, LAW AND POLITICS IN THE MIDDLE AGES 62 (1975). In a case decided when Fortescue was Chief Justice of the King's Bench, Chief Justice Prisot of the Common Pleas made a point of distinguishing between custom and positive law. Maybe Prisot stated that "usage could not be a positive law unless it had been decided and by the Court or made by Statute." This, he said, "had never occurred." Y.B. 33 Hen. VI. Quoted in T. E. Lewis, supra, at 359-360.

[79]DE LAUDIBUS, supra, at 37.

[80]Id. at 39.

[81]Id.

and "promulgated by the prudence not of one counsellor nor of a hundred only, but of more than three hundred chosen men."[82]

There is no evidence in these passages that Fortescue had customary law particularly in mind when he spoke of the "laws" of England being unchangeable at the king's whim. Moreover, he does not give custom pride of place in respect to statute law. If anything, he holds the opposite view, for he stated that customs are strengthened when they are reduced to statutes. I find nothing elsewhere in DE LAUDIBUS which suggests that Fortescue regarded customary law in particular to be fundamental. In DE NATURA, he did ascribe to the law of nature the kind of superiority that McIlwain and Chrimes thought he ascribed to custom: "Oh how great and to be extolled with all praise is that law of nature to which all human laws are obedient."[83] "This law is the mother of all human laws, and if they degenerate they deserve not to be called laws."[84] Hinton questioned whether Fortescue intended even this strong statement to actually restrain lawmaking, because in his mind the possibility of Parliament actually making laws that violated natural law was too remote to be taken seriously.[85] In any event, he did not make an equivalent claim about customary law. Hence, I find no additional support in Fortestcue's views on custom for the interpretation of the dominium politicum et regale as a theory in which the king is limited by the law, but not by co-ordinate

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[82]Id. at 41.

[83]FORTESCUE, DE NATURA, Chapter V.

[84]Id. in Chapter X.

[85]See Hinton, supra, at 416.

political power. Fortescue's discussion of statutes does support Plummer's interpretation of the dominium politicum et regale as a constitutional monarchy, for there he links "the assent of the whole realm" necessary for the making of statutes to the prudence of the "three hundred chosen men" of parliament.

CHAPTER SEVEN

THE JURISPRUDENCE OF THE COMMON LAWYERS IN THE SIXTEENTH CENTURY

THE COMMON LAW DOCTRINE OF CUSTOM IN THE SIXTEENTH CENTURY

ST. GERMAN

The next important discussion of custom by a common lawyer is to be found in Christopher St. German's DOCTOR AND STUDENT, published half a century after Fortescue's death. St. German, a barrister of the Inner Temple, was well read in the canon law and medieval philosophy and theology. DOCTOR AND STUDENT consists of two dialogues between a Doctor of Divinity and a Student of the common law. The first dialogue appeared in Latin in 1523; the second was published in English in 1530. The dialogues were not printed together until after St. German's death, and it is doubtful that St. German intended that they together should make up one coherent work. Our concern here is primarily with the first dialogue which, as St. German tells us in his Prologue, "shows what are the principles or grounds of the laws of England, and how conscience ought in many cases to be formed in accordance with those same principles and grounds."[1]

St. German's treatment of the place of custom in English jurisprudence is only understandable in the context of his general jurisprudence. This general jurisprudence is set out largely by the Doctor who, in an exposition that owes much to the schoolmen and particularly to Gerson, divides law into four kinds: law eternal, the law of nature ("the which as I haue heard saye is called by them that be learnyd in the law of England the lawe of reason"), the law of God, and the law of men.[2]

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[1]DOCTOR AND STUDENT (Selden Society Pub. No. 91, T. F. T. Plucknett & J. L. Barton eds. 1974).

[2]Id. at 7. Although the device of the dialogue always puts distance

Law eternal the Doctor describes as the supreme wisdom of the law of God--the wisdom by which God wills that all things be guided to a good end. This law eternal is called the first law because it existed before all other laws and because all other laws are derived from it.[3] No man except the blessed souls that see God face to face may entirely know this law eternal, but God shows as much as is necessary to man. Man has knowledge of eternal law first by the light of natural reason, and when known this way the eternal law is called the law of reason (or nature). Man also knows the eternal law through "heavenly revelation", and the law so known is called the law of God. Finally, eternal law may be shown to man by the order of a prince or of a secondary governor, and then it is called the law of man.[4]

It is evident from the Doctor's exposition up to this point that there is an ambiguity in St. German's use of the phrase "grounds of the laws of England". When used in connection with eternal law it appears to refer both to the ultimate source of, and to the ultimate authority for, English laws. When used in reference to the three other kinds of law identified by the Doctor it seems to signify only the means by which men can come to know the ultimate law.

The law of nature, according to the Doctor, may be understood in two ways--generally and specially. Considered generally, it refers to certain rules given by nature to all living creatures, reasonable and

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between the reader and the author's intention it is as clear in DOCTOR AND STUDENT as it ever is in a dialogue that both the Doctor and the Student speak for St. German.

[3]Id. at 9.

[4]Id. at 11.

unreasonable. Considered specially, the law of nature is the knowledge of the eternal law in a rational creature, written in the heart of every man and revealed to him by the natural light of reason. Any statute or custom contrary to it is void.[5] All other laws except the law eternal are grounded in this law, including the law of God, which the doctor defines as a certain law, given by revelation to reasonable creatures, showing them the will of God.[6]

The law of man, or positive law, is derived by reason as necessarily and probably following the law of reason and the law of God; every well-made positive law contains something of the law of reason (nature) and of the law of God.[7]

The Doctor concluded his exposition by saying that he had shown the general grounds of the law of England, on which all English law must be based if it be good law, and then he invited the Student to explain to him the more particular grounds of English law.[8]

Where Fortescue had found three grounds of the law of England, St. German's Student found six: the law of reason, the law of God, general customs, maxims, particular customs, and statutes. Of these, the Student assigned the law of reason as the first and principal ground of the law of England. "It is not vsed," he said, "amonge them that be lernyd in the lawes of Englande to reason what thynge is commandyd or prohybyt by the lawe of nature and what not: but all the

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[5] Id. at 13-19.

[6] Id. at 21.

[7] Id. at 27.

[8] Id. at 31.

resonynge in that behalfe is vnder this maner: as when anythyng is groundyd vpon the lawe of nature: they say that reason wyll that such a thyng be don..."[9]

Those learned in the law of England, he continued, divided the law of reason into the law of reason primary and the law of reason secondary. The law of reason primary is so called "because the things which are commanded or prohibited by that law are derived from reason alone, without the addition to it of any other law..."[10] For example, it prohibits murder, perjury, deceit, and the breaking of the peace. The law of reason secondary is itself divided into tc branches, secondary reason general and secondary reason particular. The law of secondary reason general "is groundyd and deryued of that generall lawe or generll custome of proprety whereby goodis mouable and vnmouable be brought in to a certayne propretye so that euery man may knowe his owne thynge."[11] The law of reason secondary particular "is that lawe that is dyryuyed vpon dyuers customes general and pertyculer and of dyuers maxyme & statutes ordeyned and held in this realme."[12] It is called the law of reason secondary particular because its reason is derived of a law that is only held for law in a particular realm, and in no other. The student admits that English law is so full of such secondary reasons (derived out of the general customs and maxims of the realm) that some men have affirmed that all the law of the

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[9]Id. at 31, 33.

[10]Id. at 33.

[11]. Id.

[12]Id. at 35.

realm is provable by the law of reason, but the Student does not think that this is so. The problem with such a claim, he says, lies in the fact that knowledge of the law of reason secondary particular is difficult to come by, for derived as it is from maxims of English law. To deduce secondary reason from them is not easy because much depends upon the manner and form of English legal argumentation.[13] We will pick up the thread of this discussion of the relation of reason to English law when we come to St. German's discussion of general customs and maxims.

The law of God was not defined by the Student. One must assume that it held the same meaning for him as it did for the Doctor. Any statute of general custom directly against the law of God the Student held to be void.[14]

General customs, the Student's third ground of English law, were defined as those:[15]

> of olde tyme vsed through all the realme: which haue ben acceptyd and approuyd by our soveraygne lorde the kynge and his progenytours and all theyr subgettes. And because the sayd customes be neyther agaynst the lawe of god not the lawe of reason & haue ben alwaye taken to be good and necessarye for the common welth of all the realme. Therfore they haue optayned the strengthe of a lawe in so moche that he that doth agaynst them doth agaynst Iustyce and law. And these be tho customes that proprely be called the common lawe. And it shall alwaye be determined by the Iustyces whether there be any suche law or generall custome as alleged, or not and not by .xii. men.

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[13] Id. at 37.

[14] Id. at 41.

[15] Id. at 45, 47.

The fourth ground of English law, said the Student, "standyth in dyuers pryncyples that be called by those learned in the lawe maxymes the which haue ben alwayes taken for law in this realme..."[16] The identification of maxims as a separate ground of law has been seen as the product of St. German's confusion of the formal and material sources of the law.[17] I would agree with Chrimes and Siegel[18] that there is little reason for designating maxims as a separate ground from general customs. The Student himself said that all maxims of English law "might be conveniently numbered among the said general customs of the realm..."[19] The Student distinguished maxims from customs on the ground that while customs were known generally throughout the realm by the unlearned as well as the learned, maxims were "known only in the king's courts or among them that take great study in the law."[20] Chrimes contended that the numerous examples St. German gave of maxims were all pithy statements of a general customs. This is not quite accurate. St. German's examples were statements of common law rules, but those rules were of a particular type--very arcane and technical rules not likely to be known by the general public. All the same, while it may have been analytically useful to distinguish maxims as a subclass of customary law, from the standpoint

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[16]Id. at 57.

[17]See S.B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 210-212 (1936).

[18]Siegel, The Aristotelian Basis of English Law, 56 N.Y.U.L. REV. 18, 23 (1981).

[19]DOCTOR AND STUDENT, supra at 59.

[20]Id.

of St. German's general jurisprudence, it is difficult to see the utility of assigning them as a separate ground.[21] As we shall see, St. German speaks of customs and maxims interchangeably in his discussion of the imperfect participation of customs and maxims in the law of reason, and this presents a problem in relation to the authority of these grounds as law.

The fifth ground of English law, the Student said, was particular customs. These differ jurisprudentially from general customs only in the fact that their jurisdiction is geographically limited.

Most of the law of England, according to the Student, depends upon general customs or maxims. Customs provide not only the content of a large part of the substantive and procedural law of England but also provide the basis of authority for all the king's courts. Although some statutes and books of English law mention the authority

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[21]I can think of two arguments for treating maxims as a ground of law separate from general custom. First, St. German at one point states that maxims are of the same strength and effect in the law as are statutes. Id. Since St. German also says that statutes made against general custom are valid (Id. at 57.), because general customs cannot always be proved by reason, it would seem to follow that maxims, being equal to statutes in their strength and effect, might also stand against contrary general customs, and deserve recognition as a separate ground. However, the Student holds that maxims, like customs, are subject to being changed by statutes (Id. at 65), so it turns out that they do not have more strength in this respect than do statutes after all. The Student says nothing directly concerning the relative strength of maxims and customs. The second argument involves St. German's understanding of the term "ground". If he is to be understood to be assigning separate grounds only on the basis of separate means of knowing a portion of the eternal law, then it might be argued that maxims, being known only through the erudition of legal specialists, should be assigned as a separate ground. But as we have already seen, while St. German does sometimes use the term "ground" in this manner, at other times he uses the term as a synonym for "authority". If "ground" is understood in the sense of "authority" I can see no basis in St. German's jurisprudence for distinguishing maxims from general customs.

of such courts, "there is not statute nor law written in the laws of England"[22] which provides either for the first institution of the courts or that they should exist at all. The custom of the realm upon which "all the ground and beginning" of the king's courts depends "is of so high authority that the said courts and their authorities may not be altered and their names changed without Parliament."[23] Indeed, no general customs of the realm which have obtained the force of law may be changed without Parliament.[24]

The Student is very careful to maintain that even the customs which have obtained the strength of a law cannot be proved only by reason.[25] How can it be proved by reason, he argues by way of example, that only the eldest son may inherit at all, and if there is no son, all the daughters shall inherit the land? In view of this imperfect connection between general customs and reason, a statute made against general custom is valid law.[26]

There is evidence that St. German recognized that he had created a theoretical predicament for himself concerning the source of authority of general customs. He twice approached this problem--once in his discussion of general customs, and once in his treatment of maxims--but never satisfactorily resolved it.

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[22] Id. at 47.

[23] Id.

[24] Id. at 49.

[25] Id. at 55, 57.

[26] Id. at 57.

Before considering St. German's attempts to deal with this problem, let us examine more fully the nature of the difficulty. In St. German's jurisprudence, to the extent that any law is entitled to the name "law," it must be grounded in or derived from God's will--the eternal law. God makes his eternal law known to man through three agencies: reason, revelation, and the order of a prince.[27] The Student assents to the Doctor's statement that the law of man--customs, maxims, and statutes--"is deryuyed by reason as a thinge whiche is necessaryly & probably folowyng of the lawe of reason & of the lawe of god..."[28] But the Student also says that many English customs cannot be proved only by reason to have the strength of a law.[29] The most important law of England, the law of property, is itself not a law of reason but a law of custom.[30] The problem, then, is how the greatest part of the law of England may be said to be entitled to the name "law".

As we have seen, this is not a new problem in English jurisprudence. Glanvil, Bracton, and Fortescue were all concerned with establishing the authority of English customs as law. For them, however, the primary problem lay in the fact that English law was largely unwritten, at a time when the European legal culture outside England, following the Corpus Juris of Justinian, primarily conceived of law as written and promulgated by the prince. For St. German the

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[27]Id. at 11.

[28]Id. at 27.

[29]Id. at 57.

[30]Id. at 57.

problem was different and more difficult. The difficulty lay not in being able to make a plausible case for unwritten law, but in maintaining the coherence of the whole jurisprudential scheme which he, uniquely among common lawyers, had set out in great detail. The nub of the problem lay in the question of how the bulk of English law--general customs and maxims--might be tied to the eternal law.

The Doctor brings up the problem in a question directed to the Student: "I pray thee show me by what authority is it proved in the laws of England that the cases of general customs of the realm... and such other which thou callest maxims ought not to be denied...for since they cannot be proved by reason as thou agreest thyself they cannot, they may as lightly be denied as affirmed unless there be some statute or other sufficient sufficient authority to approve them."[31] The Student's response does not directly answer the Doctor's question. Instead, it consists of an argument that many of the customs and maxims of English law are so well known that it is not necessary for them to be in writing, and those that are less widely known among the people may be known "partly by the law of reason: & partly by the books of the laws of England called years and terms & partly by divers records remaining in the king's courts and in his treasury...& also by divers statutes wherein [many of] the said customs and maxims be oft recited..."[32] This is not a convincing answer to the Doctor's question, which assumed that unless customs could be proved by reason they had to be proved by some "other sufficient authority". What is

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[31] Id. at 69.

[32] Id. at 69, 71.

not demonstrated is why the fact that customs are widely known, or that some of them may be found in certain books, may be regarded as "sufficient authority" to establish them as law. What is needed is some theory connecting these facts about custom to the eternal law.

Fortescue, as we have seen, when faced with the problem of setting forth the grounds for the legitimization of custom, argued that through a succession of five nations "the realm has been continuously ruled by the same customs as it is now, customs which, if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice, and totally abolished them..."[33] Professor J.G.A. Pocock has read this argument of Fortescue's as an attempt to deal with the very problem that we now find St. German faced with--the Aristotelian problem of getting from abstract universal propositions to particular rules for the resolution of concrete human problems. From some universal propositions reason can deduce further propositions, but only abstract universals can be deduced from abstract universals. Plato's question remains: How may the general be made to fit the particular? Aristotle's answer is that it is to be done by means of "common experience". Fortescue, Professor Pocock suggests, in making his argument concerning the antiquity of English customs is making a variation of Aristotle's appeal to common experience. The higher the number of men whose experience has gone into the making and confirming of a particular rule, the greater the probability that that rule is rational in the sense that it is consonant with the abstract universals of natural

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[33]DE LAUDIBUS, Ch. 17.

law. The consonance of English custom may be inferred, but not deduced, from the fact that it has survived so long, and has been approved from so many men.[34]

If Fortescue intended his argument about the antiquity of English customs to be an Aristotelian resolution of the problem of universals and particulars, St. German, who knew De Laudibus, gives no indication that he read Fortescue that way, or found the argument from antiquity useful for tying the common law to the eternal law. St. German used "the olde custome of the realme"[35] and "the ancient custome of the realme"[36] as synonyms for the common law, but he made no attempt to develop any theory concerning the antiquity of the common law. Indeed, he showed no interest at all in the antiquity of the common law, even if he did describe it as "olde custom."

If general customs were not immemorial for St. German, neither were they immutable. This was so because they did not exactly correspond with the law of reason. A statute[37]

> made agaynst suche [general] customes is perfectly valid and ought to be obseruid as law (because they be not merely the lawe of reason.) And certain it is that there is not, and never has been a law of reason that could be changed... And it is to be vnderstande that there is no statute or other written law that treateth of the begynnyng of the sayd customes of English lawe: [ne why they shuld be holden for lawe.] And therefore after theym that be lernyd in the lawes of the realme: the old custome of the realme is the only and suffycyent auctorytie to them in that behalfe.

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[34]See J. G. A. POCOCK, THE MACHIAVELLIAN MOMENT 14-24.

[35]DOCTOR AND STUDENT, supra, at 49.

[36]Id.

[37]Id. at 57.

It may be thought a little strange that after devoting so many pages to setting out a universal scheme of law in great detail, beginning with God's will and working downward to the particular human laws of England, when St. German got to the ground upon which, he says, "dependyth moste part of the lawe of this realme",[38] he can justify its authority as law only by saying, in effect, that it is its own authority. He offers no suggestion as to why this justification should be thought persuasive, except that those learned in the law of England believe it. Unlike Coke, he makes no argument about the importance of giving weight to the opinions of a succession of learned men. One is tempted to conclude that he was stumped by the problem of showing how, within his jurisprudential scheme, the common law was entitled to the name of law.

The sixth and final ground of English law named by the Student was that of "dyuers statutes made by our soueraygne lorde the kynge & hys progenytours and by the lordes spyrytuell and temporall and the commons of the whole realme in dyuers Parlyamentis in such cases where the lawe of reason the lawe of good customes maxymes neother grounde of the lawe of England semyed not to be suffycyent [to punish euyll men and to reward good men.]"[39] For St. German, statutes do not merely declare existing customary or natural law; they make new law. Furthermore, he explicitly holds statutes to be superior to custom: "a custom in this realm prevaileth not against a statute as to the

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[38] Id. at 47.

[39] Id. at 73.

law."[40]

There is evidence that St. German's professional colleagues held the common law in higher esteem than he did. In a tract entitled A Replication of a Serjaunte at the Law,[41] written anonymously as a response to Doctor and Student, and particularly against St. German's suggestion that writs of subpoena and bills of conscience might be obtained from the chancery to mitigate the rigor of the common law, it was argued that no relief was needed from the common law. In the first place, the author argued, St. German's Student himself had "right well shewed, how the law of England is grounded upon the law of reason..."[42] The problem is not any defect in the common law, but a lack of knowledge on the part of the Chancellor "of the goodness of the laws of the realm."[43] The Chancellor[44]

> is not learned in the laws of the realm; for when such a bill is put to him, it appeareth to him to be a matter of good conscience and requireth reformation: and the mattere in the bill appeareth so to him, because he is far from the understanding and the knowledge of the law of the realm, and the goodness thereof; but if he draw near to the knowledge and understanding of the common law of the realm, so that he may come to the perfect knowledge and goodness of it, he shall well perceive that the matter contained in the bill put to him in the chancery, is no matter to be reformed there...

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[40]Id. at 163.

[41]Written c. 1530. Printed most recently as an addition to DOCTOR AND STUDENT (W. Muchall ed. 1874).

[42]As we have seen, this is a serious misstatement of St. German's argument, especially in regard to the common law.

[43]Id. at 347.

[44]Id. at 348.

In an argument reminiscent of Fortescue, and which foreshadows Coke, the Sergeant contended that the wisdom of the common law was greater than the discretion of one man, even if that man were Chancellor. One of the virtues of good law is its certainty, but "if the subjects of any realm shall be compelled to leave the law of the realm, and be ordered by the discretion of one man, what thing may be more unknown or more uncertain?"[45] If the law is wiser than the discretion of a single man, even if that man is the Chancellor, St. German's Student presumes much more in thinking that his "conceit is far better than the common law," and leaving "the common law as it were a thing of no goodness, nor of no reputation..."[46]

In 1531, St. German responded to the Replication in A Little Treatise Concerning Writs of Subpoena.[47] Regarding the Serjeant's argument that the common law had the advantage over the discretion of the Chancellor in respect to certainty, St. German asserted that in fact the law of God and the law of reason, which were to be the grounds of the Chancellor's decrees, "are much more evident and apparent to give judgment upon, than are the general grounds, maxims, and some customs of the realm..."[48] It is simply false, he contended, to suggest that the Chancellor's decrees will be uncertain because they are based on the unbridled discretion and conscience of one man,

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[45] Id. at 346.

[46] Id. at 350.

[47] Most recently printed as an addition to DOCTOR AND STUDENT (W. Muchall ed. 1874).

[48] Id. at 379.

for the conscience which the Chancellor is bound to follow is a conscience "grounded upon the law of God and the law of reason, and the law of the realm not contrary to the said law of God and the law of reason."[49] Even if one takes the law of the realm as a law grounded upon the law of reason and the law of God, there still is an imperfect correspondence between the law of England and the higher laws, for the English law will not always give a man a remedy when he has a right.

Professor Guy[50] and others[51] have provided a service in correcting the traditional view of the common law courts and their personnel as locked in near mortal combat with the Court of Chancery and the other courts of conscience at the beginning of the sixteenth century. I fear, however, that the balance has been tipped too far. I suspect that the author of the Replication spoke for many of his fellow common lawyers in expressing a jurisprudential outlook at odds with an English jurisprudence in which courts of equity and conscience were thought necessary to supplement the common law and the common law courts. For these common lawyers, the common law was sufficient for all exigencies if only it were administered by men who had "the very and true knowledge of the law of the realm."[52]

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[49] Id. at 380.

[50] J.A. GUY, THE CARDINAL'S COURT: THE IMPACT OF THOMAS WOLSEY IN STAR CHAMBER (1977).

[51] E.g., J.H. BAKER, 2 THE REPORTS OF SIR JOHN SPELMAN (1978).

[52] REPLICATION, supra, at 349.

St. German, though a common lawyer, may thus be seen as a figure slightly outside the mainstream of common law thought, especially on the question of the nature of the common law and its place in the entire system of English jurisprudence. The fact that he set out to write a systematic treatise on jurisprudence which was more philosophical than practical is itself enough to distinguish him from all the other common lawyers of his time. And the fact that he denied the perfect reason of the common law, and denied that the common law was perfectly grounded in the law of reason, served to separate him from the growing ideology, stemming perhaps from Fortescue, and pointing toward the extreme views of Sir John Davies, that glorified the common law.

PLOWDEN

Edmund Plowden, now universally regarded as the best common law reporter of the sixteenth century, set a standard that was not surpassed for many generations. It is to his reports (or commentaries, as he called them) that we will turn for a sense of how the common law bench and the practicing bar of the mid-sixteenth century conceptualized the common law, including how they understood the relation of general custom to common law and how they viewed the relation of both to reason and the law of nature.

In the case of Reniger v. Fogossa[53] it is said "there are three Kinds of Laws in this Realm of England, by which the King's People are governed, viz. the Law general, Customs, and Statute Law..." This three-part division of English law, after the manner of Fortescue, indicates that St. German's six-part division did not take hold. The Reniger v. Fogossa division is, however, not the same as Fortescue's. Fortescue divided all human laws, including those of England, into the law of nature, customs, and statutes. His "customs" encompassed both the general customs of the realm (the common law) and local customs. In the Reniger v. Fogossa scheme the word "customs" refers only to local, particular customs, and "the law general" refers to the common law. This is made clear in a passage a few lines later which repeats the three-part division in slightly different language: "And so we see that some Cases shall be construed contrary to Statutes, contrary to Customs, and contrary to the ordinary course of the common

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[53]THE COMMENTARIES OR REPORTS OF EDMUND PLOWDEN 9, Cam. Scacc. 4 Edw. 6 (ed. 1779).

Law..."[54]

One finds two different statements of the nature of the common law in Plowden, one identifying the common law with reason and the other with usage. The statements identifying the common law with reason vary: "the common Law...is no other than common reason,"[55] and "the common Law is no other than pure and tried reason."[56] There is no elaboration of what is meant by either "common reason" or "pure and tried reason". I suspect that "common reason" is used as a synonym or parallel expression for the "common erudition" often mentioned in the Year Books of the late fifteenth century.[57] Common lawyers of the late fifteenth and early sixteenth centuries still had no doctrine of binding precedent. Their appeals to authority took the form not of citations to the rulings of judges in earlier cases but of appeals to the common learning acquired by all members of the profession at the Inns of Court. What was common about the "reason" with which the common law was identified in Plowden's reports was not so much that the reason was held for law throughout the entire realm, but that it was held in common by the legal profession. Here we have a foreshadowing of Sir Edward Coke, who identified the "artificial reason" of the law with the long training and experience of the lawyers.

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[54]Id.

[55]Id. at 36.

[56]Id. at 316.

[57]For a further discussion of the expression "common erudition" see my discussion of case law and precedent in Chapter Six, and E.W. IVES, THE COMMON LAWYERS OF PRE-REFORMATION ENGLAND 156-165 (1977).

Still, the term "reason", as used in Plowden, is not always a synonym of "common erudition". St. German was not merely being idiosyncratic when he identified reason with the law of nature. In several instances recorded in Plowden, common lawyers used "reason" to mean natural law. In Calthirst v. Bejushin,[58] for example, Serjeant Morgan states that "there are two principal Things from whence Arguments may be drawn, that is to say, our Maxims, and Reason, which is the Mother of all Laws." Maxims, the immediate foundations of the common law, are the particular English "conclusions"[59] of universal reason, and it is for this reason that they "ought not to be impugned, but always admitted."[60]

Sharington v. Strotton contains several unusual and explicit citations of the law of nature as one of the foundations of all laws, including the common law.[61]

> [T]he Philosophers have searched so deeply for the Law of Nature...and in their Laws have commended us to follow Nature, and have taken Nature to be one of the Foundations whereupon all Laws are based...we ought not to think that the Founders of our Law were remiss in searching after the Law of Nature, or that they were ignorant of it... [T]hey who made them were Men of the greatest and most profound Judgment, and acquainted as well with the Law of Nature, as with the Law of Reason, and the Law of God also. For there is nothing ordained in our Law of God...
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> So that for the Advancement of the Daughter the Father shall be charged by a Maxim of the common Law...and this is grounded upon the Consideration of Nature... So that a Consideration proceeding from Nature is a sufficient

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[58]Plowden, supra, at 27, C.B. 4 Edw. 6.

[59]Id.

[60]Id.

[61]Id. at 304-306.

Consideration in our Law...

The explicit citation of the Law of Nature is extraordinary. St. German was correct in observing that the practice of the common lawyers was to substitute "reason" for "nature".[62]

The claim that nothing is to be found in the common law that is contrary to the law of reason or nature is, as we have seen, conflicts with what St. German had taught earlier in the century. Indeed, this claim represents a minority view even in Plowden's time. In Wimmion v. Berkley, for example, it is said that "notwithstanding the common Law did suffer it, nevertheless it was not well done, but a Wrong. And some Things the common Law does permit to be done, which are tortious and wrong."[63] In Wimbish v. Tailbois it is said of the Statute of Westminster II:

> For at the common Law the Intent of the Donor was infringed and eluded, which was contrary to right and good Conscience, and therefore the Statute, being made to restrain that vicious Liberty of breaking such Intents, which was suffered by the common Law, shall be extended by Equity...for the common Law, which would not permit him to be received, suffered a Wrong...

It might be thought that the apparent disagreement among sixteenth century common lawyers on the question of the congruence of the common law with the law of nature can be explained as an artifact of the universal practice of advocates to make use of any arguments which promise to help win the case at hand. But the arguments in

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[62]Calvin's Case, early in the seventeenth century, is the only other case which comes to mind in which explicit resort is made to the law of nature for legal authority.

[63]. Id. at 247. C.B. 4 Eliz.

Plowden's reports on both sides of this issue are hardly extemporaneous inventions--they are clearly part of the standard equipment of the lawyers. Unless we are prepared to assume complete cynicism on their part, this suggests that the common lawyers were ambivalent about the relation of the common law to a higher, universal law (whether conceived as reason, natural law, or the law of God). We have found this ambivalence throughout the history of the common law.

Besides "common reason", and reason as the law of nature, the common law is also described in Plowden as "no other than pure and tried reason." This location suggests a different idea altogether--one similar to that represented in Fortescue's argument that English laws were the best of all human laws, because they had been tried through a succession of English kingdoms and would have been rejected otherwise.

The conceptualization of the common law as "pure and tried reason" seems to be linked to a second set of statements in Plowden which identify the common law as "nothing but common Use."[64] This raises two questions: Are "common use" and "common reason" equivalent terms? Are they tied to the concept of common erudition (understood in the sense of learning, modes of reasoning, and custom or practice of the common law bench and bar)? Despite the repeated use of these terms in the cases reported by Plowden, it is difficult to judge with assurance the meaning they had for their users. Typically, the identification of the common law as common use or common reason is made cryptically, in a context which provides few clues to the meaning

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[64] Id. at 195. C.B. 1 Eliz.

of the phrase in question--very much as if counsel and judges are reciting by rote tags of jurisprudence remembered from their training. In the case of Wrotesley v. Adams,[65] Brown, J. and Dyer, C.J. make the fullest statement reported by Plowden which identifies common law with common use:

> Farm is a collective Word consisting of divers Things collected together, whereof one is a Messuage, and the others are Lands, Meadows, Pastures, Woods, Commons and other Things lying or appertaining thereto... And yet all this does not make it be called a Farm, if it has not another Thing also; and that is, that it has been let or demised to another for Life, for Years, or at Will... So a Farm contains divers Things, as hath been said, as a Grange does; and it is a capital Messuage and a great Demesn which have been let and demised, and so it is commonly taken in every Place. For which Reason the Law also says it is so, for the Law is the Custom in relation to Letters, Counts, Pleas, and Judgments, and the common Law is nothing but common Use.

Was the law referred to as "the Custom in relation to Letters, Counts, Pleas, and Judgments" thought of as different from the common law, which was said to be "nothing but common use?" I submit that both references in the passage are to the common law. This becomes clear when one asks what kind of law, in the three-part division of English law, is "the custom in respect to Letters, Counts, Pleas, and Judgments." It is not statutory law, but a form of custom. There is no local, particular custom in respect to counts, pleas, and judgments. Therefore, this law can only be the common law of the realm.

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[65] Id.

The custom in respect to counts, pleas, and judgments is not the custom of the folk. Only lawyers and judges have customs or usages in respect to these matters. This custom, then, may also be understood as the common erudition, or common reason, of the bench and bar.

But what about the statement that the common law is "nothing but common Use"? Does "common use" refer only to the common usages of bench and bar, or does it have a wider application? We cannot be sure. In the Wrotesley case the judges stated in respect to their definition of "farm" that "so it is commonly taken in every place", and this appears to be an argument on the basis of a common usage broader than that merely of judges and lawyers. This interpretation of the judges' dictum in Wrotesley is strengthened by an argument in Reniger v. Fogossa:[66]

> Statute [26 Hen. 8] is in the disjunctive, and speaks of Payment or Agreement, &c. and this agreement is intended to be executory, as the common Usage proves, for it is usual to make an Obligation for the Payment at certain Days after.

Here the "common usage" referred to is clearly the usage of the vicars, parsons, and others who are the subjects of the statute, and not the usage of lawyers in applying the statute. Lawyers, then, were accustomed to using the phrase "common usage" in a sense that included the usages of people in the ordinary course of living and doing business. It seems most natural to read the Wrotesley phrase "commonly taken in every Place" in this sense. But we must remember that our question is whether sixteenth century lawyers, and

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[66]Id. at 9.

particularly Justices Brown and Dyer, identified the common law with such standard practices of laymen. Wrotesley suggests that common usages of the people indeed made up part of the common law, for Brown and Dyer add to their statement that the meaning that they have ascribed to "farm" is "commonly taken in every place", the conclusion, "for which reason the law also says that it is so."

What may we now say of the sixteenth century conception of the common law and its relation to custom, if indeed a single such conception existed? In Plowden's Reports the common law was identified with both reason and usage. "Reason", in turn, was used in two senses: the common erudition of the legal profession, and the law of nature. "Usage" was also used in two senses: the usages of those learned in the law and the usages of the people. It is tempting to try to weld these disparate ideas into a coherent sixteenth century theory of the common law. It might be suggested, for example, that sixteenth century common lawyers assumed, when they used any one of the several formulae we have found in Plowden, that their fellow lawyers possessed a common jurisprudential framework in which each such formula had its place in a heirarchy of concepts--much as in Doctor and Student. But I doubt very much if many sixteenth century common lawyers, any more than their counterparts today, had a conscious, coherent theory of the common law and custom.

A few lawyers, of course, such as St. German at the beginning of the century and Thomas Hedley shortly after its close,[67] had

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[67]Speech before the House of Commons, 1610. 2 PROCEEDINGS IN PARLIAMENT 1610: HOUSE OF COMMONS 172-176 (Elizabeth Reed Foster ed. 1966).

theoretically sophisticated understandings of the place of usage and reason in the common law in the English legal system as a whole. Plowden's Commentaries themselves, by virtue of the fact that they even report a few snatches of explicit jurisprudential discussions, fall into this exclusive category. Other contemporary law reporters such as Sir James Dyer[68] seldom, if ever, reported discussions about such jurisprudential questions as the nature of the common law, usage, custom or legal reason.

It is possible that such discussions frequently occurred in court[69] and were unreported because the reporter assumed that every lawyer had received a solid grounding in the fundamentals of jurisprudence at the Inns of Chancery and the Inns of Court. This, however, is not the impression one gets from reading a wide range of the sixteenth century reports. The impression, instead, is of a profession which had very little interest in legal philosophy and which, consequently, had not gone to the trouble of attempting to formulate a coherent jurisprudence.

The profession had available to it, out of the long history of the common law, several possible ways of describing that law. Which particular description was chosen for employment in any given legal argument depended less upon its user's sense of what a coherent jurisprudence required than upon whether that description would help

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[68]Dyer, admitted to the coif in 1552, was constituted a judge of the common Pleas in 1557. His Reports extent from 4 Henry VIII to the period of his death in 1582.

[69]As we have seen, Plowden reported such a discussion by Dyer himself in the Wrotesley case.

his client out of his present difficulty. The modern scholar can, by straining his ingenuity, imagine how the sixteenth century English lawyer might have fashioned a coherent theory of the common law out of the materials he had at hand. There is little evidence for such a theory in the sixteenth century reports.

CHAPTER EIGHT

THE JURISPRUDENCE OF THE COMMON LAWYERS IN THE EARLY SEVENTEENTH CENTURY

We have seen that the common lawyers of the mid-sixteenth century had available several ways of speaking and thinking of the common law: as the common usage, reason, or erudition of the professional elite; as the common usages of the people; as an extension of natural law; and as "common custom of the realm." None of these modes of speech and thought appears to have predominated in the second half of the sixteenth century. Although the concept of "common custom" may have included the notion of prescription,[1] there is little evidence in the sixteenth century law reports that the common lawyers were concerned with the immemorial antiquity of the common law. They had read their Littleton and well understood that the phrase "sithe the time whereof no minde is to the contrary" did not necessarily refer to remote antiquity.[2] Fortescue aside, the common lawyers made little effort to praise the common law for its antiquity until the end of the sixteenth century.

It was at the beginning of the seventeenth century, Professor Pocock has told us, that all this changed and the myth of immemorial antiquity became central to the common lawyer's understanding of the nature of the common law.[3] Central to Professor Pocock's

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[1]See, e.g., J. RASTELL, AN EXPOSITION OF CERTAIN DIFFICULT AND OBSCURE WORDS AND TERMS OF THE LAWS OF THIS REALME 159 (1579): "Prescription is when one hath had or used any things sithe the time whereof no mind is to the contrary."

[2]LITTLETON, TENURES, Sect. 170: "Hee shall say, that such custome hath beene used from time whereof the memory of men runneth not to the contrary, that is as much to say that no man then alive hath heard any proof to the contrary; nor hath no knowledge to the contrary..."

[3]J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 30 (1957): "The English supposed that the common law was the only law their land had ever known, and this by itself encouraged them to interpret the past as if it had been governed by the law of their own day; but in

interpretation of early seventeenth century English legal thought is what he calls the doctrine of the ancient constitution. This doctrine was shaped by the assumptions "first, that all the law in England might properly be called common law; second, that common law was common custom, originating in the usages of the people and declared, interpreted and applied in the courts; third, that all custom was by definition immemorial, that which had been usage and law since time out of mind, so that any declaration of law, judgment or (with not quite the same certainty) statute, was a declaration that its content had been usage since time immemorial."[4] The common lawyers, Professor Pocock contended, "holding that law was custom; came to believe that the common law, and with it the constitution, had always been exactly what they were now, that they were immemorial..."[5] Professor Pocock supported his thesis about the doctrine of the ancient constitution, and the mentalite he called "the common law mind", almost entirely with quotations from Sir Edward Coke and Sir John Davies but he held that the doctrine and the outlook was widely shared by common lawyers of their time:[6]

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addition the fact that the common law was a customary law, and that lawyers defined custom in a way which heavily emphasized its immemorial character, made even more radical the English tendency to read existing law into the remote past."

[4]J.G.A. Pocock, Burke and the Ancient Constitution: A Problem in the History of Ideas, in POLITICS, LANGUAGE AND TIME 209 (1973).

[5]THE ANCIENT CONSTITUTION, supra, at 36.

[6]Id. at 37. The Ancient Constitution has been criticized for representing the common law mind as being more monolithic than it was, and in his 1986 Retrospective on his classic work, Professor Pocock does not reject this criticism out of hand. He does appear to suggest that closer inspection of seventeenth century common law thought might reveal "the common-law mind" to have been monolithic after all. 1987

> But by Coke's time the increasing activity of a nearly sovereign monarchy had made it seem to most common lawyers that if a right was to be rooted in custom...it must be shown to be immemorial... The idea of the immemorial therefore took on an absolute coloring... It ceased to be a convenient fiction and was heatedly asserted as literal historical truth...

Professor Pocock's interpretation of "the common-law mind" of the seventeenth century has for thirty years so dominated scholarly discussion of that century's thought about the nature of the common law and its place in the English legal order that it must be taken into account by any scholar investigating the common law jurisprudence of that period. My purpose in this chapter, however, is not to reexamine Professor Pocock's interpretation but to examine in considerable detail what several of the leading common lawyers of the first half of the seventeenth century had to say about their understanding of the nature of the common law and its relationship to other kinds of law--about the relationship between the common law and divine and natural law, between common law and reason, common law and custom, and between common law and statute law. While Professor Pocock and I examine a number of the same sources, we do so in pursuit of different ends. He looks at common law jurisprudence for the light it may shed on the historiography of the early seventeenth century; I am engaged in a historical and comparative study of common law jurisprudence. I shall begin by looking at the two lawyers on whose writings Professor Pocock based his model of the common law mind--Sir Edward Coke and Sir John Davies--but because my aim is to paint as full a picture as possible of seventeenth century English legal

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ed. at 265.

theory, the doctrine of the ancient constitution will only serve as an orienting device in that landscape.

SIR JOHN DAVIES

Sir John Davies,[7] in the Preface to his Irish Reports,[8] described the common law in a way which Professor Pocock has taken as classically representative of "the common-law mind". Davies began by observing that, despite the operation of English law in Ireland for some four hundred years and the continuous presence there of men learned in English law, there never had been any report published of law cases adjudged in that kingdom. This Davies found strange, for men in England who were learned in the law had, from the time of the Norman conquest, thought it important to reduce notable cases into books of reports which were called "the Annalles of the Lawe".[9] These reports, Davies said, were "but Comments or interpretations of the

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[7]1569-1626. Poet and attorney-general for Ireland. Took B.A. at Oxford in 1590; studied law at Middle Temple; called to bar in 1595; disbarred and expelled from Middle Temple in 1598; upon Lord Ellesmere's intervention and his own apology was restored to bar in 1601; James I took a liking to him (apparently on the basis of his poem "Nosce Teipsum") and sent him to Ireland as solicitor-general in 1603; in 1606 was appointed attorney-general for Ireland; in 1609 was made a serjeant; in 1626 was appointed as Chief Justice, but never took office.

[8]Published at Dublin in 1615 as Le Primer Report des Casses et Matters en Ley resolues & adiudges en les Courts del Roy en Ireland. All quotations from Davies in this chapter are taken from THE COMPLETE PROSE WORKS OF SIR JOHN DAVIES (A. Grosart, ed. 1876).

[9]Id. at 250-251.

Common Law, which Text was never originally written, but hath ever been preserved in the memory of men, though no man's memory can reach to the original thereof."[10] This conceptualization of the common law as an unwritten text is most interesting, although it is not sustained. Davies said that the English law reports were interpretations or comments on the unwritten text of the common law; this suggests that they do not replicate that text. The text of the common law is to be found in "the memory of men", or, in the variant language of the next paragraph, "in the memory of the people". At this point Davies began to talk of the common law in terms of custom and did not return to the idea of the common law as an unwritten text.[11]

> For the Common Lawe of England is nothing else but the Common custome of the Realme; and a custome which hath obtained the force of a lawe, is always said to be Ius non scriptum for it cannot be made or created, either by Charter or by Parliament, which are Acts reduced to writing, and are alwaies matter of Record; but in use and practise, it can be recorded and registered no where, but in the memory of the people.
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> For a Custome taketh beginning and groweth to perfection in this manner: When a reasonable act once done, is found to be good and beneficiall to the people, and agreeable to their nature and disposition, then do they use it and practise it againe, and againe; and so by often iteration and multiplication of the act, it becometh a Custome, and being continued without interruption time out of mind, it obtaineth the force of a law.
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> And this Customary Lawe is the most perfect, and most excellent, and without comparison the best, to make and preserve a Common-wealth; for the written lawes which are made eyther by the edicts of Princes, or by counsells of Estate, are imposed upon the Subject before any Triall or

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[10] Id. at 251.

[11] Id. at 251-252.

> Probation made, whether the same be fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or no. But a Custome doth never become a law to bind the people, until it hath been tried and approved time out of mind; during all which time there did thereby arise no inconvenience, for if it had been found inconvenient at any time, it had been used no longer, but interrupted, and consequently it had lost the virtue and force of a law.

Davies did not invent the claim that the common law was "nothing else but the Common custome of the Realme." As we have seen, this was one of three standard ways the common lawyers of the second half of the sixteenth century used to describe the common law. What Davies and Coke did was to take ancient ritualistic tag-ends and phrases of the common law liturgy, that no lawyer for centuries had taken literally, and read them quite seriously and literally, and to build their myth of the common law out of implications drawn from the literal reading of these phrases. By the seventeenth century the common law was full of phrases like "immemorial custom", "common custom", "ancient law", "beyond time of memory", that served no present purpose in legal theory or practice, but were ritualistically repeated anyway. The particular phrases on which Coke and Davies relied in constructing their theory of the common law had become merely ritualistic before the end of the Middle Ages. One may see this in the Year Books and, later, in Littleton's great Treatise of Tenures, where the standard recitation as to long and continuous use is usually broken off after a few words and concludes with "&c".[12]

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[12]For example, LITTLETON, BK. III, CH. II, SECT. 271: "[T]his was by the common law before the statute of Westm. 2nd, and has always been used and continued, &c."

Fictions and artificial conventions had a definite place in the common law; it might even be said that they were the glue that held it together. But there was no need or reason for lawyers to believe in them. Let me take an example from the doctrine of trespass. In the thirteenth century the rule was that a claimed trespass, or wrong, could be heard in the king's courts only upon an allegation that the king's peace had been broken. In nearly all cases of trespass, therefore, the plaintiff alleged that wrong had been done him by means of force and arms; the complaint usually added the words "to wit with swords and bows and arrow". As the law of trespass expanded to cover cases in which no force and arms had been used, a lawyer who hoped to have his client's case heard still had to make the old allegations of vi et armis. In one fourteenth century case,[13] the buyer of a cask of wine accused the seller of having with force of arms, to wit, with swords and bows and arrows, drawn off some of the wine and substituted water. Professor Milsom has drawn a heartwarming picture of the honest cask stoutly resisting the force and arms.[14]

Having taken the standard fictions concerning the nature of the common law literally, Davies attempted to demonstrate how the characteristics of the common law represented in those fictions made the common law "the most perfect, and most excellent, and without comparison the best" law in the world. Fortescue had claimed that English customary law was better than any other nation's customary

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[13]Y. B. 10 Ed. II, 54 Seld, Soc. 140.

[14]S. F. C. Milsom, Reason in the Development of the Common Law, in STUDIES IN THE HISTORY OF THE COMMON LAW 115 (1985).

law, but he did not compare it to English statutory law. Davies found English customary law to be better than statute law because statutes are imposed before it is known whether they are "fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or no," while a "Custome doth never become a law to bind the people untill it hath bin tried and approved time out of mind."

In this passage Davies was pursuing two distinct lines of argument in praising English customary law. The first held that law must be appropriate to the nature and disposition of a people. English customary law, Davies claimed, is "so framed and fitted to the nature and disposition of this people...so as it cannot possibly be ruled by any other law.[15] It is fitted to the English people's particular nature because they "have made their owne Lawes out of their wisedome and experience (like a silke-worme that formeth all her web out of her selfe only)..."[16] This particular argument, of course, is directed at the advantages of customary law in general; within its terms there is no reason to prefer English custom to French or any other national customary law. In his second line of argument, Davies suggested that because custom, by definition, does not become law until it has been tried and approved time out of mind, it is bound to have fewer defects and inconveniences than laws instituted without long trial and experience.[17]

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[15] Id. at 255. Fortescue had claimed that this argument was Aristotelian.

[16] Id.

[17] There is a certain plausibility to this argument, but it seems to me

Davies found a kind of wisdom and reason in custom that surpassed anything an individual or legislature could devise. In extolling the common law for its reasonableness, Davies was squarely within the common law tradition (even if that particular tradition was an importation from the civil and canon law). Indeed, part of the common law definition of customary law (again imported from the civil and canon law) was its reasonableness; a custom could never attain the status of law unless it was reasonable. But Davies wanted to claim more reason for the common law than the minimum necessary to qualify it as law;[18] he himself quoted the standard civil law maxim, which had been appropriated by the common law, that "Law is nothing but a rule of reason."[19] If all law is reason, there is no special merit in the mere presence of reason in the common law. According to Davies, there were two things that made the wisdom and reason of the common law

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that it might be vulnerable to the following counterargument from supporters of statutory law. Customary law's supposed superiority to statute law is said to be demonstrated by the fact that it would not have lasted long enough to become law if it had contained important defects or produced serious inconveniences. This claim can be challenged on a factual basis, as Sir Francis Bacon did. But even if we accept the claim that immemorial custom has proved itself to be free from inconveniences, there remains the fact that not every practice embarked upon may prove to be free of inconveniences. In weighing the merits of custom and statute on the scale of the inconveniences to be found in each kind of law, should we not take account of failed usages? According to Davies's and Coke's theory of custom, usages and practices become established as customs through a process of trial and error. It is not self-evidently clear that errors that turn up in the usages of the people are any less inconvenient than misjudgments made by legislators. One might argue, too, that there is a winnowing out process with statutes just as there is with usages, and just as harmful or inconvenient usages are dropped, statutes that prove faulty are revised or repealed.

[18]He asserts of the common law that "no human Law, written or unwritten, hath more certaintie in the Rules and Maximes, more coherence in the parts thereof, or more harmonie of reason in it..."

extraordinary. First, the "[l]ong experience and many triall[s]"[19] necessary to produce customary law insured a wisdom and reason that legislation was not likely to match. The common law was no better than any other nation's customary law in this respect, however. The advantage the common law has over the other systems of customary law must lie, then, in the peculiar wisdom and virtue of the English people: "...England having had a good and happy Genius from the beginning, hath beene inhabited alwaies with a vertuous and wise people, who ever embraced honest and good Customes, full of reason and convenience..."[20]

Professor Pocock has suggested that "Coke's emphasis is less upon custom, in the pure sense in which Davies uses the word than upon the activity of the judges in constantly refining the law..."[21] It is certainly true that in the first several pages of his Preface to his Irish Reports Davies concentrates on the idea that the common law is customary law, and is primarily concerned to draw implications from that conception. In this part of his Preface the active agents in the shaping of the common law appear to be the wise and virtuous English people. But in the remainder of the Preface it is not the people who get the credit but "the great learning, wisdom, gravitie, and

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[19]Id. at 259.

[20]Id. at 255.

[21]Id. at 254. There is no evidence that Davies recognized that his praise for the common law, in comparison with other nation's laws, could be reduced to the claim that the English people were more virtuous and wise than other peoples.

[22]THE ANCIENT CONSTITUTION, supra, at 25.

constancies of our Judges..."[23] Davies was not explicit on this point, but he seemed to have in mind a division of labor: the people form the common law and the judges articulate and preserve it:[24]

> If therefore Justice, and the Law, which is but a rule or lesson of Justice, be so necessary for all persons, times and places, as no familie, no city, no common-wealth, no kingdome, can stand without the support thereof; how needful is the service of learned men in the law, without which Justice it selfe cannot possibly stand?... For if no man did study the reason of the Law, if no man kept in memory the rules of the Law, if no man knew the forme of pleading, or the course of proceeding in the law, what would become of the publique Justice in a short time, or how should the benefit of the law be derived and communicated unto the people? For as in a naturall body the reasonable soule cannot use or transmit any of her powers, but by speciall organs of the same bodie, disposed and fitted by nature for every function, as the eye to see, the eare to heare, the tongue to speake, and the like of the rest: so in the body politique of a Common-Wealth, the Law, which is the soule thereof, produceth no effect or operation at all, but by such of her Ministers as by art and experience are enabled and qualified for her service.

One may distinguish a final reason cited by Davies in support of his claim that the common law was the most perfect law in the world:[25]

> Therefore the Lawe of Nature, which the Schoolmen call Ius commune, and which is also Ius non scriptum, being written onely in the heart of man, is better than all the written lawes in the world to make men honest and happy in this life, if they would observe the rules thereof: So the customary Law of England, which we doe likewise call Ius commune, as comming neerest to the Lawe of nature, which is the root and touchstone of all good lawes, and which is also Ius non scriptum, and written onely in the memory of man...

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[23] Id. at 261.

[24] Id. at 275.

[25] Id. at 253.

Davies did not assert that the common law comes "neerest to the Lawe of nature" because its content--its reason--is the closest to that of natural law, as anyone with more than a superficial understanding of natural law theory might be expected to have done. Instead, he based his assertion of the common law's closeness to natural law on points of resemblance that any civilian or canonist, and many a common lawyer, would have dismissed as superficial: both were called ius commune and both were unwritten. In his eagerness to nail down the similarity of the two kinds of law on the last point, he also claimed that natural law, like the common law, was "written onely in the memory of man." This claim betrays either a fundamental ignorance about natural law theory (and thus may be taken as an additional proof of Professor Pocock's thesis about the insularity of "the common law mind"), or else amounts to a deliberate distortion of that theory. There were several variations in natural law theory on the question of where in men knowledge about natural law resided, or how men might attain to that knowledge, but none of them involved its preservation in men's memory.

There are reasons for suspecting that Davies knew more about natural law theory than this passage suggests, and that for his own purposes he misdescribed that theory, perhaps relying on the insularity of his readers not to be caught out. For example, he noted that the Schoolmen called the law of nature ius commune. If he had read only a few pages of Aquinas on natural law he would have known better than to have based man's access to natural law on his memory. It is clear that he had had some exposure to Aquinas because he quoted

a substantial passage later in his Preface.[26] He certainly had read St. German, who passed along Gerson's teaching on the law of nature. He cited Bodin by name.[27] He quoted the canonist Lodovicus Gomez at length.[28] In The Question Concerning Impositions he repeatedly quoted the Corpus Juris, and also quoted from the great fourteenth century post-glossator Baldus. It is unlikely that a man who had read as widely in the canon law, Civil law, and medieval theology as these citations suggest would have stated unwittingly that the law of nature was "written only in the memory of man."

In the Preface to his Irish Reports Davies "wrote to vindicate the use of English law in Irish courts."[29] In The Question Concerning Impositions, Tonnage, Poundage, Prizage, Customs, &c.,[30] he wrote for a different purpose--to vindicate the king's prerogative--and presented the common law in a different light. In the former case it suited his purposes to exalt the common law; in the latter it did not. The technical question he set out to answer in the second chapter of The Question Concerning Impositions was whether the customs duties that were payable to the Crown had been instituted by the common law or by statute. In the course of anwering this question Davies said some things about the common law that may lead us to wonder whether

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[26]Id. at 271.

[27]Id. at 267.

[28]Id. at 263.

[29]J.G.A. POCOCK, The Ancient Constitution Revisited: A Retrospective From 1986, in the ANCIENT CONSTITUTION AND THE FEUDAL LAW 263 (1987 ed.).

[30]Unpublished until 1656, thirty years after his death.

his description of the common law in his Irish Reports should best be seen as a reflection of the "common law mind" or merely as the effort of an advocate who was making the best case he could for the task at hand. Much more was at stake in the impositions debate than the power of the king to levy impositions; the broader question concerned the nature and and sources of the king's authority and power in government. Sir David Keir has listed some of the issues that were debated at the beginning of the seventeenth century under the broad qustion of the nature and scope of the king's prerogative:[31]

> Was the king's discretionary power derived from and limited by the law, or altogether beyond its confines? Could he compel the common law courts to abandon jurisdiction when matters affecting his prerogative came in question, or at least to admit their incompetence to impose limits on it? Was the exercise of prerogative powers, particularly those contained in the royal supremacy over the Church and in the conduct of foreign policy, wholly beyond parliamentary control? Did parliamentary privilege, and especially free speech, exist as a right, or solely by royal grace?

In this dispute Davies came down solidly on the side of a royal prerogative unconstrained by England's laws. He argued that neither the common law nor statutes gave the power to collect customs to the Crown; they arose from the law of nations. He quoted Justinian for the proposition that "Jus Gentium, or the generall Law of Nations, is of equal force in all Kingdoms, for all Kingdoms had their beginning by the Law of Nations..."[32] From the origin of kingdoms by authority of the law of nations, Davies not only drew conclusions about the king's legal right to duties and impositions; he drew more fundamental

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[31]D. KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, 160-161 (9th ed. 1969).

[32]THE QUESTION CONCERNING IMPOSITIONS, supra, at 9.

conclusions about the King's relationship to the laws of England, both statutory and customary. His authorities on the question of the king's prerogative and of his relationship to the law of England were, almost without exception, Roman law authorities. Defenders of the royal prerogative in England found that many of the Roman texts on imperial power could support admirably the king's claims of prerogative if only the word "king" were substituted for "emperor". Indeed they found that civilian jurists had made their path easier by creating the doctrine that a king had in his own kingdom those powers which the emperor held in the empire. Davies defended his position against the charge that the rules of imperial law which he used as authorities applied only to the emperor and not to the king of England by quoting "a learned Civilian":[33]

> [P]lus juris habet Rex in Regno quam Imperator in imperio, quia Rex transmittit regnum ad successionem quod non facit imperator, qui est tantum electionis, &c.

It was important for those who set out to defend the royal prerogative, or to expand it at the expense of statute and common law, to establish its origins and authority as independent of any customs of the people or any parliamentary grant. As in the case of the lex regia in Roman law, any time a royal power was said to have derived, directly or indirectly, from the people, there was always the possibility that an argument could be made that what had been granted could also be withdrawn. I believe that is why Davies was at pains to claim that the king's prerogative came from the law of nations:[34]

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[33] Id. at 21.

[34] Id. at 10.

> For as the Law of Nations was before Kings, for Kings were made by the Law of Nations, Ex jure Gentium Reges originem traxerunt, saith Baldus; So Kings were no sooner made by the Law of Nations, but presently the same Law...which is the Law of Nature or Nations...did annex this Prerogative to their several Crowns...

Like the medieval popes and emperors who wished to leave no doubt about their authority, English defenders of the royal prerogative frequently claimed that their kings received their authority directly from God rather than indirectly through the people by means of human law. This was the point Davies was making when he identified the law of nations with the law of nature and said that kings were made by the law of nations.

Davies again resorted to the imperial language of Roman law to make the claim that regarding his prerogatives, the king had absolute power: "wherein the King hath sole and absolute power merum imperium & non mixtum...."[35] At first, said Davies, "by the Law of Nations the King had an absolute and unlimited power in all matters whatsoever."[36] In contrast to the medieval common law doctrine taught by Bracton, in which the King received his authority from the law, and as a result never had absolute power because he was subordinate to the law, Davies claimed that the King had an absolute power in all matters before England had any particular law of its own:[37]

> Hereupon by the same Law of Nations, Tributes and Customes became due to the King of Prince to maintain him in his place of Government...and all these things, namely Property and Contract, and Kings, and Customes, were before any

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[35] Id. at 11.

[36] Id. at 25.

[37] Id. at 24, 25.

> positive Law was made; then came the positive Law, and limited the Law of Nations, whereas by the Law of Nations the king had an absolute and unlimited power in all matters whatsoever.

Clearly, then, despite his claims elsewhere about the antiquity of the common law, Davies' argument here is inconsistent with the famous assertion of Sergeant Catesby, made in 1470, that the common law had existed since the beginning of the world. Davies is quite explicit about the chronology of the development of the English constitution. At first, by the law of nature, all things were held in common and there was neither king nor subject; then, with the inauguration of the law of nations, the law of nature was limited and property was established. The existence of property required the institution of kings and rulers to protect it.[38] Up until this point in the chronology there is no law of England, whether statutory or customary. There are no legal limits on the king. Any legal restrictions on the king exist not by the law's operation on the king but by the king's voluntary creation of, or acquiescence in, law that has that effect. That this is the Roman imperial theory of the ruler's relation to the law is not left to the reader's inference; Davies is quite explicit about it:[39]

> By the positive Law the King himself was pleased to limit and stint his absolute power, and to tye himself to the ordinary rules of the Law, in common and ordinary cases, worthily and princely, according to the Roman Emperour, Dignissimum Principe Rex se allegatum legibus confiteri, retaining and reserving notwithstanding in may points that absolute and unlimited power which was given unto him by the Law of Nations, and in these cases or points, the King's

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[38] Id. at 24.

[39] Id. at 25.

> Prerogatives do consist; so as the king's prerogatives were not granted unto him by the people, but reserved by himself to himself, when the positive law was first established; and the King doth exercise a double power, viz. an absolute power, or Merum Imperium, when he doth use Prerogatives onely, which is not bound by the positive Law; and an ordinary power of Jurisdiction, which doth co-operate with the Law, and whereby he doth minister Justice to the people, according to the prescript rule of the positive Law...

Davies was nice in his choice of language describing the two kinds of power he attributed to the king. In regard to his prerogatives, the king has an "absolute power...which is not bound by the positive law;"[40] in regard to his power of ordinary jurisdiction, he may have "tied" himself to the positive law, but only in the sense that he will "cooperate" with it, not in the sense that he is bound by it.

This distinction of two powers held by the English king, one absolute and one ordinary, was by no means original with Davies. The Venetian ambassador had written in 1551 of the English monarchy that "the king of England exercises two powers,...the one royal and absolute, the other ordinary and legal."[41] Sir John Doddridge, a Justice of the King's Bench from 1612 to 1628 and among the most learned and distinguished common lawyers of the early seventeenth century, late in Elizabeth's reign distinguished between the "absolute" and the "ordinate" power of the king.[42] The most famous statement of the king's double power, and the one on which Davies very likely based our passage, was that made in 1606 by Chief Baron Fleming

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[40]Seventeenth century common lawyers used the term "positive law" to refer to both statute and common law.

[41]Quoted in M. JUDSON, THE CRISIS OF THE CONSTITUTION 112 (1949).

[42]TREATISE ON THE KING'S PREROGATIVE. See id.

in deciding Bates' Case (or the Case of Impositions) in the Court of Exchequer:[43]

> The King's power is double, ordinary and absolute, and they have several lawes and ends. That of the ordinary is for the profit of particular subjects, for the execution of civil justice, the determining of meum; and this is exercised by equitie and justice in ordinary courts, and by the civilians is nominated jus privatum and with us, common law: and these laws cannot be changed, without parliament; and although that their form and cause may be changed, and interrupted, yet they can never be changed in substance. The absolute power of the King is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is applied to the general benefit of the people and is salus populi; as the people is the body, and the King is the head; and this power is guided by the rules, which direct only at the common law, and is most properly named Policy and Government; and as the constitution of this body varieth with the time, so varieth this absolute law accessing to the misdome of the King, for the common good...

Statements by royalist lawyers in support of the King's prerogative, even though they agreed that the King had both an ordinary and an absolute power, varied in the extent of the claims made for both kinds of power. Davies's statement of the doctrine of the two powers did more to subordinate the law to the King than did Fleming's judgment. It is true that according to Fleming the King's own wisdom is the only limit on what he may do within the scope of his absolute power: "all things done within these rules are lawful." But Fleming also suggested that in the exercise of his ordinary power, the King was subject to the dictates of the common law as applied by the ordinary courts, and that he could not change that law without parliament. There was no suggestion in Fleming's judgment that in his

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[43]T. HOWELL (ed.), 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 387.

ordinary power the King "cooperated" with the law because it pleased him to do so, with the implication that if at some point he should no longer be pleased to follow the law he would be within his rights to act contrary to it.

This is precisely the implication to be drawn from Davies' description of the King's ordinary power: the King is not bound by the common law even in the exercise of his ordinary power. In fact the common law is permitted to exist only by the King's grace: "the King doth suffer the customary law of England to have her course..."[44] This is to assign to the common law a very different role in English constitutional jurisprudence from that which Sir Edward Coke, who also on occasion stoutly defended the King's prerogative, ascribed to it when he asserted that "[t]he common law has no controler in any part of it, but the high count of parliament; and if it be not abrogated or altered by parliament, it remaines still."[45]

Davies' attempt to separate the king's prerogative from the common law and his claim that the common law's existence depended upon the king's permission had little, if any, support from the leading common lawyers of his day, even from those like Bacon and Ellesmere who usually could be counted on to support the King's interests. Lord Chancellor Ellesmere, in his speech in the Exchequer Chamber concerning Calvin's Case, expanded at some length on the nature of the common law and what it encompassed, and divided the common law into

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[44]THE QUESTION CONCERNING IMPOSITIONS, supra, at 26. Davies did not him as authority, but as we saw in Chapter 5, at least one medieval treastise writer-Britton-took a similar view of the common law.

[45]1 INSTITUTES 115b.

three parts:[46]

> "when it respects the church, it is called Lex Anglicanae...when it respects the Crowne and the King, it is sometimes called Lex Coronae...And it is sometimes called Lex Regia...when it respects the common subjects, it is called, Lex Terrae..."

Ellesmere's successor as Lord Chancellor, Sir Francis Bacon, on the occasion of the swearing in of Sir Thomas Chamberlain as a Judge on the King's Bench, showed exasperation at the idea that the King's prerogative was not based on the common law:[47]

> The Lord Chancellor took occasion to enlarge himself much upon the Prerogative and how near it was akin and of blood (as he termed it) to the common law; saying further, whatsoever some unleaned lawyers might prattle, that it was the accomplishment and perfection of the common law.

To add one final authority, Sir Henry Finch, a serjeant-at-law and the author of a legal treatise which arguably was superseded only by Blackstone's Commentaries and Austin's work on jurisprudence,[48] took what seems to have been the standard common lawyer's view of the relationship of common law and prerogative in the early 17th century:[49]

> [I]t must be remembered that the King's prerogative stretcheth not to the doing of any wrong; for it groweth wholly from the reason of the common law, and is as it were a finger of that hand, although so much differing in fashion (as the head and body can never be of one proportion) that if you set them in parallels together you shall find it to be law almost in every case of the King, that is law in no case of a subject; yet for all that they are not two, but

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[46]L. KNAFLA, LAW AND POLITICS IN JACOBEAN ENGLAND: THE TRACTS OF LORD ELLESMERE 216 (1977).

[47]14 THE WORKS OF FRANCIS BACON 118 (J. Spedding ed. 1869).

[48]See D.N.B.

[49]SIR HENRY FINCH, LAW OR A DISCOURSE THEREOF 85 (1759 ed).

> one law: only the common law is as the primum mobile, which draws all the planets in their contrary course.

Davies also used planetary imagery in his discussion of the prerogative and the common law, but for him the King, not the common law, was the primum mobile:[50]

> [T]he Government and ordering of Traffique, Trade, and Commerce, both within the Land and without, doth rest in the Crown as a principall Prerogative, wherein the King is like to a Primum mobile, which carrieth about all the inferior Spheres in his superior Course, and yet doth suffer all the Planets underneath him to finish all their divers and particular courses; or rather he doth imitate the Divine Majesty, which in the Government of the world doth suffer things for the most part to passe according to the order and course of Nature, yet many times doth show his extraordinary power in working of miracles above Nature.
>
> And truly, as the King doth suffer the customary Law of England to have her course on the one side, so doth the same law yeeld, submit, and give way to the King's Prerogative over the other...

I do not think Davies' two pictures of the common law--the one found in his Irish Reports and the one drawn in The Question Concerning Impositions--are logically incompatible. It is not inconsistent to praise the common law as the most perfect law in the world and still hold that it existed only by the King's sufferance and was subordinate to his prerogative. But for reasons that I shall now begin to detail, I believe that it is a mistake to choose Davies as a representative of the "common law mind," if by that phrase one means the understanding most common lawyers in the early seventeenth century had about the nature of the common law and the place it held in English jurisprudence. It is a mistake to choose Davies because he was extreme in his praise of the common law in the Irish Reports and

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[50]THE QUESTION CONCERNING IMPOSITIONS, supra, at 26.

uncharacteristic in his insistence that the common law was the ancient, immemorial custom of the people, and in the significance he seemed to find in describing the common law that way. He was extreme, too, even compared to other leading royalist lawyers, in seeking to divorce the common law from the King's prerogative and in making the very existence of the common law subject to the King's sufferance.

To say that Davies was extreme in the views he expressed about the common law is by no means to suggest that one may not find examples of many of the things that he said in the common law literature and reported cases of his day. Professor Pocock was not imagining things when he found claims about the common law in Sir Edward Coke's writings that seemed of a piece with Davies' description of the common law in his Irish Reports. But I shall argue that when one looks at the entire corpus of Coke's writings on the law and judicial opinions, the portrait of the common law that emerges is very different from the one Davies pointed in the Preface to his Irish Reports. Similarly, although one may find references to the antiquity of the common law, or to the common law as the common custom of the realm, scattered through the seventeenth century case reports, one who has systematically read all those reports, and nearly all of the legal treatises of the time, cannot avoid the impression that the things Davies emphasized about common law were not central to the leading common lawyers' vision of the common law. That, at least, is one of the things that I hope to demonstrate as a by-product of my attempt to provide as full on account as possible of seventeenth century legal theory. Before we move on to that full account, however, let us take

a look at the evidence in the common law literature that might be used to build a case that Davies' views were paradigmatic.

In the first place, references to the antiquity of the common law are scattered through the reports of seventeenth century law cases,[51] although their concentration in cases reported by Coke, and relative paucity in cases reported by other seventeenth century reporters, may cause one to wonder whether the judges and lawyers in the cases actually made them, or whether most of them were the product of Coke's own preoccupation with the age of the common law. In the treatise literature, too, there are scattered references to the antiquity of the common law;[52] but with the important exception of Sir Edward Coke, these references are made in a casual way and little, if anything, is made of them. Much more common were references to the common law as the common custom of the realm, with the associated idea that custom was a law used time out of mind.[53] Coke and Davies are alone, or

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[51]For example, in Chudleigh's Case, 1 Co. Rep. 282, 286, 296, at least three references were made to "the ancient common law"; in Caudry's Case, 5 Co. Rep., mention is made of "the ancient law of the crown" (p. 10), "the ancient law and right" (p. 10), "the ancient laws of this realm" (p. 10), "the ancient common laws of England" (pp. 19, 44, 45), "the good ancient laws" (p. 23), and "the ancient common laws of this realm" (p. 46); The Earl of Rutland's Case, 8 Co. Rep. 558, speaks of "the ancient rule of the law"; Vynior's Case, 8 Co. Rep. 601, refers to "the ancient forms and precedents".

[52]For example, Lord Ellesmere asserted that what passed in 1615 for the common law was "not the substance but the shadow of the auncient Common lawes," A Breviate or Direccion for the Kinges Learned Councell, in Knafla, supra, at 326. Michael Dalton, in The Country Justice (1618), spoke of the common laws of England "being for their Antiquity, those where by this Realme was governed many hundred years before the Conquest."

[53]For example, H. FINCH, LAW, OR A DISCOURSE THEREOF 77 (1627), "The common law of England is a law used time out mind..."; W. PHILLIPPS, THE PRINCIPLES OF LAW REDUCED TO PRACTICE 1 (1660), "for the learned know that the law of England (excepting statutes) is a customary and

nearly alone, however, in tying the praiseworthy qualities of the common law to immemorial usage. Finally, Coke, like Davies, is anxious to claim that the common law is the best law in the world:[54]

> I say to thee (gentle reader) next to thy duty and piety to God, and his anointed, thy gracious Sovereign, and Thy honor to thy parents, yield due reverence and obedience to the common laws of England: for of all laws (I speak of human) these are the most equal and most certain, of greatest antiquity, and least delay, and most beneficial and easy to be observed...
>
> If the ancient laws of this noble island had not excelled all others, it could not be that some of the several conquerers and generous thereof, that is to say, the Romans, Saxons, Danes, or Normans, and especially the Romans, who (as they justly may) do boast of their civil laws, would (as every of them might) have altered and changed the same.

The other leading common lawyers of Coke's time sometimes followed Bracton's example and asserted that the common law, despite being ius non scriptum, was fully law, just as certain as laws reduced to texts, and therefore not inferor to other nation's laws. Unlike Coke and Davies, they appeared to have little interest in boasting of the superiority of the common law. Sir Francis Bacon provides us with

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no written law..."; E. WINGATE, THE BODY OF THE COMMON LAW OF ENGLAND (1655), "The common law of England is a law used time out of mind throughout the realm." The case reports, and particularly Coke's Reports, nearly always refer to the idea of time immemorial in the same breath with any mention of customary law, whether of local custom of the common custom of the realm. This was simply the way one alleged a custom, although there were several standard ways of expressing the same idea: "from the time where of the memory of men is not to the contrary," Pelham's Case, 1 Col. Rep. 13 (Pleadings); "a[local] custom which hath been used time out of memory," Heydon's Case, 3 Co. Rep. ; "that the custom of the said county...hath been time out of mind that," The Case of Swans, 7 Co. Rep. 437; "before time of memory," The Case of the Abbot of Stata Mercella, 9 Co. Rep. 771; "for custom is without time of memory," Rayner v. Peoll, 2 Brownl. & Golds. 804 (1611).

[54]Preface, 2 Co. Rep. (1793 ed.).

an interesting example of this attitude. On one occasion, to be sure, he claimed that if rightly administered, the common laws "are the best, the equallest in the world between the Prince and People."[55] But here he was claiming one political virtue for the common law, not that it was the best law in the world in all respects. Although he elsewhere described the laws of England as "wise...just...and moderate laws,"[56] Bacon did not praise them for their antiquity, for the accumulated experience that antiquity represented, nor because they reflected the peculiar wisdom and virtue of the English people.[57]

Although one can find passages in the reports of decision and legal literature of the early seventeenth century that appear to support the understanding of English jurisprudence set forth by Sir John Davies in the Preface to his Irish Reports, that understanding was not central to mainstream common law jurisprudence, and if it did not contradict it, it was almost irrelevent to it. And despite the fact that Davies' portrait of the common law, and of its place in English jurisprudence, was heavily based on the writings of Sir Edward

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[55]Letter to George Villiers, Duke of Buckingham, in 13 WORKS, supra, at 18.

[56]A Proposition to his Majesty by Sir Francis Bacon, Knight, his Majesty's Attorney-General, and one of his Privy Council Touching the Compiling and Amendment of the Laws of England, in 13 WORKS, supra, at 63.

[57]Rather their being peculiarly English, Bacon emphasized that the English laws "are as mixt as our language, compounded of British, Roman, Saxon, Danish, Norman customs." Id. In like manner, Sir John Doddridge went out of his way to emphasize the debt owed by the common law to the civil law for many of its most fundamental principles: "Out of the Civill Lawes there are also very many Axiomes and Rules." THE LAWYER'S LIGHT, supra, at 10. Doodridge went on for several pages, giving examples of fundamental common law maxims that had been borrowed from the civil law.

Coke, the best place to begin in our search for the jurisprudence of the seventeenth century common lawyers is with Coke. This is not because he was the most representative common law thinker of his time--his views were in a number of important respects idiosyncratic--nor because he was the most learned or sophisticated common law jurist of his era. Several of his contemporaries were at least as learned as he, and Finch, Bacon, and Doddridge, to name only three, had a more profound understanding of legal theory. Coke simply wrote more, on more legal subjects, than anyone else.

It is hazardous to attempt to systematize Coke's jurisprudence; consistency and organization were not among his strengths as a thinker or a writer. Still, it is possible for the patient scholar to discover fundamental ideas and themes that run throughout his work, even if it is not possible to show everything he said to have been consistent with those ideas and themes.

To understand Coke's pronouncements on the nature of the common law, one must understand how he thought the common law fit into the fabric of English law as whole. Part of the answer to this question is clear enough: Coke repeatedly made a three-part division of English law into common law, statutes, and customs.[58] A representative example of Coke's standard division of English law may be found in his discussion of Littleton's use of the term "common law":[59]

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[58]E.g., 4 Co. Rep., Preface vi; Co. Litt. 110b; Co. Litt. 115b; Co. Litt. 344a; Rowles V. Mason, 2 Brownl. & Golds. 895 (1612). Despite Coke's repetition of this division of English law into three parts, one interesting exception is found in Coke on Littleton, 11b, where he lists fifteen kinds of laws within the realm of England.

[59]Co. Litt. 115b.

> The law of England is divided, as hath beene said before, into three parts; 1, the common law, which is the most generall and ancient law of the realme, of part where of Littleton wrote; 2, statutes or acts of parliament; and 3, particular customes (where of Littleton also maketh some mention). I say particular, for if it be the generall custome of the realme, it is part of the common law.

This division is no invention on the part of Coke; as we have seen, it was reported by Plowden in the middle of the sixteenth century.

To understand Coke's jurisprudence, one next needs to know as nearly as possible just what Coke understood "the common law," "customs," and "statutes" to be, and what there relationship was one with another. The first thing to be learned from the passage just quoted is that Coke is careful to distinguish between the common law and custom. When Coke spoke of "custom" he meant local, special customs derogating from the common law, not the common law: "but a custom cannot be alleged generally within the Kingdom of England; for that is the common law."[60] This had always been the standard common lawyer's usage of the word "custom." When one finds it unmodified in the Year Book cases, or in the reports of the sixteenth and seventeenth centuries, the reference is always to local custom and not to the common law. Apparently there was developing, in the early seventeenth century, some looseness by the bar in the use of this terminology, however, for not only did Coke remark with considerable asperity on several occasions that it was improper to allege a custom throughout the realm, other leading lawyers made the same point. For example, Sir Henry Finch wrote: "For to plead that there is a custom among merchants throughout the realm...is not good, inasmuch as that

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[60]Co. Litt. 110b.

which is current throughout the realm, is common law, not custom."[61] These remarks by Coke and Finch appear to be directed only at getting lawyers to use the correct legal jargon, not at making a substantive point about the nature of the common law. To instruct lawyers not to say the words "a custom used throughout the realm" because the proper way to make that allegation is to say that "the common law holds this" is to tacitly agree, however, that the common law really is the common custom of the realm.

If Coke and Finch did really conceptualize the common law as custom, we might expect them to hold the common law to the same test for validity to which local customs were subjected. The common law tests for valid, local customs were almost identical to those established by the medieval civilians and canonists. In the common law, just as in the civil law, the concept basic to custom was that of prescription. The Year Book discussions of custom had always focused on the prescriptive elements of time and usage.[62] In the second half of the fifteenth century, Littleton was very explicit about the need for proof of the prescriptive elements of custom:[63]

> And note, that no custome is to bee allowed, but such custome, as hath bin used by title of prescription, that is to say, from time out of minde. But divers opinions have beene of time out of minde, &c. and of title of prescription, which is all one in the law ...

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[61]FINCH, LAW, supra, at 77.

[62]For example, 4.13.32 Edw. I 264 (1304); 6 Y.B. Edw. II 18 (1313); 17 Edw. III 216, 224 (1343).

[63]OF TENURES, Sect. 170.

Coke, in commenting on this passage, distinguished between prescription and custom:[64]

> Prescription is a title taking his substance of use and time allowed by the law ... In the common law a prescription, which is personal, is for the most part applied to persons ... And a custome, which is local, is alleged in no person, but layd within some mannor or other place.

He went on to say what was common to customs and prescriptions:[65]

> But both to customes and prescriptions, these two things are incidents inseparable, viz. possession or usage, and time. Possession must have three qualities: it must be long, continual, and peaceable ...

A little earlier in the same work he had described the prescriptive elements of custom in slightly different language:[66]

> Of every custome there be two essential parts, time and usage; time out of minde, (as shall be said hereafter) and continuall and peaceable usage without lawfull interruption.

Just as the civil law and common law agreed that a valid custom had to meet the requirements of prescription, both also agreed that no custom could be valid that was unreasonable. The case reports of the late sixteenth century are filled with examples of the courts' refusing to allow customs because they were unreasonable.[67] The seventeenth century reports likewise contain many cases in which it is held that customs must be reasonable to be good. In Rowles v. Mason,[68] Coke in his capacity as Chief Justice made a statement that

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[64]CO. LITT. 113a & 113b.

[65] Id.

[66] Id. at 110b.

[67] E.g., Salforde's Case, 3 Dyer's Rep. 803 (19 Eliz.); Stebbs and Goodlack's Case, 1 Leon. Rep. 92 (30 Eliz); Jeroms Case, 4 Leon. Rep. 787 (30 Eliz.).

[68]2 Brownl. & Golds. 895 (1612).

may serve us as a summary of the requirements for a custom to be valid: "prescription and custom are brothers, and ought to have the same age, and reason ought to be the father, and congruence the mother, and use the muse, and time out of memory to fortify them both."

I have suggested that if the common lawyers of the early seventeenth century had not merely been using a ritualized form of expression, but truly conceptualized the common law as custom, then they would have subjected an alleged common law rule to the same tests for validity that alleged local customs were required to meet. I shall argue that the evidence on this question is mixed. In their descriptions of the common law, most of the leading writers on the law did not use the standard language for describing both of the central elements that had to be proved in order to establish custom - time of usage and custom. Some, like Coke, had a good deal to say about both elements. Others, like Finch, mentioned both elements but devoted their attention almost entirely to the element of reason. Still others, like Sir Francis Bacon, showed no interest in the age of the common law. Except for those of Coke and Davies, all of the theoretical writings about law concentrated on the element of reason in the common law rather than on its time of usage. Even though reason was one of the two necessary elements for proving custom, I have found no evidence in the sometimes elaborate discussions of the relationship between the common law and reason in the works of Finch, Doddridge, Bacon, or Ellesmere that the attention given to the idea of

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reason had anything to do with a perceived need to prove the elements of custom. It may be that the common lawyers' association of reason with the common law--an association we have found from the time of the earliest Year Book cases--stems in part from a conception of the common law as customary law and from the tests for valid customs that the common law took over from civil[69] and common law doctrine. But the widespread medieval association of the common law with reason could as easily have been based on the standard medieval theological and juristic view, based on the classical tradition, that all law--not just customary law--had to be based on reason.

It is likely that both of these strands of thought mutually reinforced the early common lawyers' preoccupation with reason. Our examination of medieval conceptions of the common law, however, unearthed little textual support for the proposition that Chief Justice Bereford and the others who emphasized the element of reason in the common law did so because they were trying consciously to establish the customary validity of the common law. Instead, when Bereford announced that "ley est resoun," he seemed to be proclaiming the essential nature and character of the common law based on the universal medieval assumption that all law is based on reason. As we shall see, when the more theoretical of the seventeenth century legal writers turned their attention to the element of reason in the common law, their discussions quite explicitly were based on the classical, scholastic, and civilian traditions rather than on an understanding

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[69]Vacarius' teachings on custom, discussed earlier in Chapter 3, may have had great influence on this matter.

that they needed to prove the common law's reasonableness in order to establish it as custom.

To make this point is not to advance a model of the seventeenth century "common law mind" in competition with the one suggested by Professor Pocock. Coke and Davies certainly wrote passages that suggest that the conception of the common law as immemorial custom was critical to their understanding of the essence of the common law. The medieval Year Books also contain a series of statements in which the common law is identified with ancient past practices and long usage. It is certainly logically possible to hold both ways of looking at the common law at the same time, without any contradiction, but I am driven to the conclusion that two different approaches to conceptualizing the common law existed side-by-side for many centuries, and that the common lawyers tended to gravitate to one view or the other. This did not prevent a lawyer with one basic orientation from occasionally speaking of the common law in the language of the other orientation. I take it that this was what was happening when Sir Henry Finch wrote that "The common law of England is a law used time out of mind, or by prescription throughout the realm,"[70] and then proceeded with an elaborate examination of the nature of the common law in which he gave no attention to the time of its use.

Only rarely did a lawyer feel the need demonstrate that both conceptions of the common law were compatible. We have seen how Christopher St. German was frustrated in such an attempt. In the

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[70]LAW, OR A DISCOURSE THEREOF, supra, at 77.

seventeenth century the most successful attempt at a description of the common law in which both custom and reason played complementary and equally important roles is found not in a law case or legal treatise but in the famous speech of Thomas Hedley to the House of Commons in 1610;[71]

> [T]he common law is a reasonable usage, throughout the whole realm, approved time out of mind in the King's courts of record which have jurisdiction over the whole kingdom, to be good and profitable for the commonwealth. But here because I make custom a part in my definition of the common law, I would not be mistaken, as though I meant to confuse common law with custom, which differ as much as artificial reason and bare precedents. Customs are confined to certain and particular places, triable by the country, but their reasonableness or unreasonableness by the judges, to be taken strictly according to the letter and precedent, and therefore admits small discourse of art or wit; whereas the common law is extended by equity, that whatsoever falleth under the same reason will be found the same law. And it hath not custom for its next or immediate course, but many other secondary reasons which be necessary consequence upon other rules and cases in law, which yet may be so deduced by degrees till it come to some primitive maxim, depending immediately upon some prescription or custom, in which secondary reasons and consequence appears as much art and learning, wisdom and excellency of reason as in any law, art or profession whatsoever.

The key to Hedley's linkage of custom and reason is to be found in the idea of "tried reason." Earlier in his speech, Hedley had considered and rejected several possible definitions of the common law. To say that the common law was merely whatever the judges willed was no more correct than saying that the truth was whatever the jury willed.[72] It might be more correct to say that the common law was common reason since all law was reason, but this was not an adequate

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[71]2 PROCEEDINGS IN PARLIAMENT 1610, pp. 175-176 (E. R. Foster ed. 1966).

[72]Id. at 173.

definition because not all reason was law.[73] It is even more correct to say that the common law is reason approved by the judges to be good and profitable for the commonwealth, but statute laws are also reasonable and good and profitable for the commonwealth, and yet the judges nor even the king could make them laws without the parliament.[73] Some might suggest that it was the parliament that gave form and force to the common law, but that has matters backward: the parliament has its power from the common law.[75] The proper definition, Hedley concluded, got back to the idea of reason; it "was tried reason, or the quintessence of reason..."[76] The only thing that can try reason is[77]

> time, which is the trier of truth, author of all human wisdom, learning and knowledge, and from whom all human laws receive their chiefest strength, honor and estimation. Time is wiser than the judges, wiser than the parliament, way wiser than the wit of man.

Hedley proffered his conception of the common law as "tried reason" at a time when the doctrine of binding precedent was beginning to gain a toehold in English jurisprudence. It was at a time, too, when several of his peers were elaborating conceptions of the common law as the artificial reason and wisdom of the professional elite. Hedley took aim at both tendencies:[78]

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[73] Id.

[73] Id.

[75] Id. at 174.

[76] Id. at 175.

[77] Id.

[78] Id. at 178-179.

> And if a judgment once given should be preemptory and trench in succession to bind and conclude all future judges from examining the law in that point or to vary from it, then the common law could never have been said to be tried reason grounded upon better reason than the statutes, for it then should be grounded merely upon the reason or opinion of 3 or 4 judges, which must needs come short of the wisdom of the parliament.

The reason that serves as the ultimate ground of the common law must be proven to be real by "trial of time," otherwise "it is but counterfeit stuff and no part of the common law."[79]

The pieces of Hedley's theory of the common law--especially its customary component--all come from Sir Edward Coke. Coke, though, never put all the pieces together, and thus it is difficult to say whether Hedley's synoptic version of Coke really reflected Coke's vision of the common law.

There can be no doubt that Coke was preoccupied with the age of the common law. His legal writings are filled with references to the "antiquity" of that law. On a few occasions he also used the traditional formulae for alleging time of usage in describing the common law.[80] In perhaps the most striking of such instances he wrote:[81]

> That by like time there had been writs of assise and other original writs returnable into the King's courts, which (seeing they be, as Justice Fitzherbert saith in his preface to his book of Natura Brevium, the rules and principles of the science of the common law) do manifestly prove that the common law of England had been time out of mind of man

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[79]Id. at 178.

[80]For example, he uses the expreview "time out of mind several times in the preface to the third volume of his Reports.

[81]Preface, 3 Co. Rep. vi-vii.

before the conquest, and was not altered or changed by the Conqueror.

The fact that Coke only rarely used the traditional formulae for alleging customs when he referred to the common law, but still very frequently alleged the antiquity of the common law, suggests that his interest in the age of the common law was not directed at proving the common law to be good custom. What Coke was interested in proving by alleging the antiquity of the common law was its superiority[82] over other kinds of law. When Sir John Davies claimed that the common law was superior to statute law because it did not become a law "until it had been tried and approved time out of mind, during all which time there did thereby arise no inconvenience," he was echoing Coke's statement that "If the ancient laws of this noble island had not excelled all others, it could not be but that some of the several conquerors and governors thereof...would...have altered or changed the same."[83] But Davies was not following Coke's example when he used the technical language for proving customs ("tried and approved time out of mind") in alleging the absence of inconveniences. To Coke, the antiquity of the common law not only constituted proof of the absence of inconveniences the law had occasioned, it also showed that law to contain a kind of wisdom not available to the wisest individual men, or even to groups of rich men:[84]

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[82]Superiority in the sense of being better--more excellent--and not of controlling other forms of law.

[83]2 Co. Rep., Preface.

[84]Calvin's Case, 7 6 Rep. 6-7. (1608):

> [W]e are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow, in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience (the trial of light and truth) fined and refined, which no one man (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto. And therefore it is optima regula... no man ought to take it upon himself to be wiser than the laws.

Thomas Hedley, in his 1610 speech to the House of commons, linked the common law's time of usage to the "tried reason" in terms of which he defined the common law. Coke, in Calvin's Case, spoke not of reason but of wisdom. If one compares Coke's discussions of the antiquity of the common law in the prefaces of his Reports and in Calvin's Case with his later discussions in his Institutes, it is easy to get the impression that there was a considerable evolution over time in his views about the significance of the law's antiquity.

Coke's treatment of the antiquity of the common law in the Prefaces and in Calvin's Case might be seen as little more than a reprise of Sir John Fortescue: the common law is shown to be the best and wisest of laws by its very age. Had it not been the best it would it would not still be around.[85] In the First Part of Coke's

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[85]Coke's great rival, Sir Francis Bacon, in his essay "Of Custom and Education," made a telling implicit criticism of this line of argument. It is not a custom's wisdom that explains its long continuation. "We see also the reign or tyranny of custom, what it is. The Indians (I mean the sect of their wise men) lay themselves quietly upon a stack of wood, and so sacrifice themselves by fire. Nay the wives strive to be burned with the corpses of their husbands...There be monks in Russia, for periance, that will sit a whole night in a vessel of water, till they be engaged with hard ice. Many examples may be put of the force of custom, both upon mind and body." 6 F. BACON, WORKS 471 (J. Spedding ed. 1858).

Institutes, published in 1628, there is a passage that is parallel to the one I have quoted from Calvin's Case. In it Coke appears to have elaborated and refined his conception of the wisdom of the common law: that law consists in "an artificial perfection of reason."[86]

> And this is another strong argument in law, Nihil quod est contra rationem est licitum for 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 naturall reason; for, Nemo nascitur artifex. This legal reason est summa ratio. And therefore if all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law of England is: because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this realm, as the old rule may justly be verified of it, Neminem oportet esse sapientiorem legibus: no man out of his own private reason ought to be wiser than the law, which is the perfection of reason.

The law has not arrived by chance at this exalted state of perfection which, if altered, inevitably leads to dangerous consequences. It has not even done so through the accumulated wisdom of the folk--a plausible way of reading the passage in Calvin's Case. In the Institutes passage we are considering, Coke does not view the common law as the kind of custom which "being only matter of fact, and consisting in use and practice...can be recorded and registered no where but in the memory of the people."[87] Here the repository of the common law is not the "memory of the people"[88] but in certain "grave

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[86]1 INST. 97b.

[87]The quotation is from Sir John Davies's preface to his Irish Reports.

[88]As it would have been had Coke essentially have conceived of the common law as custom. As Thomas Hedley noted, customs were "triable by the country," which was the technical way of saying that their

and learned men"--the common law judges and lawyers. The "reason" of the law is not, like that of St. German's Doctor, "written in the heart of every man;" instead, it is "an artificial perfection of reason" gotten only by "long study, observation, and experience."[89]

The hypothesis that between the time of his early Reports and the writing of the first part of his Institutes Coke evolved or discovered his conception of the common law as an artificial perfection of reason does not hold up if his famous account of a 1608 colloquy between himself and King James is to be believed:[90]

> A controversy of land between parties was heard by the King, and sentence was given, which was repealed for this, that it did belong to the common law: then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes, which concern the life, or inheritance or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial judgment and reason of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it...

Thus it appears that Coke had arrived at his conception of the common law as artificial reason by the time that his early Reports were published.[91] It is also the case, however, that Coke much more

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existence was to be determined as a matter of fact by ordinary inhabitants of the locality in which they were alleged to have force.

[89]In a moment we shall undertake a thorough going examination of Coke's association of the common law with reason, comparing his views with those of several of his distinguished peers, several of whom addressed the subject in considerably more detail than did he.

[90]Case of Prohibitions Del Roy, 12 Co. Rep. 64.

[91]Even Coke's report of Calvin's Case contains a clause which evokes the notion that it is the wisdom of the professional elite, not of the English people, that form the common law: "the laws have been by the

frequently identified the common law with reason in his Institutes than in his Reports.[92] This suggests that as time passed, the idea of the law as reason increased its hold on Coke, and that he shifted the focus of his conception of the common law away from the element of time and toward the idea of reason. As we shall see, time still played a part in his conception of the common law, but it played that part in the service of reason.

COKE AND HIS CONTEMPORARIES ON REASON AND THE COMMON LAW

Coke was not alone among the leading common lawyers of his time in thinking about the common law in terms of reason. The case reports of his time--those assembled by other reporters as well as Coke's own--contain dozens of passages in which the common law is tied to, associated with, defined in terms of, said to be grounded on, or held to the standard of reason. Two important common lawyers, Sir John Doddridge and Sir Henry Finch, wrote extensive analyses of the relationship between the common law and reason. Although Charles Gray has suggested that the conception of the common law as artificial reason was Coke's main gift to legal theory,[93] he does not present

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wisdom of the most excellent men."

[92]In the prefaces to his Reports, Coke's emphasis is on the antiquity of the common law and the wisdom produced and guaranteed by this antiquity. E.g., in the prefaces to all of the first eight Parts of his reports he repeatedly dwells on the law's antiquity. There are scattered references to the law's antiquity in his Institutes (e.g. in Co. Litt. 115b) but references to the law's reason predominate there in much the same way that references to its antiquity did in the Reports. Important discussions of reason and the common law are found in Co. Litt. 10b-11a, 97b, 183b, 232b, and 394b-395a.

[93]Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke, in CULTURE AND POLITICS: FROM PURITANISM TO THE ENLIGHTENMENT (P. Zagorin ed. 1980).

evidence that this conception was Coke's invention.

There have been several scholarly interpretations of Coke's meaning when he wrote of the artificial reason of the law. Professor Pocock, for example, has emphasized the passage from Calvin's Case in which Coke spoke of the refinement of the laws by "excellent men" by "long and continual experience." Coke's point, he finds, is that "[p]hilosophic reason could not by its own efforts reconstruct the law, because the law's origin is not in any philosophic assumption but in a multitude of particular decisions."[94] In addition, Coke believed that the human intellect could not reduce the law to general principles since it had arisen from "one emergency following upon another," with each emergency unique.[95] By contrast, John Underwood Lewis concludes that Coke's concern is the reasonableness of the law; that is, with "the internal consistency of English law as a system and not, primarily, with a defense of the notion that a law should be defined in terms of reason rather than will..."[96] In this view, further elaborated by D.E.C. Yale, Coke saw the common law not primarily as case law (i.e., as the product of individual emergencies) but as reasonable "in the sense that it represented the product of a professional skill working a refinement and co-ordination of social

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[94]J.G.A. POCOCK, Burke and the Ancient Constitution: A Problem in the History of Ideas, in POLITICS, LANGUAGE AND TIME 214 (1973).

[95]Id. at 215.

[96]Sir Edward Coke (1552-1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory, 84 L.Q. REV. 330, 334, 335 (1968).

habits into a system of rules."[97]

I shall not argue at this time that either of these interpretations is misconceived; there is language in Coke's writings that appears to support both readings. To say that, though, is to set the problems which I now wish to examine. Given that in the large body of Coke's writings there are dozens of references to reason and the law and that these references, if not inconsistent, make several different points, to what extent is it possible to say that he had a coherent pattern of beliefs[98] about reason and the law? Do his statements about the artificial reason of the law add up to a coherent vision? In what ways is Coke's exposition of the relationship between law and reason different from that of his leading contemporaries, and in what respects is it similar? Is it accurate to speak of "Coke's doctrine of the artificial reason of the law," as if it were a doctrine that he invented or that was peculiar to him?

As we have seen, the common lawyers had identified the common law with reason since the time of the earliest Year Books. So it was no innovation for Coke and his contemporaries to hold that the common law

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[97]D.E.C. Yale, Hobbes and Hale on Law, Legislation and the Sovereign, 31 CAMB. L.J. 121, 125-126 (1972).

[98]To say that Coke had a theory about this matter is to elevate his views to a higher level of abstraction than perhaps his cast of mind allowed. This is not intended as a pejorative statement. Sir Francis Bacon, with his usual clarity of mind, saw both advantages and disadvantages in Coke's characteristic approach to the law. "All who have written concerning laws have written either as philosophers or lawyers. The philosophers lay down many precepts fair in argument, but not applicable to use: the lawyers, being subject and addicted to the positive rules either of the laws of their own country or else of the Roman or Pontifical, have no freedom of opinion, but as it were talk in bonds." F. BACON, DE AUGMENTIS 311, in 9 WORKS (J. Spedding ed. 1864).

must be in accord with reason. In being held to this standard, the common law was no different from statute law or local custom: the common lawyers had early accepted the civilian and canonist doctrine that no purported law was really law if it was contrary to reason. This idea is reflected in the case reports of Coke's day by statements of the general necessity for the law, whether customary, statutory, or common law, to be in harmony with reason. We have seen already that consonance with reason was one of two standard tests that an alleged custom had to pass in order to be held valid. In a few instances Coke also stated that statutes against reason were void.[99] In the case reports, a typical recognition of this principle would justify the rejection of a rule or interpretation contrary to reason,[100] but sometimes a rule or interpretation would be upheld because it comported with reason.[101] The fullest statement by any of Coke's contemporaries of this general requirement that laws be consonant with reason was perhaps that made by Sir Henry Finch:[102]

> The law of nature and of reason, or the law of reason primary and secondary, with the rules framed and collected thereupon; which three are as the sun and the moon and the seven stars, to give light to all the positive laws in the world.

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[99]E.g., in Dr. Bonham's Case, 8 Co. Rep. 652 (1609); Rowles v. Mason, 2 Brownl. & Golds. 895 (1611-12).

[100]E.g., an interpretation was rejected because it was "repugnant to law and reason," Corbet's Case, 1 Co. Rep. 190 (42 Eliz.); a doctrine was rejected because "the law would not let in a thing so absurd, and against the law of nature and reason," Sir William Ellis v. Archbishop of York, Hobart's Rep. 459 (17 Jam. I).

[101]E.g., "And they said that this construction was just, and consonant to reason and equity," Chudleigh's Case, 1 Co. Rep. 320 (31 Eliz.).

[102]LAW, OR A DISCOURSE THEREOF, supra, at 74, 75.

> Positive are law framed in their light; and from thence came the grounds and maximums of all common law: for that which we call common law is not a word new and strange, or barbarous, and proper to curselves, and the law that we profess, as some unlearnedly would have it, but the right term for all other laws....
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> Therefore laws positive, which are directly contrary to the former [the law of nature and reason], lose their force, and are no laws at all.

Although there is evidence from the case reports that Coke recognized this generally accepted principle, none of his statements about reason in his Institutes clearly reflect it. He does quote two standard Latin maxims often used for stating that principle,[103] but he goes on to gloss the maxims in such a way as to suggest that the reason he has in mind is not the law of reason (or nature), but "the reason of the law,"[104] which he says "is to be understood of an artificial perfection of reason..."[105]

Just as the case reports contain a series of references to reason that may best be understood as reflections of the principle that all law must be in harmony with the law of reason, they also contain many passages in which the references are much closer to Coke's treatment of reason in his Institutes: they have to do with the reason of the law rather than the law of reason.[106] As Coke informed King James in

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[103]"Ratio est anima legis" (quoted in 1 INST 394b), and "Nihil quod est contra rationem est licitum" (quoted in 1 INST 97b).

[104]1 INST. 394b.

[105]1 INST. 97b.

[106]E.g., in Ratcliff's Case, 3 Co. Rep. 728 (1592), "And the reason of the common law is notable, and may be collected from the said ancient authors of the law..."; Bozoun's Case, 4 Co. Rep. 972 (1584), "a non obstante of the common law, will not, against the reason of the common law, make the grant good..."; Ferrer's Case, 6 Co. Rep. 266 (40 & 41 Eliz.), "all which was remedied by the rule and reason of the common law..."; Englefield's Case, 7 Co. Rep. 430 (33 & 34 Eliz.), "and all

the Case of Prohibitions, this reason of the law is not everyman's natural reason, but the "artificial judgment and reason of law."[107] In this conversation he was explaining why the King could not make legal judgments: he did not have the "artificial" reason necessary for making such judgments. In a parallel passage in the First Part of his Institutes, Coke extended this idea; judgments not only had to be made by means of this artificial reason, "the common law itselfe is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason..."[108]

Coke explicitly contrasted the artificial reason of which the common law was composed, and which had to be known and mastered by anyone who was to make a legal judgment, with natural reason. This helps us put some bounds on what he possibly may have meant by calling legal reason "artificial." But the artificial may be opposed to the natural in more than one sense. One such sense of the artificial is that of something that is feigned or fictitious; Coke clearly did not have this sense in mind. Relying on another sense of the word, Charles Gray has written that the "expression artificial reason suggests a substitute for reason..."[109] It is true that the adjective "artificial" may be used to describe something that is a substitute for, or imitation of, the real or natural thing, but the mere usage of

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this agrees with the reason of the common law..."

[107]12 Co. Rep. 64.

[108]1 INST. 97b.

[109]Reason, Authority, and Imagination, supra, at 31.

a word does not suggest anything about the sense in which it is to be taken. There is nothing in the contexts of the several passages in which Coke used the expression artificial reason that suggests that he saw legal reason as a substitute for natural reason. That was not his point in describing it as artificial. There are two standard senses of "artificial" which Coke may have had in mind. The first and more specific refers to something attained to only by education or training. The Oxford English Dictionary uses a quotation from Coke On Littleton as an illustration of this sense: "Not...understood of every unlearned man's reason, but of artificial and legal reason."[110] In Coke's references to artificial reason in the Case of Prohibitions,[111] and in Section 138 of On Littleton,[112] his point clearly was that what made legal reason artificial and not natural was the fact that no one possessed it spontaneously, no matter how great that person's natural gifts; it could only be developed through education, training and experience.

There are reasons, however, for not limiting our reading of Coke's expression "artificial reason" to reason produced by study or education. To understand Coke's doctrine of the artificial reason of

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[110]1 INST. 62a.

[111]12 Co. Rep. 64. "[C]auses which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act that requires long study and experience, before that a man can attain to the cognizance of it..."

[112]1 INST. 97b. "[F]or reason is the life of the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason..."

the law one must make a distinction that Coke himself does not clearly make, although it is implicit in what he says. That distinction is between how legal reason is to be learned by those who will practice law and make legal judgments, and how that reason got to be what it is--in Coke's language, how it grew to much perfection. Both processes are artificial: the knowledge of legal reason by legal professionals is not spontaneous or innate, and the reason itself is artificial in the sense that it is constructed by the art and professional skill of lawyers. It is true that Coke sometimes talks as if the process by which the reason of the common law grew to its state of perfection had been a natural process, not one in which human artiface and skill had played a critical role. I am thinking of those passages in which he emphasizes the role of experience in the formation of the law--e.g., "by long experience growne to such a perfection, for the government of this realme..."[113] But there is another passage in On Littleton, seldom if ever quoted in discussions of his concept of artificial reason, which portrays the reason of the law as the product of an active exercise of the professional craft and skill of lawyers:[114]

> And by reasoning and debating of grave learned men the darkness of ignorance is expelled, and by the light of legall reason the right is discerned, and thereupon judgment is given according to law, which is the perfection of reason.

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[113]1 INST. 97b.

[114]1 INST. 232b.

[115]1 INST. 97b.; Calvin's Case, 9 Co. Rep. 3b.

The fining and refining[115] of legal reason by grave and learned men is thus shown to be an active, perhaps even unruly, constructive process, and not a passive ratification of previous experience.

To summarize, we have identified two senses in which Coke appears to have considered legal reason to be artificial: lawyers come to know it only by artificial, not innate means, and it did not come to be what it was naturally--it is a construction made by artifice and skill. These two senses are consistent; the first is a special instance of the second.

Even if we now have a pretty good idea what Coke had in mind in calling the reason of the common law artificial, we still will not fully understand his expression "artificial reason" if we do not know what he meant when he said that the common law was nothing else but reason. The problem is that Coke's various statements about the reason of the common law tell us considerably more about why he called that reason artificial than about why he called the law reason. Knowing exactly what he meant in doing so is even more difficult. We are not totally without clues. Professor Pocock, in his elegant glosses on Coke, Davies and Hedley, has shown that part of the answer is summed up in Hedley's expression "tried reason." The law was reason, indeed perfect reason, because long trial and experience had shown it to be reasonable--perfectly fitted for England and its people. It is hard to be sure whether Coke meant anything more than that in his identification of the common law with reason. If he did not, it was not because he had lacked exposure to other ways of thinking about the connection between law and reason. Most

importantly, he and all other common lawyers who had read Sir John Fortescue and Christopher St. German had been exposed to Aristotelian epistemology. Indeed, it is probably true, as Professor Stephen Siegel has written,[116] that the thinking of all educated men of Coke's time had been influenced by Aristotelian epistemology, whether they knew it or not.

THE ARISTOTELIAN TRADITION

To know something scientifically, Aristotle taught, is to know its cause and to know that it could not be other than it is.[117] We know by "demonstration," that is, by a syllogism through which our knowledge is deduced from first principles or premises that are "true, primary, immediate, better known than and prior to the conclusion, which is further related to them as effect to cause."[118] These first principles must be themselves "indemonstratable; otherwise they will require demonstration in order to be known."[119] If they required demonstration in order to be known, they would not be primary premises because they would rest on other, more fundamental,principles to avoid an infinite regression,[120] Aristotle was forced to conclude that "not all knowledge is demonstrative,"[121] if we are to know the first

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[116]S. Siegel, The Aristotelian Basis of English Law, 56 N.Y.U.L. REV. 18, 30-31 (1981).

[117]ARISTOTLE, POSTERIOR ANALYTICS, BK. I, Ch 2.

[118]Id.

[119]Id.

[120]Id. at Ch. 3.

[121]Id.

principles which are the foundation of scientific knowledge. Aristotle rejects the possibility that men possess knowledge of the primary premises from birth; instead "they possess a congenital discriminative capacity which is called sense-perception ."[122] Out of sense-perception comes memory, and out of frequently repeated memories of the same thing experience develops. Out of experience, which is "the universal now stabilized in its entirety within the soul," comes scientific knowledge.[123] In other words, "we must get to know the primary premisses by induction; for the method by which even sense perception implants the universal is by induction."[124] The kind of intuition that allows the human mind to abstract eternal, universal primary premisses from "logically indiscriminable particulars" provides the only kind of knowledge that can be truer than scientific knowledge.

This epistemology is not immediately applicable to problems about legal knowledge and legal reasoning. Aristotle distinguished between theoretical and practical sciences.[125] Practical science and practical reason, which have to do with correct actions, can never attain certainty. Human affairs are made up of too many complex premutations of particulars to admit of exact reasoning leading to certain truths.[126] Probable truths are all that may be expected of practical

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[122]Id. BK. II, Ch. 19.

[123]Id.

[124]Id.

[125]ARISTOTLE, METAPHYSICS, BK. XI, Ch. 7.

[126]See ARISTOTLE, NICHOMACHEAN ETHICS, BOOK I, Ch. 3.

science. In theoretical science, reasoning "by demonstration" starts from premises that are true, universal, immutable, and certain. In practical science, "dialectical reasoning" starts from premises that are only probable. They are probable in the sense that they are "generally accepted" by "everyone or by the majority or by the philosophers--i.e. by all, or by the majority or by the most notable and illustrious of them."[127]

The common law of England, made up as it was of a huge, chaotic, apparently inconsistent mass of particular rules and holdings, to a non-common lawyer had always seemed to be incapable of being even a practical science, as Aristotle and the medieval scholasties understood that expression. The charge that common lawyers, from Fortescue to Coke, were forever rebutting was that certainty of decision was not possible. How could it be possible when there were no first principles from which reasoning could proceed?

The common lawyers responded in Aristotelian terms: they could reason their way to probable knowledge and reasonable certainty because there existed fundamental principles of law that were accepted without question by the profession. As Sir John Fortescue put it,[128]

> Aristotle, in the first book of the Physics, says that We think we know anything when we know the causes and principles of it as far as the elements of it. On this the Commentator observes that Aristotle meant by principles, effective causes, final causes, and by elements, matter and form. In the laws, indeed, there is no matter and form as there is in physical things and in things artificially devised. But nevertheless there are in them certain

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[127]ARISTOTLE, TOPICS, BK. I, Ch. 1.

[128]DE LAUDIBUS LEGUM ANGLIAE 21, 21 (S. B. Chrimes ed. 1942).

> elements out of which they proceed as out of matter and form, such as customs, statues, and the law of nature, from which all the laws of the realm proceed as natural things do out of matter and form, just as all we read comes out of the letters which are also called elements. The principles, furthermore, which the Commentator said are effective causes, are certain universals which those learned in the laws of England and mathematicians alike call maxims, just as rhetoricians speak of paradoxes, and civilians of rules of law. These principles, indeed, are not known by force of argument nor by logical demonstrations, but they are acquired, as is taught in the second book of the Posteriora, by induction through the senses and memory. Wherefore Aristotle says in the first book of the Physics that Principles do not proceed out of other things nor out of one another, but other things proceed out of them. Hence in the first book of the Topica it is written that Any principle is its own ground for holding it. For that reason, Aristotle says, There is no arguing with those who deny principles, because, as it is written in the sixth book of the Ethics, there is no rational ground for principles. Therefore, whoever are anxious to understand my branch of knowledge must learn thoroughly its principles. For out of them are discovered the final causes, to which one is brought by a process of reasoning upon a knowledge of principles.

Professor Pocock has found a problem with Fortescue's attempted demonstration that English was a rational science:[129]

> Principles, inescapably, are universal statements; and from universals we can deduce only universals. Now if English law is to be a rational branch of study, it must consist of certain principles, underived from other principles, and their consequences, which must be true of all English legal situations to which they apply. It is affirmed that English law consists of a series of uniform deductions from certain maxims, with which it is all logically coherent; but what principles (we must now ask) could there be, underived from other principles and intuitively perceived to be self-evident, of which "England" is the subject?

If Fortescue was indeed trying to claim for the law of England the certainty of an Aristotelian theoretical science then Professor Pocock's point is exactly correct. Fortescue certainly sounds as if he did not understand the difference, in Aristotle's philosophy,

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[129]J. G. A. POCOCK, THE MACHIAVELLIAN MOMENT 11 (1975).

between a theoretical and a practical science. Had he been aware of this distinction, however, the structure and form of his argument would have been the same. Legal reasoning and knowledge would proceed from fundamental principles, but those principles would be only probable, not certain. They would not be derived from other principles, and there would be, as Fortescue said, no denying them, but on the other hand, they would not be true in and by themselves. They are as certain as premises get in practical science, but their probability rests only on the fact that they are generally accepted.

Later common lawyers such as St. German, Sir Henry Finch, and Sir Doddridge who had been exposed to the Aristotelian traditions of logic, rhetoric, and dialectic understood very well the distruction between theoretical and practical science. They recognized limits on the role of the maxims or grounds of law in legal reasoning. As we saw in our discussion of St. German's Doctor and Student, this did not mean that their treatment of maxims and grounds of law was always consistent with other parts of their legal theory,[130] but it at least allowed them to talk plausibly about how lawyers could have at least probable knowledge about the common law, and could reason[131] about it.

There can be no doubt that Aristotelian philosophy had a great influence on the way English lawyers of the sixteenth and seventeenth viewed the law, and particularly legal reason. Increasingly, from the

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[130]The problem had to do with how those maxims of English law that were peculiarly English could be connected with the universal law of nature or reason from which, the common lawyers agreed, the maxims of English law derived.

[131]In Aristotle's sense of making an argument in which, certain premises being accepted as given, conclusions follow.

mid-sixteenth century on, the Inns of Court--the law schools for common lawyers--attracted men who had learned academic philosophy in the universities.[132] This was at a time in England when there was a resurgence of interest in logic and rhetoric. Sir Thomas Wilson's The rule of Reason, conteinvng the Arte of Logique, set forth in Englishe, published in 1651, was the first logic to appear in English. It was an attempt to teach the main concepts and terms of Aristotle's Organon.[133] Wilson also published Arte of Rhetorique in 1553 -- a book that was reprinted seven times before the century's end. Wilson, who had a doctorate in civil law from the University of Ferrara, was very interested the use of rhetoric by lawyers, and attempted to appeal to common lawyers as well as civilians.[134]

I have been writing about a resurgence of interest in traditional and scholastic logic. This was complicated in the second half of the sixteenth century by the publication in England of works by and about the ideas of the French logician and educational reformer, Peter Ramus, and by the Ramist movement that subsequently swept through the British universities. Ramus sought to reform the liberal arts, including grammar, rhetoric and logic. The theories of scholastic

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[132]See W. Prest, The Dialectical Origins of Finch's LAW, 36 CAMB. L. J. 326, 328 (1977).

[133]For a discussion of The Rule of Reason see W. HOWELL, LOGIC AND RHETORIC IN ENGLAND, 1500-1700 at 12-31 (1961).

[134]For a discussion of the ARTE OF RHETORIQUE see R. Schoeck, Rhetoric and Law in Sixteenth-Century England 110, 118-121. Schoeck suggests that Wilson largely intended the work for the students at the Inns of Court; this explains why so much of the content of the work was legal in nature and why many of the illustrations were drawn from legal experience.

logic and traditional rhetoric and grammar seemed to him to be redundant and indecisive,[135] and he therefore sought to reduce all argumentation to one "art of discourse," which he sometimes called logic and sometimes dialectic. In doing so, he eliminated dialectic as a distinctive kind of reasoning which argues from probabilities instead of from first principles that are certain. He further taught that logic was composed of invention, by means of which one could discover arguments, and arrangement (iudicium or dispositio), which included syllogism and method.

One of Ramus's English followers was Abraham Fraunce.[136] Fraunce was educated at St. John's College, Cambridge, where he was exposed and converted to Ramism. While he pursued his master's degree in the early 1580's he worked on three treatises on Ramus's theory, none of which he published. The last of these, The Sheapheardes Logike, summarized Ramus's doctrine and illustrated it with examples drawn from Edmund Spencer's The Shepheardes Calender. In 1583, after taking his master's degree, Fraunce was admitted to Gray's Inn to study law. In 1588, he published a re-worked version of The Sheapheardes Logike called The Lawiers Logike. This book, which added many legal illustrations to the earlier version, was "the first systematic attempt in English to adapt logical theory to legal learning and to

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[135]W. HOWELL, LOGIC AND RHETORIC IN ENGLAND, supra, at 147. It is more accurate to see Ramus's criticism of Aristotelian logic and rhetoric as directed at scholastic interpretations of Aristotle rather than direct attacks on Aristotle's own works.

[136]For a discussion of France's place in the English Ramist movement see W. HOWELL, LOGIC AND RHETORIC, supra, at 282-229, 249-50.

interpret Ramism to lawyers."[137] In his dedication of The Lawiers Logike to the Earl of Pembroke, Fraunce stated his understanding of the relationship between logic and the law:

> I then perceaued, the practise of Law to bee the vse of Logike, and the method of Logike to lighten the Lawe. So that after the application of Logike to Lawe, and examination of Lawe by Logike, I made playne the precepts of the one by the practise of the other, and called my booke, The Lawyers Logike; not as though Logike were tyed onely to Law, but for that our Law is most fit to express the praecepts of Logike.

With the moots and bolts of the Inns of Court fresh in his mind, it was only natural that Fraunce should see the practice of law to be the use of logic, particularly if he, following Ramus, included in "logic" methods that earlier philosophers might have placed under the rubric of rhetoric. At the Inns of Court during law terms, students attended the courts in the morning, spent their afternoons in argument and discussion, and their evenings attending more formally conducted arguments called moots.[138] Sir Thomas Elyot, who apparently had attended moots, saw in them a natural arena for putting learning about rhetoric (or as the Ramists later would have it, logic) into practice:[139]

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[137] Id. at 223.

[138] M. HASTINGS, THE COURT OF COMMON PLEAS IN FIFTEENTH CENTURY ENGLAND 66 (1947). When Sir Edward Coke said "And by reasoning and debating of grave learned men the darkness of ignorance is expelled, and by the light of legall reason the right is discerned...," it seems a reasonable guess that he was thinking in part of the learned disputations of the Utter and Inner Barristers in moots.

[139] 1 T. ELYOT, THE BOKE NAMED THE GOUERNOUR 148-149, (H. Croft ed. 1967). The Governor was first published in 1531. Six further editions were published in the sixteenth century.

> It is to be remembered that in the lernying of the lawes of this realme, there is at this daye an exercise, wherein is a maner, a shadowe, or figure of the auncient rhetorike. I mean the pleadynge used in courte and Chauncery called motes; where first a case is appoynted to be moted by certayne yonge men, contaynyng some doubtefull controuersie, which is in stede of the heed of a declamation called thema. The case being knowen, they whiche be appoynted to mote, do examine the case, and inuestigate what they therin can espie, whiche may make a contention, wherof may ryse a question to be argued, and that of Tulli is called constitutio, and of Quintilian status causae.
>
> And they consider what plees on euery parte ought to be made, and howe the case may be reasoned, which is the fyrste part of Rhetorike, named Inuention than appoynt they howe many plees may be made for every parte, and in what formalitie they shulde be sette, which is the seconde parte of Rhetorike, called disposition, wherin they do moche approche unto Rhetorike: than gather they all in to perfecte remembrance, in such order as it ought to be pleaded, which is the parte of Rhetorike named memorie... And verily I suppose, if there mought ones happen some man, hauying an excellent wytte, to be brought up in such fourme as I haue hytherto written, andy maye also be exactly or depely learned in the arte of an Oratour, and also in the lawes of this realme...undoughtedly it shulde not be impossible for hym to bring the pleadyng and reasonyng of the lawe, to the ancient fourme of noble oratours...

At least two important common lawyers who received academic educations in logic and rhetoric before proceding to their legal educations at the Inns of Court, set out in a serious and systematic way to apply their academic training to the theory and practice of the common law. Sir John Doddridge, a justice of the King's Bench from 1612 to 1628 and a man of so many parts that Fuller says of him that "it was hard to say whether he was better artist, divine, civil or common lawyer," strongly urged the utility of a liberal education for a common lawyer:[140]

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[140]J. DODDRIDGE, THE ENGLISH LAWYER 34-35 (1631).

> [I]t may well bee affirmed, that the knowledge of the Law is truly stiled Rerum divinarum humanarumque Scientia and worthily imputed to be the Science of Sciences; and that therein lies the knowledge almost of every other learned science: But yet I pray consider, that those forraine knowledges, are not inherent or imbred in the Lawes, but rather as a borrowed light not found there, but brought thither, and learned elsewhere by them that have adorned and polished the studies of the Lawes. For since the materiall subject of the Law is so ample (as indeed it is) containing all things that may be controverted. The study of the Lawes then must of necessity stretch out her hand, and crave to be holpen and assisted by almost of all other Sciences; Therefore this objection [that because the law is the science of sciences and therefore contains the knowledge of all divine and human things, anyone who knows the law does not need to study anything else] may well be inverted against them that doe urge the same, and proveth rather that the Professor of the Lawes should be furnished with the knowledge of all good literature of most of the Sciences liberall; for if a man may observe the use of those sciences to lie hidden in the Law, who then may better use them or observe them, then he which is already furnished with them.

The English Lawyer consists of a series of arguments that it is essential for the common lawyer to know grammar and logic, and a rudimentary exploration of those subjects for lawyers who had not had the benefit of a university education. To those lawyers who argued that England had had many excellent lawyers who totally lacked any erudition beyond what their natural gifts and the law provided them, Doddridge responded that should such men have possessed the benefit of other learning, they would have been even more excellent: "their speeches have wanted perspicuity and brevity, their arguments although deeply learned and full of excellent matter, yet have oftentimes beene tedious, confused and puplexed, and their opinions wavering and unsettled..."[141] In The Lawyer's Light,[142] which we shall examine at

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[141]Id. at 31. This sounds like a description of Sir Edward Coke.

[142]Published two years earlier, in 1629.

some length, Doddridge used his own learning in logic and rhetoric to produce the most systematic and comprehensive examination of common law jurisprudence since the appearance of St. German's Doctor and Student.

The second important common lawyer of the early seventeenth century to rely heavily on his university education in logic and rhetoric in producing a systematic study of common law jurisprudence was Sir Henry Finch. Finch's tutor at Cambridge in the mid-1570s was Laurence Chaderton, who had been the first proponent of Ramist logic in England.[143] That Finch himself converted to Ramism while at Cambridge is made clear by a commentary he wrote as a student on the first ten odes of Horace. He had been, he said,[144]

> for a long time collecting certain precepts for teaching and writing from Dialectic and Rhetoric, partly out of the lectures and other books of Peter Ramus, the most gifted luminary of our age...

This work was never published, and nowhere else in his writings does Finch acknowledge his intellectual debt to Ramus.[145] Some time toward the end of the sixteenth century, after getting a legal education at Gray's Inn, Finch began to work on a series of drafts of a treatise on common law jurisprudence. Three copies have been found of his third draft entitled "Nomotexnia, the Arte of Law or the Lawiers Logique." In 1613, a law French version of this treatise was published entitled "Nomotechnia, cestascavoir un Description del Common Leys d'Angleterre

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[143]W. Prest, The Dialectical Origins of Finch's LAW, 36 Camb. L. J. 326, 330 (1977).

[144]Quoted in Prest, supra.

[145]Id. at 331.

solonque les Rules del Parallelees ore les Prerogative le Roy, &c., &c." An English version[146] entitled Law, or a Discourse thereof in Four Books was published in 1627.[147] As a systematic exposition of the common law, Finch's Law has always been highly regarded. Its method served as a basis for Blackstone's Commentaries. Blackstone invidiously compared Coke's Institutes with it: "Sir Henry Finch's discourse of law is a treatise of a very different character; his method is superior to all that were before extant..."[148]

We shall see, when we examine Finch's Law and Doddridge's The Lawyer's Light in more detail, that the Aristotelian tradition of logic, rhetoric, and dialectic provided a powerful method for analyzing and conceptualizing the common law, and especially the reason of that law. Finch and Doddridge were not unusual among the leading lawyers and judges of their time in their exposure and intellectual indebtedness to Aristotelian modes of thought about reason and reasoning. Several of their peers had had university educations before embarking on their legal careers; even Coke himself had studied for three and a half years at Cambridge. Sir Francis

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[146]The title-page states that it was "done into English" by Finch himself.

[147]There has been a disagreement among scholars about which of these two published versions was written first and which was the better. Because of the publisher's claim on the title-page that the 1627 version had been a translation from the French, it had always been assumed that the English version was the later one. Prest has shown, however, that the latest volume of Coke's reports cited in Law was Number Five, whereas Nomotechnia cites the Seventh, Eighth, and Ninth Reports. Id. at 341.

[148]W. BLACKSTONE, Analysis of the Laws of England in TRACTS CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND vi (1771).

Bacon not only was learned in the liberal arts, he broke new philosophical ground in the fields of logic and rhetoric in his Advancement of Learning. There undoubtedly were common lawyers who lacked formal training in logic and rhetoric except for what they had gotten by indirection at the Inns of Court, and who exceedingly resisted such learning. Doddridge's painstaking arguments for the utility of a liberal education would be hard to understand otherwise. There is simply no evidence, however, that most common lawyers of the early seventeenth century belonged to the latter group. Of the four common lawyers of the period who wrote most extensively about the common law, three--Bacon, Finch, and Doddridge--used their philosophical and logical training to analyse common law jurisprudence systematically, something that only Christopher St. German had done before them. Only Coke held on to the lack of system that had been the hallmark of common law literature before the seventeenth century.[149]

FINCH'S LAW

The last three of the four books into which Finch divided his treatise consist of a systematic examination of the substantive rules of the common law. It is the first book, however, that is of primary interest for our purposes because it is an essay on jurisprudence--a philosophical treatment of legal theory in which the common law's

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[149]The most influential part of his INSTITUTES, his commentary on Littleton, is in form a series of glosses on particular words and phrases in Littleton's TENURES. It is little different in design and execution from the medieval civilians' glosses on the law books of Justinian.

place in the legal universe is set forth.

Following Cicero in De Legibus, Finch divides all law into two types: native and positive.[150] Native laws are "those laws which are in us of themselves, and therefore unchangeable and perpetual.[151] Because men are reasonable creatures, native laws are appropriate to them, and just as reason itself is divided into two faculties, native laws are divided into two kinds: the law of nature and the law of reason. The faculty of reason in humans is made up of two distinguishable faculties: mind and "the reasoning part." Mind is "that faculty of the soul that offereth unto us things clear and lightsome of themselves, with out any further reasoning or discourse."[152] The "reasoning part" is "that faculty of the soul; that by discourse of reason doth deduce and draw one thing from another."[153] Corresponding with the faculty of mind is the law of nature, or the primary rules of reason; corresponding with "the reasoning part" is the law of reason, or the secondary rules of reason.

The law of nature is a kind of reason fixed in men's nature "which ministereth common principles of good and evil."[154] These common principles are self-evident and very general. The include, for example, the rule that justice is to be done to all men.

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[150]H. FINCH, LAW, OR A DISCOURSE THEREOF 2 (1759 ed.).

[151]Id.

[152]Id. at 3.

[153]Id.

[154]Id. at 4.

"The law of reason is that which deduces principles by the discourse of sound reason."[155] The reasoning or discoursing faculty in men was originally perfect and uncorrupted; but as the result of Adam's fall, it is now so defaced, even in the wisest of men, that its light shines obscurely. It still shines, however, and is reflected, more or less clearly, in the diverse rules of reason that "are so many stars and shining lights to direct our course in the arguing of any case."[156] These reflected rules of reason even overrule the grounds and maxims of the positive law. "The rules of reason are of two sorts; some taken from foreign learnings, both divine and humane; the rest proper to law itself."[157]

The laws native, that is, the "law of nature and of reason, or the law of reason primary and secondary, with the rules formed and collected thereupon," are the source of all positive laws, and of the grounds and maxims of all common law.[158] Finch does not limit the term common law to the English common law: references to the common laws of Greece by Euripides and Plato show the antiquity of the term and prove the common law to be nothing but common reason. This common reason is "not that which every one doth frame unto himself, but refined reason."[159] He explains what he means by "refined reason" by

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[155] Id.

[156] Id. at 5.

[157] Id. at 6.

[158] Id. at 74.

[159] Id. at 75.

quoting Cicero and Plato:[160]

> Quae cum adolevit atque perfecta est nominatur rite sapientia, as Tully saith, and as Plato hath it, when it cometh to be opinio or decretum. How? generally received by the consent of all.

His gloss on these authors ("generally received by the consent of all"), is nothing else than Aristotle's test for the primary premise from which dialectal reasoning proceeds. This suggests, although Finch does not explicitly say so, that he meant by refined reason nothing other than common law maxims or grounds. If so, this places Finch solidly in the mainstream of common law thought about the place of maxims in legal reasoning. We have seen that Fortescue and St. German made such maxims the basis of legal reasoning. Sir Edward Coke treated them in the same way:[161]

> Maxime, i.e. a sure foundation or ground of art, and a conclusion of reason, so called quia maxima est ejus dignitas et certissima authoritas, et quod maxime omnibus probetur, so sure and uncontrollable as that they ought not to be questioned.

The fact that legal maxims were important in both Coke's and Finch's treatment of legal reason does not suggest that they had the same understanding about the reason of the common law. There was a strand of thought that ran through the whole body of Coke's judicial opinions and legal writings which associated legal reason with the antiquity of the common law and with the experience that antiquity represented. There is no hint of this in Finch; he appears only to be concerned with the existence of a consensus in support of any ground

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[160] Id.

[161] 1 INST. 106a.

from which legal reasoning will proceed, not with the process by which such a consensus was arrived at or the length of time it took to be achieved. Indeed, Finch shows no interest in the age of the common law. His entire discussion of legal philosophy is directed at showing that all positive laws must conform to the law of nature and the law of reason.[162] Unlike Coke, he saw no danger in altering established rules of law: "such are the common laws of England; and almost so many people so many laws:[163] and as those laws are diverse from one another, so one and the self same laws may be altered and changed in themselves, so long as no alteration is permitted against the two main laws of nature and reason."[164]

DODDRIDGE'S THE LAWYER'S LIGHT

Sir John Doddridge, solicitor-general, serjeant to the King, and finally a justice of the Court of the King's Bench,[165] wrote, in The Lawyer's Light, what remains to this day one of the most comprehensive

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[162] Id. at 76.

[163]He was at pains to claim that the common law of England was just me of many common laws in the world. Indeed, he said, the laws of every people are common laws, and are "the golden and sacred rule of reason." His point seems to have been that there is no basis for invidiously comparing the laws of different people because if they are truly law they will be in accord with the law of nature and the law of reason.

[164]Id. at 76.

[165]He was called to be a serjeant in 1604, and in the same year was appointed to the office of solicitor-general. In 1607 he was obliged to resign his office in order to create a vacancy which Sir Francis Bacon might fill. As repayment he was knighted and promised a seat on the Court of the King's Bench at the first vacancy. This occurred in 1612, and he served on the Court until he died in 1628. 6 E. FOSS, THE JUDGES OF ENGLAND 306-310 (1966 ed.).

treatments of the relationship between law and reason in English. In his own time there was nothing to which it could be compared, not so much because of the learning in logic and rhetoric that informed it but because of the detail with which it covered its subject.

In his first sentence, Doddridge takes as his text the first book of Aristotle's Topics. Aristotle, he says, provides the means by which in every intellectual science that rests upon discourse of reason, men could have the kind of reason that will serve to prove and disprove things called into debate.[166] These means are profitable and even necessary for studying the laws of England "which are grounded vpon depth of Reason, and invested often times by the name of Reason, in our reported cases..."[167]

The first of Aristotle's tools useful for legal study is Propositionum electio, containing "the Election, choice observation, and collection of all received Principles, Propositions, Sentences, Assertions, Axioms and Reasons, importing eyther certainty of truth, or likelyhood of probability."[168] In the Reports and other legal writings there are many different names or titles given to the propositions that are ascribed as reasons of decided cases. Sometimes they are called grounds, sometimes maxims, sometimes principles, and sometimes eruditions. They are also called rules and propositions. Sometimes they are called positive laws, or merely laws.[169] Such a

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[166]J. DODDRIDGE, THE LAWYER'S LIGHT 1 (1629).

[167]Id.

[168]Id. at 2.

[169]Id. at 3-4.

ground, rule or principle of the law of England is properly defined as "a conclusion either of the Law of Nature, or derived from some general Custome used within the Realme, conteyning in a short Summe, the reason and direction of many particular and speciall occurrences."[170]

Another way of understanding the principles and grounds of the law, said Doddridge, comes from considering the causes from which they spring. All causes are either internal or external.[171] Internal causes, in turn, are either material or formal. External causes are either efficient or final.

Doddridge first discusses the material courses of the grounds of the law. Some rules or grounds of law are applicable to every part of the law and not just one particular branch. These are the kinds of rules that are also axioms to be observed in all of man's life because they are either the conclusions of natural reason, or are derived from such conclusions, being originally derived from those arts that are necessary for the maintenance of human society.[172] Among such arts from which grounds of the common law are drawn are logic, natural philosophy, moral philosophy and, most interestingly, the civil law. Doddridge, like Finch, shows no inclination to praise the common law in comparing it with other peoples' laws. All laws, he says, "are derived from the Law of Nature, and do concurre and agree in the

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[170]Id. at 6.

[171]Id. at 7.

[172]Id.

principles of Nature and Reason..."[173] Because the civil laws reflect the great wisdom with which the Roman state was governed at the time it flourished most, and because English law has always followed the best and most approved reason, it necessarily follows that there must be great conformity between the two systems of law. This conformity is demonstrated in some one thousand axioms and conclusions of reason.

In addition to the material causes of the principles and grounds of the common law, there are also formal courses. In regard to form, the coherence of the words and the matter must first be considered, and in doing that, one must take into account first the verity of propositions or grounds and then their generality.

There are two kinds of verity that a proposition may have. It may reflect a necessary or known truth which cannot be impugned. If so, it is called a primary conclusion of reason. As such, it is "imprinted on the minde of every man, and discerned by the light of very nature itself."[174] Because a primary conclusion of reason is certain and undoubted, it needs no confirmation. A legal ground may only import contingent truth or probability, however, and he subject to impeachment. If so, it is called a secondary principle of reason.[175] Although secondary principles do not need great proof to be confirmed because they have great probability, they generally are known only to those who profess the study of the law. They are said to be probable because they appear to many men, and especially to wise

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[173] Id. at 10.

[174] Id. at 42.

[175] Id.

men, to be true.[176]

Because the common law is grounded on so many of the primary and secondary rules of reason, some men affirm that the common law itself is the law of reason. But there is a greater difficulty in knowing the secondary rules of reason than in knowing the primary rules, and in that difficulty hangs much of the matter and form of legal arguments in England.[177] There are two kinds of secondary grounds or rules of reason in the law: those founded on intendment of law and those founded on the discourse of reason conducted in argument.[178]

Many rules of the law that are accepted by common intendment (i.e., by presumption) are accepted as truth even though they are apparently false, and may not be rebutted.[179] Other rules and principles that are accepted by common intendment are only accepted prima facie and may sometimes be impeached.[180]

Grounds of law based on discourse and manner of reasoning are always subject to exceptions. The human mind has two faculties, capacity and discourse. By capacity we apprehend many primary propositions whose self-evidence causes everyone to consent to them. By discourse we take the primary propositions apprehended by capacity and derive secondary propositions from them. Every science does not have the same certainty, and moral science, from which the knowledge

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[176]Id. at 45.

[177]Id.

[178]Id. at 47, 50.

[179]Id. at 54, 55.

[180]Id. at 55.

of all laws is derived, because it consists entirely of man's changeable and inconstant conversation, admits much variety and fluctuation of opinion.[181] It follows that it is hardly possible to make a secondary rule of law that will not fail in some particular case.

Because of the uncertainty of principles that are established by discourse of reason and presumption, common lawyers permit the rules and axioms of law to be restrained by exceptions that are founded either on equity[182] or some other rule or ground of law that seems to contradict the rule or ground proposed. Almost every disposition in the law results from a conference or comparison of competing maxims and is adjudicate by reason of equity or upon some other rule or axiom. Matters of debate in the law commonly have a maxim on one side pitted against a competing maxim on the other side, or several reasons on each side derived from competing maxims, or else there is a maxim or general rule of law on one side to which the other side opposes an exception.[183]

Doddridge has little sympathy with Coke and other common lawyers of like mind who praised the common law largely for the long accretion of experience, gotten through the decision of thousands of particular cases, that the experience represented. It is better, he argued, to

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[181]Id. at 59, 60.

[182]Doddridge closely follows St. German on the role equity plays in the common law. Basically, it keeps the common law consistent, interprets statutes, and give remedies in courts of conscience in extreme cases which the law leaves unredressed. Id. at 61-78.

[183]Id. at 79.

begin with general rules and propositions and reason our way to particular conclusions. Things proposed in their generality are best known and most familiar to our understanding; they also stick in our memory better. They are the precepts of art and therefore are called perpetual and eternal.[184] In a sentence which repudiated everything that Coke stood for, he added:[185]

> for the orderly proceeding of every Art, Methodically handled, is from the due regard had of the generall, to descend vnto the specialls contained vnderneath the same: wherefore it ensueth hereof, that generall Propositions are the most speedy instruments of knowledge: for experience, which is wholly gotten by the observation of particular things (being deprived of speculation) is slow, blinde, doubtfull, and deceiueable, and truly called the mistress of fools.

He did not, however, draw the conclusion that the laws of England should be published, after the manners of the civil law, as general and special rules with their conclusions. It was better, he said, "to frame Law upon deliberation and debate of reason, by men skilful and learned in that facultie" on the occasions of cases arising that required judicial determination, than to try to decide all cases in advance through the enactment of positive laws.[186] Having deprecated experience, Doddridge proceeded to demonstrate that he could be as inconsistent as the next common lawyer. The law is called reason, he wrote, "not for that every man can comprehend the same; but it is artificiall reason; the reason of such, as by their wisdome, learning,

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[184]Id. at 89.

[185]Id.

[186]Id. at 90.

and long experience are skillful in the affaires of men..."[187]

It would not be amiss, I think, to take Doddridge's wavering between the Aristotelian and common law components of his education, and his failure, in the end, to rigorously push the Aristotelian strand of his legal thought (which he clearly favored) to its logical conclusion, as a representation, or portrait in miniature, of the common law mind in the seventeenth century. All of Sir Edward Coke's inclinations were in the opposite direction from Doddridge's and Finch's; he clearly favored a traditional legal ideology that owed more to his apprenticeship and practice in the law, and to the case reports and technical books of pleading, then to the liberal arts. But he, too, sometimes lapsed into speaking of the common law in ways that at least indirectly, clearly had their origins in Aristotle's philosophy. The common lawyers of Coke's and Doddridge's time who left a record of what they thought about the law may be roughly divided into two groups. In one, the representative figures are Bacon, Finch, and Doddridge, and in the other, Coke. Some lawyers, like Sir John Davies, shifted from one broad orientation to the other as the exigencies of the moment moved them. It is impossible for us to know the jurisprudence of the great majority of the common lawyers because they left no record of their thoughts. The most we can say, on the evidence we do have, is that the common law mind was divided.

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[187] Id. at 91.

CHAPTER NINE

ROMAN LAW MIND AND COMMON LAW MIND

In my Preface I partially summarized the orthodox understanding of the distinctive differences of the jurisprudence of the Roman law and common law traditions and characterized that understanding as historically and factually inaccurate or misleading. I did not summarize the received statement of antitheses, however, for the purpose of replacing it with a better one. It was precisely the effort to distill the essences of two rich intellectual traditions into a brief statement of antitheses that I found misleading. Nevertheless, I think a different kind of summary comparison of the two traditions' approaches to formal sources of law may be helpful. It will concentrate on the two sources of law, custom and precedent, which were discussed fully in regard to both traditions. Roman and civil law theories of legislation and equity received extensive treatment in the body of this work, but because common law theory on the same subjects did not receive a comparable treatment I shall not attempt a summary comparison.

Because this work is historical in intention and attempts to take into account the evolution that took place in the legal thought of both traditions, and the more radical shifts that also sometimes occurred, the summary must also be historical if it is to reflect the body of the work. It will, however, be more overtly comparative and more of an exercise in analytical jurisprudence than the text on which it is based.

PRECEDENT

Writers on comparative jurisprudence have long stressed a difference in attitude toward precedent as the primary distinction

between the common law and Roman legal traditions. John W. Salmond stated the standard view:[1]

> The importance of judicial precedents has always been a distinguishing characteristic of English law... Neither Roman law, however, nor any of those modern systems which one founded upon it, allows any such place or authority to precedent. They allow it no further or no other influence then that which is possessed by any other expression of expert opinions.

Recently, comparative lawyers have begun to modify this view of the standing of precedent as a source of law, but only because they have concluded that courts on the Continent have begun openly to rely on earlier cases in reaching their decisions. The standard distinction between the two traditions on the basis of their attitudes toward precedent is based as an element of truth but is extremely misleading, both historically and jurisprudentially.

The germ of truth lies in the fact that Justinian, having decreed that the emperor should be regarded as the sole makes and interpreter of the law, and having taken the trouble to attempt to reduce Roman jurisprudence to a written code, attempted to keep judges and jurists out of the business of developing the law by further decreeing that "Decisions should be based not on precedents but on laws."[2] In the Middle Ages, the civilian jurists took the maxim non exemplis very seriously and universally taught that a judicial decision was binding only on the parties to the case in which it was made, but could have no other legal effect since "other judges must not decide according to

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[1]The Theory of Judicial Precedents, 16 L. Q. Rev. 376 (1900).

[2]C. 7. 45. 13. Non exemplis sed legibus iudicandum est.

that example."[3]

It is likely, however, that faithful as civilian jurists always were in repeating the non exemplis formula, case law always played an important part in the development of Roman legal doctrine. If judges never paid attention to how similar cases had been decided there would be little coherence or predictability in the law. This would lead to the violation of what has been regarded as a central requirement of justice since the time of Aristotle -- that similar cases be treated similarly. Therefore I suspect that Continental judges were always aware of what had been done before in similar cases.

Medieval civilians easily found a way to justify circumventing the prohibition against a reliance on precedents. Precedents themselves could not serve as authority for judicial decisions, but they had developed the doctrine that it only took two judicial decisions to establish the existence of a legally binding custom. In other words, if a rule were upheld in two decisions, it was proved to be a custom. Since they agreed that customs were "law" within the meaning of C.7.45.13, two earlier judicial decisions could serve as legal authority for present decisions.

If the civilians' avoided their rule against the authority of earlier decisions by the exercise of a jurisprudential slight-of hand, the common lawyers, contrary to widespread belief, for centuries had no doctrine of binding precedent.

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[3]PLACINTINUS, QUESTIONES DE IURIS SUBTILITATIBUS III, 1-2 (Fitting ed. 1894).

Bracton was alone among the early treatise writers in showing any interest in decided cases. Bracton referred to several hundred cases in De Legibus and collected some two thousand cases in his Notebook, but he did not intend for his cases or case citations to be regarded as having binding force in future cases.

A workable doctrine of the binding authority of earlier cases is very difficult to achieve without reliable reports of what those cases held. Within a generation of Bracton's death the Year Book series began and it continued until the sixteenth century. The Year Books were crude law reports, but they were not designed for the purpose of recording precedents. Instead they were used for teaching law students and lawyers the techniques of pleading. The judgment in a case was of no interest to the users of the Year Books, and so it was not ever reported. The object of pleading was to determine the issue, which would then be decided as a question of fact.

The idea was to arrive at an affirmative proposition that was countered by a direct negative. Pleading was done orally and tentatively; no written record was made until the end of the term. Pleas could be tried out and withdrawn if problems were encountered. The Year Book reporters were interested in what had happened to particular pleas and in the arguments surrounding the pleas and demurrers.

So long as the interest of the profession was concentrated on the formulation of the issue rather than on the decision of particular points, there was little pressure for the kind of accurate reporting that the theory of binding precedent requires. Such pressure could

only come with the development of the view that particular decisions were authoritative in regard to the issues they decided. The shift, beginning in the 15th century, from the system of oral to written pleadings "enabled the point at issue to be defined more clearly, and concentrated attention more firmly upon the decision of that point."[4] This in turn led a shift in interest from the formulation of the issue to the decision of the issue.[5] This shift in interest from the debate in Court to the decision of the court led to the growth of the modern view as to the authority of particular decided cases and to the growth of the practice of citing cases.[6]

In fewer than one out of twenty cases reported in the Year Books was there any mention by counsel, judge, or reporter of any earlier case. In only about one case out of forty was the reference to an earlier case specific enough for identification. As the Year Book period came to an end cases were more frequently cited than in the earlier Year Books, "but at no time were the citations sufficiently numerous to say that there was a general practice of relying on judicial decisions."[7]

After 1535 the Year Books ceased, but they were replaced by reports of cases compiled by named reporters. Some of the early reports such as those of Dyer closely resembled the Year Books.[8]

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[4]W. S. HOLDSWORTH, 5 A HISTORY OF ENGLISH LAW 371 (1924).

[5]Id.

[6] Id. at 372

[7]T. E. Lewis, The History of Judicial Precedent, 187 L.Q.R.411, 415 (1931).

[8]Dyer's Reports covered the period from 1537 to 1582.

Plowden's Commentaries, which covered much of the same period as Dyer's Reports, were very different and established a model for accurate, detailed, clear reporting of the questions at issue, the debates of council, the judgments, and the reasons for the judgments. Although Plowden's reports were greatly admired, they were not emulated until Burrow's Reports of the mid-eighteenth century. And until accurate reports were available, the modern theory of case law and precedent, which holds that a case once decided binds a court to make the same decision in a future similar case, could not be fully established in practice. This is not to suggest that the view that particular decisions were binding was arrived at suddenly. We can see its foreshadowing in the sixteenth and seventeenth centuries.

Neither Plowden nor Dyer contain assertions that precedents are building, but both continue the practice, begin in the later Year Books, of increased citations of earlier cases. Some of the cases reported by Plowden contain more than twenty case citations. Clearly, decided cases are coming to have much more importance for common lawyers.

By the time of Coke and Bacon in the early seventeenth century, prior decisions had unquestionably become authoritative. But seventeenth century common lawyers like Coke, Bacon, and later, Matthew Hale, did not regard individual decided cases as law; they saw cases as the "evidence" or "proof" of law. "Our Booke Cases," wrote Coke, "are the best proofes of what the law is."[9] This understanding

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[9]Co. Litt. 254a.

was stated in more detail by Sir Matthew Hale:[10]

> It is true, the Decisions of Courts of Justice, tho' by Virtue of the Laws of this Realm they do bind, as a law between the parties thereto, as to the particular Case in Question, 'till revers'd by Error or Attaint, yet they do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great weight at Authority in Expounding, Declaring, and Publishing what the law of this kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former times; and tho' such Decisions are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons, as such, whatsoever.

The view that individual legal decisions were only binding between the parties is identical to the civilian view of the authority of judicial decisions. Just like the civilians, the common lawyers taught that judges were bound to give their decisions according to the law. As Chief Justice Vaughan put it in 1670:[11]

> If a Court give judgment judicially, another Court is not bound to give like judgment, unless it think that judgment first given was according to law. For my Court may err...therefore, if a judge conceives a judgment given in another Court to be erroneous, he being sworn to judge according to law, that is, in his own conscience ought not to give the like judgment, for that were to wrong every man having a like cause, because mother was wronged before.

This sounds like a civilian gloss on Justinian's decree that "Decisions should be based not in precedents but on laws."

Undoubtedly, the common law was always, at every point in its history, much more receptive than the civil law to the influence of decided cases. It was a case law rather than a book law. But when leading common lawyers and judges felt called upon to announce the

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[10]M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45 (Gray ed. 1971).

[11]Bole v. Horton, Vaughan's Rep. 360, 382 (1670).

official common law theory regarding the authority of precedents, they usually said something that civilian jurists would have had no quarrel with. Sometimes they even quoted from Justinian, as when Chief Justice Bereford, in the early fourteenth century, stated a garbled but clearly recognizable version the maxim non exemplis.[12] If there was an important difference between the civilian and common law doctrines of precedent, it lay in the fact that the common lawyers did not teach that judges had to ignore precedent. They held that precedent had to conform to reason and the law, and they held that it was the law and not precedent that constituted the authority for judicial decisions, but they were always open to the possibility that lawyers and judges might learn something from earlier cases.

CUSTOM

The most basic (and perhaps the most easily answered) question to be addressed in any comparison of Roman law and common law theories of custom is "Was custom recognized as an authoritative source of law?"

There are reasons for doubting that Roman jurists developed a definite theory about custom as a source of law before the Middle Ages. It is true that Justinian's Digest contains several texts which proclaim the authority of custom as law. D.1.3.32.1 states that "Immemorial custom is observed as a statute (pro lege)...", and D.1.3.33 holds that where there are no written rules it is the practice "for custom of long standing to be observed for law and statute (pro iure et lege)." Other passages in the Corpus Juris,

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[12]Whiteacre v. Marmion, Y. B. 8 Edw. II 273-74.

however, appear to be inconsistent with the Digest's theoretical justification of custom's power to introduce law. It is hard, for example, to reconcile C. 1. 14. 11, which holds that "the Emperor alone can make laws," with the theory that it is the people's judgment and will that give custom authority as law (D. 1. 3. 32). There is nothing in the Corpus Juris that suggests that Roman jurists recognized the existence of a problem, given the opposing sets of texts, regarding the theoretical basis for custom's authority as law. This is hardly surprising in view of Justinian's insistence that his law books contained no inconsistencies. But because the Corpus Juris does not attempt a reconciliation of the two sets of texts, one cannot state with any assurance what Roman jurists through Justinian's time thought about custom's authority to introduce law.

Medieval civilian jurists took it as a given that custom could be an authoritative source of law. They concerned themselves with such questions as what custom was, under what circumstances it might become law, what theoretical justifications underlay its power to create law, by whose authority its status as law might be established, and what legal effect it might have once it had been established.

With only a few exceptions,[13] from the late twelfth century on, the common lawyers recognized custom as an authoritative source of law. They did not, despite what C. H. McIlwain and others have taught us, think that all English law was customary in nature.

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[13]E. g., Britton, a reviser of Bracton in the time of Edward I, represented all the law of England as being statutory--as proceeding from the king's mouth.

The Corpus Juris provided few details about what a custom was and how lawyers and judges were to know one when they saw it. The Digest indirectly defined custom as the practice established by usage (D. 1. 3. 32). Clearly not every practice established by usage was regarded as having legal force. A number of Corpus Juris texts suggested that usages had to be continued over a certain period of time before they had the force of law. The precise length of time was never specified in Justinian's law books, and we have no way of knowing what tests Roman jurists through the time of Justinian applied to determine whether the requisite time of usage had been met for an alleged custom. Corpus Juris texts used three different adjectives, all indeterminate, to describe the time required: diuturni mores (Inst. 1. 2. 9), inveterata consuetudo (D. 1. 3. 33), and longa consuetudine (D. 1. 3. 35). The necessary time of uninterrupted usage became a point of controversy among the medieval civilians. The location "cuius contrarii non extat memoria," or a variation, was repeated by civilian jurists throughout the Middle Ages. This phrase was never taken by civilians to mean that a custom had to have existed from time immemorial in the sense that no one had ever heard of a contrary practice, nor was it taken literally to require that there was no one alive who had actually witnessed a contrary practice. Since the Corpus Juris gave no hint about how much time it took to have a longa or inveterata custom, medieval civilians borrowed their analysis from the property doctrines of prescriptio and usucapio where they found parallel issues regarding time. Under both of these doctrines of property law one might acquire property belonging to

another by continuous possession of it for a period of time fixed by law. Unfortunately for the medieval civilians, the Corpus Juris provided several different times of prescription (continuous adverse possession) so the jurists who wanted help in deciding how long usage must continue in order to imbue a custom with legal force had to choose which prescriptive period they would take as their guide. By the time of Azo (d. 1220), the great dispute among civilians was whether the time beyond which there was no memory to the contrary was ten or twenty years. Azo said the periods asserted by earlier glossators had ranged from ten to fifty years.

By the sixteenth and seventeenth centuries, both civilian and common law jurists sometimes complained that their fellows confused or equated custom and prescription. It is understandable that this confusion should have existed. Essential to both concepts is the notion of an uninterrupted practice continued for a specified length of time. Further, as we have just seen, medieval jurists borrowed from the law regarding prescription when they were attempting to elaborate their doctrine of custom, and as we shall see in a moment, the common law borrowed its doctrines on custom from the medieval civilians. But there is more behind the confusion in both traditions about custom and prescription that that. Most medieval civilians dealt with the contraritas between the Code text which held that only the emperor could make laws, and the Digest texts which allowed a lawmaking role to custom, by assuming that as the general rule, the emperor's legislation was the law. Custom might become law, but only when there were gaps in the imperial law, or (according to some) in

derogation of, or detraction from, the imperial law. Among the common lawyers before the seventeenth century, virtually every recorded discussion of the period of usage of a custom had to do with local, particular customs, and the background issue always involved the question whether a practice different from that established by the general law of the land (statute law or common law) would be admitted to govern legal relations in a limited local geographic area. The doctrine of prescription involved an analogous problem, namely, whether a property right could be established in derogation of an existing right held by another person. To summarize, custom and prescription involved a derogation or detraction from an existing right of someone else, or a lawmaking power held by someone else.

I have suggested that the common lawyers borrowed their conception of what custom was and their tests for proving or disproving its existence from the medieval civilians. There is nothing Germanic about the common law conception of custom; many English customary rules may have had Germanic origins but the conception itself was entirely Roman (or more precisely, civilian).

Two things may be said with assurance about Glanvill and Bracton, the twelfth and thirteenth century common law treatise writers: what little they had to say about the nature of customary law was borrowed or derived from the writings of civilian jurists, and they didn't have much to say.

Both Glanvill and Bracton were concerned to claim for the unwritten English laws the status of law. So far as they knew, for the entire civilized world outside of England, the primary source of

law was legislation. Unwritten customs, they had been taught by the civilian authors they had read, could only be a secondary source of law. So what of England, in which all laws were unwritten? Must it be said that it had no laws? This was the threshold question that Glanvill and Bracton set out to answer. Relying on Roman legal sources, they both concluded that the fact that English law had not been reduced to writing did not keep it from being law.

It is not entirely clear that either Glanvill or Bracton conceived of all the English laws as custom. More precisely, it is not clear that either conceived of the general law of the whole realm as custom. If they did, their conception of custom was different from that held by either the medieval civilians or all of the common lawyers only a half century after Bracton. One cannot say with certainty that Glanvill and Bracton did not conceive of all written laws as custom; both wrote treatises "in the laws and customs of England." The mere use of the expression "laws and customs" tells us very little, however, about whether they conceived of all unwritten laws as customs. The phrase by itself is ambiguous; while it does not suggest that English laws are equivalent to customs, neither does it necessarily suggest that laws and customs are to be distinguished. In the only unambiguous use of the word "custom" by either writer, Bracton refers only to local customs. When Bracton and Glanvill unambiguously refer to the laws governing all of England, they always use the word leges. This alone does not suggest that they did not conceive of the general law of England as custom. Lex, ius, and consuetudo could be used interchangeably by early English lawyers.

But both writers' discussions of the law of the realm make that law seem much more like legislation than like custom (at least as the medieval civilians and later common lawyers understood custom). When they wrote of the unwritten laws of England, they made it clear that they had in mind the enactments and decisions of the king, made with the advice of the magnates, which had not been recorded in writing.

Glanvill and Bracton said very little about their understanding of the nature of customary law, and what they said was borrowed either directly from the Corpus Juris or from its medieval glossators. Glanvill wrote of "customs of the realm which had their origin in reason and have long prevailed." Here, in very general terms, are the two basic medieval civilian criteria fro customary law--long usage and reasonableness. Bracton did not hold custom to the standard of reasonableness, but he did identify it with what long usage had approved. The passage in which he defined lex and consuetudo was clearly based on two Digest texts (D.1.3.1 and D.1.3.32), and his omitting to make reasonableness a test of custom may perhaps be explained by the fact that the Digest itself did not require that customs be reasonable.

During the Year Book period (from the late thirteenth to the sixteenth century) the common law conception of custom was almost indistinguishable form the medieval civilian conception. The discussions about custom by common lawyers and judges reported in the Year Books, with only one exception out of more than 1500 cases I read, all had to do with the validity of alleged local customs which differed from the rules established by the common law. Just as in the

civil law, a central test of a custom's validity was that it have its title by prescription. In other words, it had to have been used from a time of which there was no memory to the contrary. The similarity of this expression to the the medieval civilians' "cuius contrarii non extat memoraria" is striking. No less striking is Sir Thomas Littleton's explicit recognition, near the end of the Year Book period, that custom's required time of usage was a prescriptive concept:[14]

> [A]nd note well, that no custom is allowable, but only such custom as hath been used by title of prescription, that is to say, from time whereof the memory of man runneth not to the contrary.

At some point the common lawyers had borrowed the civilian concept of custom with its tests for validity intact, but as the emphasis of the common law shifted toward the technicalities of writs and pleading, they lost the memory of its origins and came to believe that their borrowed conception was a native product. We do not have enough evidence to know when the full-blown concept was borrowed. We have seen that Glanvill, in the last part of the twelfth century, was already drawing his conception of custom from Roman sources. But neither Glanvill nor Bracton reproduced the civilian tests for valid custom with anything like the faithfulness and linguistic similarity exhibited by the common lawyers in the fourteenth and fifteenth centuries, and I am therefore inclined to believe that other important common lawyers read the civilian glossators after the time of Bracton.

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[14]LITTLETON, HIS TREATISE OF TENURES (T. E. Tomlins, ed. 1841).

Once the common lawyers had adopted the civilian formulae for time necessary to establish customs, they had just as much trouble as did civilians in agreeing about what the formula meant. In Littleton's words, "But divers opinions have been concerning time of member, &c, and of title of prescription, which is all one in the law."[15] Some common lawyers argued that time of memory extended back to the time of Richard I (September 3, 1189), the date provided in the Statute of Westminster I (1275) as a limitation on writs of right. Others argued that what was meant by saying that custom had been used "from time whereof the memory of man runneth not to the contrary" was only that no man then alive had knowledge to the contrary.[16] The latter interpretation imposed a considerably less onerous burden of proof regarding customs than the former, but it still was more burdensome than the ten or twenty years time of memory common among medieval civilians.

The common lawyers of the thirteenth and fourteenth did not apply the "time of memory" test to the common law, nor did their court arguments, preserved in the Year Books, suggest that they conceived of the common law as custom. They did equate the common law with reason, but in doing so they never gave the impression that they were testing its validity as custom.

The first unambiguous identification of the common law as custom that I found in the common law literature or case reports was made by Sir John Fortescue in the last half of the fifteenth century. All

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[15] Id.

[16] Id.

human laws, said Fortescue, "are either laws of nature, customs, or statues . . ."[17] Given those possibilities, the common law could only be custom. Fortescue praised English customs for their antiquity, but did not present that antiquity as a test of a custom's validity.

The greatest difference in the Middle Ages between the civilians' treatment of custom and that of the common lawyers does not lie in the conception each tradition had of the elements that made valid custom or the tests for proving custom. The conceptions were naturally very close since the common lawyers borrowed their definition of custom and their tests for its validity from the Roman law. The great difference lay in the fact that the civilians engaged in a detailed theoretical examination of the nature of custom, the bases of its guiding force as law, its relationship to other sources of law, etc., and that the common lawyers had virtually nothing to say about these matters.

Fortescue's three-part division of law did not take hold among the common lawyers. By the mid-sixteenth century it had become the universal practice to distinguish three kinds of law in England, "the law general (i.e. the common law), customs, and statute law . . ."[18] This distinction was retained for centuries. By "custom" the common lawyers meant only local custom. In order for a local custom to be allowed, proof had to be made that it had existed "from time immemorial" and that it was in harmony with reason--the standard civilian and medieval common law tests for the validity of custom. The increased frequency and sharpness of challenges to customs for

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[17]DE LAUDIBUS LEGUM ANGLIE 37 (S. B. Chrimes ed. 1942).

[18]Reniger v. Fogossa, Plowden's Comm. 9.

failing to meet these tests, as compared to the Year Book period, suggest that the courts were becoming less tolerant of local deviations from the law of the whole realm. In any event, the sixteenth and seventeenth century reports are filled with examples of customs being held strictly to the time of usage and reasonableness standards, with more than a few failing the tests. The sixteenth century reports, however, provided no more information about how one could know when the tests had been met than had the Year Books.

The hardest question to answer about the sixteenth century common law approach to custom is whether, despite the fact that it had now become the universal practice to distinguish the common law from "customs", the common lawyers still really followed Fortescue in conceptualizing it as custom. The evidence is inconclusive.

On the one hand, the medieval practice of never examining the common law to see if it meets the "time of memory" requirement of custom is continued. Indeed, just as with the Year Books, the sixteenth century reports contain not even an abstract statement of any requirement that in order to the valid a common law rule must have been practiced for a certain length of time. If the common law had really been conceptualized as custom, why was it never held to the central test for the existence of valid customs? Furthermore, many of the reported discussions about the common law suggested that it was thought of more as the common learning of the professional elite than as the custom of the realm.

On the other hand, Plowden recorded at least one instance in

which the common bar was described as "nothing but common use,"[19] another in which it was asserted that "it is usage which proves what the law is,"[20] and third in which the common law was described as "the custom in relation to letters, courts, pleas and judgments."[21] All these statements appear to suggest that the common law was conceptualized as custom, but there are reasons to be cautious about reaching that conclusion. Sixteenth century common lawyers were accustomed to using the phrase "common usage" in two quite different senses. One referred to the usage of those learned in the law; the other referred to the usages of the people. I found one instance in which the term "common usage" apparently referred to the usages of the people (when the reference was to the common law rather than to local custom); in the other instances the phrase could more naturally be taken to refer to the usages of the common law courts. In the case in which the common law was said to be custom, the context made it clear that the reference was to the custom of the common law bench and law and not of the people.

I read this inconclusive evidence as suggesting that the sixteenth century common lawyers had available to them several ways of describing the common law, one of which was in terms of custom and usage. But if some of them did conceive of the common law as custom, that conception had little in common with their conception of local custom. Most importantly, they did not insist that a common law usage

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[19]Wrotesley v. Adams, 1 Plowd. Comm. 299.

[20]The Case of Mines, 1 Plow. Comm. 485.

[21]Wrotesley v. Adams

have a time of prescription. Secondly, it was the usage not of the people but of a tiny professional elite. Such a conception of custom is incompatible not only with the traditional common law description of custom, it is incompatible with the Roman law doctrine from which that traditional description was drawn. Perhaps we have finally discovered an original common law conception of custom.

The common law conception of the nature of custom, and the tests prescribed for validating custom's existence, did not change in the seventeenth century. Custom was still defined as a reasonable usage of the people, continued time out of mind. But if the tests for custom had not changed, the rigor with which they were applied greatly increased toward the end of the sixteenth century. The common law judges became zealous in supporting the authority of the common law[22] and began to examine local customs very strictly. The historian is not left to infer this strictness from the increasing frequency with which the courts found that customs violated the reasonableness test;[23] the rule was frequently stated that "when a custom is pleaded it shall be pleaded stricti juris..."[24]

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[22]This attitude was manifested in their treatment of equity decrees as well as in their treatment of custom in derogation of the common law.

[23]A typical instance of a custom being rejected for unreasonableness is found in Stebbs and Goodlacks Case, 1 Leonard 92: "And the opinion of Wray Justice was that the custom was against common reason, and so void..." More customs are reported as having been rejected for lack of reasonableness in Leonard's Reports than in other reports of sixteenth and seventeenth century cases. Among such cases are Leigh and Oakley and Christmass Case, 1 Leon. 286 (32 Eliz.); Devered and Ratcliff's Case, 2 Leon. 332 (32 Eliz.); and Jeroms Case, 4 Leon. 787 (30 Eliz.).

[24]The Lord Cromwell's Case, 3 Leon. 526. Also see 4 Leon 846: "for three things in law shall be taken strictly, conditions, customs, and penal laws."

In the first part of the seventeenth century, for the first time, an important common lawyer began unequivocally to describe the common law as the custom of the English people. He also, for the first time that I have discovered, described it in terms of all the tests that had before been applied only to local custom. We have seen that in the law reports of the second half of the sixteenth century the common law was sometimes referred to as the "common custom of the realm," but we found little evidence that sixteenth century lawyers understood that phrase as referring to anything other than the learning of the judges and lawyers who worked in the King's courts. With Sir John Davies all that changed. Davies taught that the common law, as common custom of the realm, was created by the usages and practices of the English people, and was recorded nowhere but in the people's memory.[25] Furthermore, he explicitly described the common law in terms of the standard tests for valid custom: a reasonable act continued time out of mind.[26]

Other important seventeenth century common lawyers sometimes attributed great antiquity to the common law, although only Coke, among the leading lawyers and judges, stressed the age of the common law. Among these lawyers, not even Coke made a point of identifying the common law as custom.[27] If they had been pressed to categorize the

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[25]For discussion, see pp. 307-308 infra.

[26]Id.

[27]Coke was interested in defending the superiority of the common law, and like Sir John Fortescue in the fifteenth century, he believed the very continued use of a law dating from time immemorial proved its superiority. Other leading lawyers and judges of the early seventeenth century showed little interest in either the antiquity of

common law as a type of law, most seventeenth century common lawyers probably would have classified it as custom. But that was because they did not have the linguistic or conceptual tools for describing human law in any other way than as custom or statute. They could not describe the common law as judge-made precedent; medieval common law judges sometimes frankly admitted that the cases they decided made new law throughout the land, but the official doctrine, taken over from the Roman law, always had been and would so remain for more than a century, that the law was not necessarily the same as precedent. The way most common lawyers (even Coke) understood the common law required a new category of law and a new terminology. Their understanding of the common law, as best I can interpret what they had to say about it, required a new category conceptually somewhere between custom and judicial precedent. Ironically, in the sixteenth century they had developed a terminology that would have served that purpose very well. They had developed two expressions for the common law that together captured very well the essence of how most lawyers and judges conceived of the common law: "common erudition" and "common reason." Having themselves gone through process of education at the Inns of Court, apprenticeship at the bar, and practice and intellectual association with the tiny legal elite, they understood well enough that the common law was not custom in the some sense that the custom of a borough or vill was custom. Whether a particular rule existed at common law did not depend upon factual proof that the English people had lived by it since time immemorial. When a putative common law

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the common law or in alleging its superiority to other laws.

rule was being discussed in court, no one ever asked whether the English people had practiced it, or if so, whether that practice had been continued without interruption time out of mind. The same rule apparently was applied to the common law as to the "customs' of the court" (i.e., to the rules established by the courts for the conduct of court business):[28]

> [F]or the customs and usages of every of the King's Courts are as a law, and the common law, for the universality thereof, doth take notice of them; and it is not necessary to allege in pleading any usage or prescription to warrant the same.

The reason why no lawyer discussed the time of prescription of any alleged common law rule was that he well knew that the existence of such rules would be settled by the "common erudition" of the profession (the accumulated lore passed on from one generation of lawyers to the next), and by the "common reason" of the profession (the accepted reasoning of the professions - the artificial reason of the law).

I am not certain why the language of common erudition and common reason, so apt for use in the development of an explicit new theory of the nature of the common law, and so much more reflective of the way most lawyers actually talked about the common law than the language of custom, did not develop into a new conceptualization of the common law. Perhaps part of the answer is to be found in the enormous influence of Sir Edward Coke. Coke was the ultimate traditionalist, and although he himself most frequently talked about the common law in ways more consistent with a conceptualization as the common erudition

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[28]Lane's Case, 2 Co. Rep. 424.

of the legal profession than as custom, nevertheless he called it custom. It was especially hard, I think, for the common lawyers to break away from the traditional descriptive terminology for the common law because, unlike the civil lawyers, the common lawyers had no theory worthy of the name for why the common law was authoritatively binding. As long as they called it custom they did not need to provide a theoretical justification for its authority because custom was recognized as a valid source of law all over Europe. But had they taken the position that the common law really wasn't custom at all, but the accumulated learning and accepted reason of the legal profession or even of the judges, they would have had to have built a justification from the ground up. That would have required more jurisprudential innovation than perhaps their practice-oriented training had provided them the resources for, especially since they had no models, either in the common law or in the civil law, for a theory of judicially-developed law.

Finally, part of the reason the common lawyers did not overtly reconceptualize the common law in terms of common erudition and common reason lies in the fact that the common law was rapidly developing in a direction that would soon lead to its conceptualization in a completely different way--as the sum of the precedents established by the common law courts.

The Basis of Custom's Binding Force

There were two basic and quite different theories in civilian jurisprudence about how customs attained legal force, and as usual each of those theories had its origins in apparently incompatible

Corpus Juris texts. The major Digest texts on custom based custom's legal authority on the consent of the people; other texts, however, asserted that only the emperor could make law. Some of the earlier medieval civilians took very seriously the Digest texts which held custom's binding authority derived from the people's agreement or consent (e.g. D.1.3.32.1 and D.1.3.35) and taught that it was the voluntas populi that gave legal character to custom. The majority view among the medieval civilians was to the contrary; the Roman people, they taught, had by means of a lex regia sometime in the distant past irrevocably transferred all their lawmaking power to the emperor and therefore ultimately it was only the emperor's consent, either express or tacit, that could give legal force to custom.

Not many medieval civilians held either theory in its pure form. Even the most committed imperialists were impelled to find a place for popular action and consent in the development of customary law because the very idea of custom presupposes the people's action and participation. By the fourteenth century nearly all civilians accepted the view that the remote (or intermediate, depending upon the jurist) cause of custom's legal force was the people's usage and the proximate or primary cause was the sovereign power of the emperor.

Although the common lawyers borrowed the concept of custom and the tests for its validity from the civilians, they did not borrow its justificatory theory. They certainly never based its authority on the idea of popular consent. The early treatise writers clearly felt a burden to establish that the unwritten laws of England had the status of binding law, but they were satisfied that paraphrasing civilian

texts which recognized that laws could be unwritten accomplished that purpose. To the extent that they took into account the theory behind those civilian texts, they supported the imperial theory rather than the theory of popular consent.

Glanvill, in his twelfth century defense of the legal authority of English unwritten laws, asserted that it was not absurd to call leges those laws that had been settled in council with the supporting authority of the prince. To make certain that no one misunderstood that it was the King's authority that gave English laws their legal character, Glanville, immediately quoted the famous Roman imperialist maxim, "what pleases the prince has the force of law." Half a century later, Bracton also attributed the authority of English unwritten law to the King's approval. It might be argued that both Glanvill and Bracton developed their own versions of what eventually came to be standard civilian doctrine about the source of the authority of customary law for they both suggested that English unwritten laws originated in the decision and approval of the magnates (remote cause) but got their authority from the approval of the King (proximate cause). This interpretation does not work, however, because if the unwritten laws originate with the magnates' decisions and approval we clearly are not talking about custom but about proposals for legislation.

At the end of the thirteenth century an abbreviated version of Bracton's De Legibus appeared. Known as Britton, and widely used for several centuries, it represented all English law as proceeding from the King's authority.

There is, to my knowledge, no discussion of what gave custom its authority as law in the Year Books. It is true that a custom, in order to be held valid, needed to be shown to be reasonable. Therefore it might be said that the common lawyers in the fourteenth and fifteenth centuries held that reason was the basis of custom's authority. But for medieval lawyers, both English and civilian, reasonableness was just a necessary background condition for any law's validity; it was not the primary or proximate causes of its status as binding law.

Beginning with Sir John Fortescue in the fifteenth century, a succession of common lawyers praised the common law for its wisdom and excellence, and should they have perceived a need to justify its authority as law, they might have argued that people ought to obey it because it was the best of all human laws. However, unlike the civilians, and unlike Glanvill and Bracton, they evidently felt no need to provide any theoretical basis for the binding character of English custom.

Christopher St. German was an interesting exception to the medieval and early modern common lawyers' almost total lack of interest in legal theory, and in an exposition that was primarily dependent on medieval theology, and especially on Jean Gerson, he located the general custom of England in a hierarchy of laws. Having followed the medieval theologians this far, it should have been relatively easy for him to model his theory of custom's authority on the teachings of someone like Aquinas. He didn't. Instead he merely said that custom itself was the only authority for its status as law.

By the sixteenth century it no longer occurred to common lawyers to doubt that custom or the common law was law, or to imagine that the binding legal character of either needed exploration. This was generally true of the seventeenth century too, but sometimes, when there was a conflict between the common law and the king's prerogative, royalist lawyers like Sir John Davies would feel the need establish the dependence of the common law on the king's authority and consent. In making this case, royalist lawyers relied heavily and explicitly on imperialist passages in the Corpus Juris of Justinian. Had Davies known Glanvill and Bracton better, he could have built his case from English materials. Most of Davies's peers rejected out of hand his claim that the king's prerogative was not part of the common law, but if they objected to Davies's assertion that the common law itself was allowed to exist only by the king's grace they left no record of it.

The Relationship of Customary Law to Statute

There was no coherent theory in the Corpus Juris about the relationship of customary and statutory law. D.1.3.32 and Inst. 1.2.11 both provided that statutes could be abrogated by falling out of use by common consent. These texts, however, are inconsistent with the imperial theory that the prince alone could make law and with C.8.52.2 which, while admitting that the authority of custom was not small, nevertheless held that custom would not overcome either reason or statute.

Faced with this contrariatas in the Corpus Juris, medieval civilians gave several different answers to the question whether

custom could overcome or abrogate statutory law. The answer a particular jurist gave correlated highly with his position on the question of where imperium resided: did the Roman people still retain any lawmaking powers, or had they given them all up by means of a lex regia? The more imperialist of the civilians insisted that no custom could abrogate statutory law or derogate from it since only the emperor could make or interpret law. Others taught that a general custom observed by all could abrogate written law, but a local custom could not. Others taught that a good custom would prevail over a bad statute. Still others made the outcome depend upon whether the people intended to abrogate at statute; if they followed a custom with knowledge that it was contrary to the statute then the statute was abrogated, but a statute was not abrogated if the people practised a contrary custom and were ignorant of the statute.

Among the civilians, one of the strongest supporters of custom's power to abrogate statutes was Vacarius, who was instrumental in introducing civilian learning in England. He taught that custom's power to overcome statute come from the consensus populi. His views apparently had little influence on the common lawyers, who never accepted the view that general custom could abrogate the common law.

Despite C. H. McIlwain's thesis that the medieval common lawyers regarded the common law (conceived as custom) as a fundamental law to which all other forms of law were subordinate, McIlwain produced not a single statement of that doctrine by a medieval common lawyer, nor did I find one. To the contrary, the Year Books make it very clear that the common lawyers universally held that statutes controlled the

common law in cases of conflict. On the other hand, the common law did allow local customs to differ from the common law -- a reversal of the civilian doctrine that general customs might abrogate statutory law, but not special or local customs.

In the seventeenth century, in Dr. Bonham's Case, Sir Edward Coke delivered himself of some remarks that have sometimes been taken as evidence that he understood that the common law was superior to statute. He said:[29]

> And it appears in our books, that in many cases the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law with controul it, and adjudge such Act to be void.

In Rowles v. Mason, a later case involving a conflict between the common law and local custom, Coke set out to explain the relationship between the common law and the other two kinds of English law:[30]

> Fortescue and Littleton and all others are agreed that the law consists of three parts. First, common law. Secondly, Statute Law, which corrects, abridges and explains the common law: the third, Custom, which takes away the common law: But the common law corrects, allows and disallows both statute law and custom, for if there be repugnancy in a statute, or unreasonableness in a custom, the common law disallows and rejects it, as appears by Dr. Bonhams Case...

Both of these statements do appear to hold that at least in some circumstances the common law will override the authority of statutes. Unfortunately for those who have contended that Coke in these cases was presenting the common law as a fundamental law which limited both

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[29]8 Co. Rep. 652, 653.

[30]2 Brownl. & Golds. 895.

Crown and Parliament,[31] Coke elsewhere asserted that "the highest and most binding laws are the statutes which are established by Parliament,"[32] and that the "power and jurisdiction of the Parliament, for the making of laws" was "so transcendent and absolute as it cannot be confined either for persons or causes within any bounds."[33] Coke was manifestly capable of being inconsistent and he may well have been on this subject. Scholars have found it possible to discover pretty much what they want to discover in these passages. Those disposed to see Coke as a theorist of a fundamental law which is superior to king, parliament, and all other law find support in the statement in Bonham's Case that the common law will sometimes control, and even void Acts of Parliament, and in the Rowles statement that the common law corrects, allows, and disallows other law. Those want to see him as an advocate of parliamentary sovereignty happily notice that in Rowles he says that statute law corrects the common law, and that in the Institutes he asserts that the highest laws are those made by Parliament.

Perhaps the most plausible interpretation based only on a reading of these four passages is that Coke tried out the fundamental law idea and then either changed his mind or was pressured into offering a different view.[34] I tend to side with those who contend that even in

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[31]See, for example, T.F.T. Plucknett, Bonham's Case and Judicial Review, 40 HARV. L. REV. 30.

[32]2 INST., Proeme.

[33]4 INST. 25 et seq.

[34]See, e.g., L. Boudin, Lord Coke and the American Doctrine of Judicial Review, 6 N.Y.U.L.REV. 233.

Bonham's Case Coke never taught that the common law was superior in authority to statute[35] although my reasons may be somewhat different.

A passage in Justinian's Digest held that "custom is the best interpreter of statutes."[36] Even those civilians, like Lucas de Penna, who were skeptical of custom's powers to abrogate statutory law, allowed custom considerable scope in interpreting and supplementing statutes. Similarly, although the settled doctrine in the common law had always been that legislation was superior to custom or to the common law, the common law was frequently said to be the best interpreter of statutes. In the sixteenth century, common lawyers and judges became increasingly interested in the problems of statutory interpretion, and developed a Byzantine network of rules to guide their interpretive practice.[37] One of the rules of interpretation held that the best interpretation was the one that was the most consistent with reason--not reason in the abstract but the reason of the common law: "And also statutes ought to be construed according to the reason of the common law..."[38] Perhaps because the judges had lost the power they had once possessed to openly exercise discretion in interpretation, they began to show a willingness to find that statutes failed the test of reasonableness. When they found a statute to be

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[35]See S. Thorne, Dr. Bonham's Case, 54 L.Q.REV.543, and J. W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY (1955).

[36]D.1.3.37.

[37]Plucknett wrote of these rules that "So great was their variety, and so diverse were the rules, that almost any conclusion could be reached, simply by selecting the appropriate rule." T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 334 (5th ed. 1956).

[38]Reniger v. Fogossa, 1 Plowd. Comm. 16.

unreasonable, or to create mischiefs or inconveniences, they did not declare it to be void; they simply read it in a manner that would make it, in their judgment, reasonable. In Stowell v. Lord Zouch,[39] three judges said that:

> Acts of Parliament are laws positive which consist of two parts. The first is, the words of the Act, the other is the sense, for the letter without the sense does not make the law, but the letter and the sense together...And the way to apprehend the sense is to consider the common law, which is the ancient of every positive law (as Brown said), and has a place in the exposition of the law positive; and thereby the mischiefs and inconviences, which are in the letter, are to be considered and avoided by the application of reason, and by putting such construction on the law positive as shall exclude all rigors and mischiefs, and stand with equity and good reason.

Fulmerston v. Steward[40] also upheld the power of the common law judges to construe the meaning of statutory language differently from what it apparently meant in order that the statute might meet the test of reasonableness:

> And so the Judges have expounded the text which is general to be but particular, which exposition is contrary to the text, because the text is contrary to reason... [A]nd so reason shall guide the exposition of statutes, and the equity of them.

When Coke spoke in Bonham's Case of the powers of the common law to control statutes when they were against common right or reason, or repugnant, or impossible to be performed, he was not claiming that the common law was superior to statutes or that the common law judges had the power of judicial review; he was merely continuing to assert the power of common law judges to interpret statutes in ways consistent

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[39] 1 Plowd. Comm. 551.

[40] 1 Plowd. Comm. 172-173 (1554).

with reason. I know of no sixteenth or seventeenth century common law case in which the judges held a statute to be void. We today, having been exposed to the jurisprudence of legal realism may feel inclined to say that in fact this approach to interpretation gave the common law judge's a power hardly distinguishable from that of judicial review, and that if the common law truly did provide the measure for the reasonableness of statutes then it is fair to conclude that it was superior to statute. That, however, is only our view from the outside. Coke and his sixteenth century models did not look at the matter in that way.

Once again we have found an important common law doctrine that had close parallels in the civil law. Not only did the civilians teach that custom was the best interpreter of statutes, but the common law doctrine of "equity of interpretation" which played such an important part in the willingness on the part of sixteenth century judges to interpret statutes so as to avoid unreasonableness and hardship was a Continental import.[41]

ROMAN LAW MIND AND COMMON LAW MIND

In the end, I must report that I found no Roman Law Mind on the subject of sources of law that can easily be distinguished from a common law mind. To the extent that one can distill a Common Law Mind out of five centuries of common law jurisprudence, that mind was distinguishable from the Roman Law Mind only at the margins. I have little doubt that this is the case because most of the common law

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[41] See T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, supra at 334.

doctrines about sources of law were borrowed from the Roman law.

Vita

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