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"UNDERSTANDING, AUTHORITY, AND WILL": SIR EDWARD COKE AND THE ELIZABETHAN ORIGINS OF JUDICIAL REVIEW

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Bacon and Shakespeare: what they were to philosophy and literature, Coke was to the common law.

—J.H. Baker

I. INTRODUCTION

Of all important jurisprudents, Sir Edward Coke is the most infuriatingly conventional. Despite the drama which often attended his career—his cross-examination of Sir Walter Raleigh, his role in uncovering the Gunpowder Plot, his bitter rivalry with Sir Francis Bacon and his explosive face-to-face confrontations with King James I—Coke's work presents a studied calm.[1] Coke explains rather than critiques. He describes and justifies existing legal rules rather than working out how the law provides rules for making rules. He is a poet of judicial wisdom and legal craftsmanship rather than a prophet of change. He feels that what exists has lasted and is therefore to be trusted, and his work sounds in practice rather than in theory.

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[1] Coke's most recent biography is CATHERINE DRINKER BOWEN, THE LION AND THE THRONE (1956). *See* STEPHEN COOTE, A PLAY OF PASSION: THE LIFE OF SIR WALTER RALEIGH (1994); DAPHNE DU MAURIER, THE WINDING STAIR (1977) (life of Sir Francis Bacon); LADY ANTONIA FRASER, FAITH AND TREASON: THE STORY OF GUNPOWDER PLOT (1996); MARK NICHOLLS, INVESTIGATING GUNPOWDER PLOT (1992).

The common law, Coke wrote, represented "an artificial perfection of reason." The artifice was the skill of the practicing lawyer. The perfection was the mastery achieved by judges in their generations—"an infinite series of grave and learned men." In short, in sum, law represents the understandings of the legal community.

To take such a perspective can be treacherous. To define law by the practices of lawyers comes perilously close to defining the ideal as the norm, to making conventionality the test of law. Within the conventional, however, there is a core of consensus which gives it mass and power. Coke's definition of law as the lawyers' "artificial reason" privileges agreement and shared understanding. To define law in this way means dealing not only with doctrines and statutes, but also with practices—how the law is put into action, and how it operates within the legal profession and the broader society.

The *locus classicus* of Coke's definition of artificial reason is found in his *Commentary Upon Littleton.* Here Coke wrote:

> [R]eason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason; 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 in 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 be justly 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.[2]

The themes sounded in this passage are central to Coke's jurisprudence. Artificial reason is not natural reason or simple native intelligence. It is a skill to be acquired only by an apprentice steeped in lawyers' conventions. Mastery of the law is an art rather than a science. The law rests somewhat upon custom (that is, on its evolu-

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[2] SIR EDWARD COKE, COMMENTARY UPON LITTLETON 97b (Charles Butler ed., 18th ed., Legal Classics Library 1985) (1628). Also known as the FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, this work is hereinafter cited as CO. LITT., to continue the practice of thirty-seven decades.

tion and acceptance over centuries) and somewhat upon reason (upon the perfection achieved by centuries of study). Critically, the law is valid because it reflects the judgment of "grave and learned men"—the procession of sages and savants, the heroes of Coke's law books.

Coke so trusted the wisdom of the judges that he ranked it above the wisdom of the legislature, and sealed his faith with the witness of his career. The modern doctrine of judicial review traces its origins to the opinion Coke rendered in *Bonham's Case* (1610).[3] Much of the vitality of this doctrine relates to the circumstances in which it was reached. Acting as chief justice, Coke struck down a law he found insupportable, and held to his decision against forceful opposition.

From this history emerged *Marbury v. Madison*[4] and two central principles of constitutional law. The first of these is that the judges are the ultimate arbiters of what is constitutional. The second, perhaps a necessary corollary of the first, is that judges are independent of other branches of government. Coke formulated the principle of judicial review, and his defense of this proposition provided the paradigm of the independent judge.

II. Coke's Belief in the Wisdom of the Judges

For Coke, law is a matter of judicial decisions, in all this phrase's meanings. The notable aspect of artificial reason is Coke's focus on the judge's role in making the law. Another aspect is the emphasis which Coke placed on the case—a treatment of law-cases as the manifestations of abstract principles. Finally, there is the attention which Coke pays to the craft and procedure of judicial lawmaking, the trial process through which legal artifice is applied.

A. *Coke on Custom and the Common Law*

In Coke's day, discussions of the character of the common law tended to conflate different theories of law—reason, custom, and nature. Of these, custom was the most important. It was universally agreed that the common law was *consuetudines angliae,* the general customs of the realm, beliefs and practices so broadly shared by England's people that they formed the pattern of national character. No sooner had this perspective been taken, however, than the muddling began; the general consensus among the commentators was that what was customary

[3] 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610).

[4] 1 Cranch 137 (1803).

was reasonable and natural. Thomas Wilson, the most influential rhetorician of Elizabethan England, wrote that "that is right by custom which long time hath confirmed, being partly grounded upon nature and partly upon reason . . . ."[5]

Sir John Fortescue had taken a positivist tack, arguing that statutes were law, whether morally right or not. In the same pages, however, Fortescue also insisted that English law reflected a morality based on divine law and linked legal reasoning to natural reason by describing legal maxims as "universals." Christopher St. German had argued that the common law was based on reason, but fell back on custom to explain why certain specific legal rules were followed. Sir John Davies, Coke's younger colleague, wrote that the common law was based on custom, but also stated that the "law is nothing but a rule of reason," and that "the law of nature . . . is the root and touchstone of all good laws."[6]

Coke too conflated theories of law. Most often, he voiced the conventional view that the common law was the custom of the realm. He translated *consuetudo angliae* as "common law" and remarked that if a practice were "current throughout the commonwealth," it was part of the common law. "Customs are either general or particular," he wrote, "general, which are part of the common law, being current throughout the whole commonwealth, and used in . . . every town, and every manor."[7] His usage, however, constantly shifted toward other definitions:

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[5] THOMAS WILSON, THE ART OF RHETORIC 74–75 (Peter E. Medine ed., Penn. State Univ. Press 1994) (1553).

[6] The generous theoretical muddle of Tudor jurisprudence is ably surveyed by GLENN BURGESS, THE POLITICS OF THE ANCIENT CONSTITUTION 21–78 (1993) and Harold Berman, *The Origins of Historical Jurisprudence: Coke, Selden, and Hale*, 103 YALE L.J. 1651, 1656–64 (1994). Fortescue's views were expressed in his DE LAUDIBUS LEGUM ANGLORUM (S.B. Chrimes ed. & trans., Cambridge Univ. Press 1949) (1470). *See also* Norman Doe, *Pecock and Fortescue: Fifteenth Century Concepts of Law*, 10 HIST. POL. THOUGHT 257 (1989). On St. German, see ST. GERMAN'S DOCTOR AND STUDENT (T.F.T. Plucknett & J.L. Barton eds., Selden Soc'y vol. 94, 1974). On Davies, see J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 32–35 (1987) and Hans S. Pawlisch, *Sir John Davies, the Ancient Constitution, and Civil Law*, 23 HIST. J. 689 (1980).

[7] SIR EDWARD COKE, THE COMPLETE COPYHOLDER 70 (1641); *see also* Parker v. Harrold, 2 Leon. 114, 74 Eng. Rep. 404 (K.B. 1586); COKE, CO. LITT., *supra* note 2, at 115b ("If it be the general custom of the realm it is part of the common law"); SIR EDWARD COKE, SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 58 (William S. Hein Co. 1986) (1797 ed.) [hereinafter 2 INSTITUTES] ("*consuetudo Angliae*" means common law). Coke also suggested that a local custom might sometimes override the common law (that "a custom, used up on a certain reasonable cause, depriveth the common law"). COKE, CO. LITT., *supra* note 2, at 113a. He further indicated, opaquely, that the judges' interpretation of the common law should adopt a meaning derived from custom:

> The common law of England sometimes is called right, sometimes common right, and sometimes communis justitia. In the grand charter the common law is called right . . . . And all the commissions and charters for execution of justice are, *facturi quod ad justitiam pertinet secundum legem et consuetudinem Angliae.* So as in truth justice is the daughter of the law, for the law bringeth her forth. And in this sense being largely taken, as well the statutes and customs of the realm, as that which is properly [called] the common law, is included within *common right.*[8]

In this one short passage, Coke shifts from something close to a natural law view (the common law as common right) to customary law (the common law as the custom of the realm, the laws and customs of England). Moreover, the entire discussion is lapped in positivism: Coke's suggestions of what the common law might be in fact derived from what the common law was called in charters and commissions.[9]

Coke constantly reached out to buttress the common law by linking it to the Judeo-Christian moral tradition, or to the law of nature. In cataloguing his library, he listed divinity books first, followed by "the books of the laws of England because they are derived from the laws of God."[10] He also wrote that the keeping of brothel houses was forbidden by the law of God, "on which the common law of England in that case is grounded," and cited five Old Testament sources.[11] In the Star Chamber, he argued that divine right, rather than common law, governed the succession to the crown of England.[12]

> And as usage is a good interpreter of laws, so non usage . . . is a great intendment that the law will not bear it . . . . Not that an act of parliament by non user can be antiquated or lose [its] force, but that it may be expounded or declared how the act is to be understood.

COKE, CO. LITT., *supra* note 2, at 81b.

[8] COKE, CO. LITT., *supra* note 2, at 142a–142b.

[9] Somewhere further along this line of thinking lay the suggestion of Thomas Egerton, Lord Ellesmere, that the law of England derived from charters and statutes. *See* LOUIS A. KNAFLA, LAW AND POLITICS IN JACOBEAN ENGLAND: THE TRACTS OF LORD CHANCELLOR ELLESMERE 165–66 (1977); T.F.T. Plucknett, *Ellesmere on Statutes,* 60 L.Q. REV. 242 (1944).

[10] A CATALOGUE OF THE LIBRARY OF SIR EDWARD COKE 22 (W.O. Hassall ed., 1950) [hereinafter CATALOGUE]. Significantly, Coke cinched this point with a citation to Sir Edmund Plowden's *Commentaries.*

[11] SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 205 (William S. Hein Co. 1986) (1797 ed.) [hereinafter 3 INSTITUTES].

[12] *See* Conrad Russell, *Divine Rights in the Early Seventeenth Century, in* PUBLIC DUTY AND PRIVATE CONSCIENCE IN SEVENTEENTH CENTURY ENGLAND 100, 118 (John Morrill et al. eds.,

In the same breath, Coke attempted to argue both that the common law was custom and that the common law had not changed since the days of the Druids (whereas the essence of custom is exactly that it may evolve to fit the needs of new generations).[13] If Coke had rigorously considered the implications of what he asserted, it is doubtful that he would have insisted so hard that the law had never changed. As Glenn Burgess has observed:

> Coke tried, half-heartedly and with a notable lack of success, to pretend that statutes were declaratory of pre-existent law, or at best restored law to its pristine purity. Essentially he was saying that while in theory statutes could alter law and make new law, in practice (as experience and history tell us) they had not done so.[14]

Coke's belief in custom was essentially skin-deep. His statements that the common law expresses custom do not cut down to the core of his way of thinking about law. He did not work out (as Davies did) a true theory of common law as customary law. When it actually came to relating custom to law, to explaining how custom and usage fit into the harder terrain of legal judgments, Coke held back. He did not tie custom to the common law; he discussed individual customs as a matter of copyhold law, in terms of the localized practices of individual manors.[15] Moreover, the only common denominator of custom was that reason defined it. "[O]nly this incident inseparable every custom must have, viz. that it be consonant to reason; for how long soever it hath continued, if it be against reason, it is of no force in law."[16] In the final analysis, reason and not custom defined law.

Ultimately, Coke's work in legal theory is halfhearted because his interest in legal practice is so strong. He was less interested in what the law might be than in what lawyers and judges do. His theory that the

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1993). This turned around the common-law theory of allegiance which Coke developed in *Calvin's Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (K.B. 1609).

[13] *See, e.g.*, SIR EDWARD COKE, *Preface to* 3 REPORTS (1602), in that, extrapolating backward from forms of writs, Coke felt it proven that "the common law of England had been time out of mind of man before the conquest." Hereinafter, citations to the prefaces of Coke's *Reports* will follow this format, with citations to cases printed in the *Reports* given as ___ Co. Rep. ___.

[14] BURGESS, *supra* note 6, at 27.

[15] *See, e.g.*, COKE, Co. LITT., *supra* note 2, at 62a, where Coke discussed custom in terms of the "many and divers customs" recognized on a purely local basis in manorial courts, and noted that "in respect of the variety of customs in most manors, it is not possible to set down any [with] certainty" in the text.

[16] *Id.* Coke carefully added that *against reason* did not mean "every unlearned man's reason," but rather "artificial and legal reason warranted by authority of law: *Lex est summa ratio.*" *Id.*

law is "artificial reason" focuses on the work of the judge. The common law may be reason, but it is the reason of the judges; it may reflect custom, but it is custom as settled by the judges. His belief in the excellence of the common law is not a belief in the just prevalence and practicality of custom; it reflects a judge's faith in the communal, professional wisdom of the bar—intelligence refined by training, by artifice.

1. Artifice in Rhetoric and Law

When Coke defined law as the artificial reason of the judges, he borrowed for jurisprudence a concept rooted in the discipline of rhetoric. Coke's artificial reason is closely related to the "artificial logic" which rhetoricians employed in analyzing and discussing issues.[17]

Abraham Fraunce's remarks on artificial logic bear particular comparison with Coke's remarks on law. In 1588, forty years before the *Commentary Upon Littleton*, Fraunce wrote:

> Logic is an art, to distinguish artificial logic from natural reason. Artificial Logic is gathered out of diverse examples of natural reason, which is not any art of logic, but that ingraven gift and faculty of wit and reason shining in the particular discourses of several men, whereby they both invent, and orderly dispose . . . . This as it is to no man given in full perfection, so diverse have it in sundry measure . . . . And then is the logic of art more certain than that of nature, because of many particulars in nature, a general and infallible constitution of logic is put down in art.[18]

The most significant parallel between artificial logic and artificial reason—the most significant way in which the rhetoricians' understanding of their discipline shaped Coke's understanding of the lawyers' profession—lies in the idea that professional training and practice improve upon talent. The artifice applied by the rhetorician came out of orderly invention and disposition, examination and discussion among thinkers schooled in the rhetorical arts.[19] The artifice applied by the lawyer reflected the knowledge acquired by

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[17] *See* Allen D. Boyer, *Sir Edward Coke, Ciceronianus: Classical Rhetoric and the Common Law Tradition*, 10 INT'L J. SEMIOTICS L. 3, 6 (1997).

[18] ABRAHAM FRAUNCE, THE LAWIERS LOGICKE, EXEMPLIFYING THE PRAECEPTS OF LOGICKE BY THE PRACTISE OF THE COMMON LAWE B.ii (1588).

[19] Invention and disposition, mentioned here by Fraunce, were the two great subjects of rhetorical theory. The first covered the analysis of subjects, using place-logic; the second related

long study, the regular observance of practice in the courts. Moreover, both Coke and Fraunce shared the belief that the truest understanding of an issue is that reached by disputation and discussion; the wisdom of the group will be fuller and more trustworthy than the opinion of any one lawyer or orator.[20] This vision of law also borrowed from the rhetoricians its emphasis on professional rigor. Both lawyers and rhetoricians located the individual talent within a professional tradition, and insisted that the individual perspective was constrained and bounded by professional consensus.

Rhetoricians claimed as a special privilege for their discipline that the highest eloquence could be achieved only by employing its technical forms. As Thomas Wilson declared, "[m]any speak wisely which never read logic, but to speak wisely with an argument, and to know the very foundations of things: that can none do, except they have some skill in this art."[21] They further claimed that the sophistication of their discipline made rhetorical discourse the only appropriate discourse for public life. George Puttenham's comments are revealing:

> And though grave and wise councilors in their consultations do not use much superfluous eloquence, and also in their judicial hearings do much mislike all scholastical rhetorics: yet in such a case as it may be (and as this Parliament was) if the Lord Chancellor of England or Archbishop of Canterbury himself were to speak, he ought to do it cunningly and eloquently, which can not be without the use of figures . . . .[22]

Privileging rhetoric cleared the way for Coke's privileging of the judges' reason. The master's command of his discipline (in law as in rhetoric) provided an unanswerable claim to superior wisdom. Moreover, the rhetoricians' equation of eloquence with rhetorical accom-

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to the discussion of topics, that is, the construction, presentation and conclusion, of argument. *See generally* W.S. HOWELL, LOGIC AND RHETORIC IN ENGLAND 1500–1700 (1956); WALTER ONG, RAMUS: METHOD AND THE DECLINE OF DIALOGUE (1958).

[20] Significantly, Coke was not the only common lawyer to call the law "artificial reason" or to describe it in terms patterned on rhetoric. Sir John Dodderidge wrote:

> [Law] is called reason; not for that every man can comprehend the same; but it is artificial reason; the reason of such, as by their wisdom, learning, and long experience are skillful in the affairs of men, and know what is fit and convenient to be held and observed for the appeasing of controversies and debates among men, still having an eye and due regard of justice, and a consideration of the commonwealth wherein they live.

SIR JOHN DODDERIDGE, THE ENGLISH LAWYER 242 (Da Capo Press 1973) (1631).

[21] THOMAS WILSON, THE RULE OF REASON O.2^{r}–O.2^{v} (Da Capo Press 1970) (1551).

[22] GEORGE PUTTENHAM, THE ART OF ENGLISH POESIE 139 (Gladys Doidge Wilcox & Alice Walker eds., Cambridge Univ. Press 1936) (1589).

plishment could be given a corollary: that no trained rhetorician need accept an argument which did not employ the figures and conventions of rhetoric. To the extent that common lawyers carried over this perspective into law, it may have underlain resistance to changes and innovations which came from outside the common-law tradition.

Closely related to such thinking is the conclusion that the individual legal talent cannot outweigh the wisdom and consensus of the profession—that, as Coke put it, no man can be wiser than the law. This is the conclusion to which Coke's discussion of artificial reason leads. It is also the viewpoint for which Coke risked his career in 1608, when he told James I, face to face, that His Majesty, no matter what his natural gifts and intellect, nonetheless lacked the training to decide cases properly according to the laws of England.[23]

From this perspective, it may seem that Coke asserted the importance of artificial reason in a defensive context—that he extolled the merits of professionalism only when change threatened. Indeed, it is true that artificial reason has certain conservative dimensions. When it defines law as the collective opinion of lawyers and judges, it defines law according to the opinion of men with substantial stakes in the status quo. On the other hand, since Coke's day, artificial reason has had continuing liberal associations. It has frowned equally not only on the divine right of kings, but also upon any violent attempt to force change upon the commonwealth. Perhaps the first occasion on which Coke argued that one man's will should not prevail against the settled wisdom of the law was during the speech in which he prosecuted the Earl of Essex for treason.[24]

Moreover, there is a broader, positive active aspect to artificial reason. Coke articulated this when he discussed how the law should be learned: "And true it is that Seneca saith . . . 'Quo plus recipit animus, hoc se magis laxat': the mind, the more it suddenly receiveth, the more it looseth, and freeth itself."[25]

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[23] *See* Prohibitions del Roy, 12 Co. Rep. 63, 65, 77 Eng. Rep. 1342, 1343 (K.B. 1607); *see also* Roland G. Usher, *James I and Sir Edward Coke*, 18 ENG. HIST. REV. 664, 664 (1903).

[24] Coke's condemnation of Essex clearly looked forward to his statements in the *Commentary Upon Littleton*:

> The laws, that by long experience and practice of many successions of grave, learned and wise men, have grown to perfection, are grounded no doubt upon greater and more absolute reason than the singular and private opinion or conceit of the wisest man that liveth in the world can find out or attain unto. Therefore the law shall stand for reason.

BOWEN, *supra* note 1, at 144–45.

[25] SIR EDWARD COKE, *Preface to* 6 REPORTS (1607). There is a tension here. In the following

Sir Francis Bacon stated that he preferred to write aphorisms about the law, rather than to discuss its principles in discursive detail, because the maxim format "doth allow the wit of man to toss and turn."[26] Bacon argued that the law would be better understood if students loosed their individual perspectives upon legal principles, rather than learning by rote what some oracle had taught them. Coke's trust in the wisdom of the bar shares the same trust in open inquiry and discussion, the same belief that many intelligences following a common inquiry will uncover more of the truth.

At the same time that Coke privileges the collective wisdom of the bench and bar, he also privileges the character of the individual lawyer and judge. Coke's theory of law as artificial reason, in fact, depends upon the conscience and intellect of the individual lawyer in the same way that theories of democracy or republican government rely upon the virtue of the individual citizen.

Coke resisted any suggestion of taint or bias. "Never can a judge punish extortion, that is corrupted himself," he wrote in 1604, and "therefore it is an incident inseparable to good government, that the magistrates to whom the execution of laws is committed be principal observers of the same themselves."[27] It was his favorite boast that he had never purchased any office of trust.[28]

As Coke continued, however, following the law was only one of the ways in which the judge must "embrace discipline"; it was also neces-

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passage, Coke warns students not to seek to learn the law too fast, for "a cursory and tumultuary reading doth ever make a confused memory, a troubled utterance, and an incertain judgment." *Id.* Against this theme, however, one hears the idea of the mind "loosing" and freeing itself, just as the trial process would "open and enlarge," i.e., set at liberty, the lawyers' understanding. *See id.*

[26] DANIEL COQUILLETTE, FRANCIS BACON 38 (1992) (citing 7 SIR FRANCIS BACON, COLLECTED WORKS 321 (James Spedding et al. eds., 1861)).

[27] SIR EDWARD COKE, *Preface to* 4 REPORTS (1604). In the same vein, Coke also warned that those who bought legal office would also have to sell. *See* COKE, 2 INSTITUTES, *supra* note 7, at 234, 566; COKE, 3 INSTITUTES, *supra* note 11, at 154. As Christopher Hill has noted: "The example given is Sir Arthur Ingram's purchase of the office of Cofferer of the Household, so Coke stretched the conception of legal office far into the Civil Service." CHRISTOPHER HILL, INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION 244 n.1 (1969).

[28] In his private papers, beside a list of the government positions he had held, Coke jotted down that all these had been acquired *sin prece et pretio*, without begging and without bribery. *See* Historical Manuscripts Commission, Ninth Report: The Manuscripts of the Right Honourable the Earl of Leicester 374 (1884) (unpublished manuscripts on file at Holkham Hall, Norfolk). In St. Mary's Church at Tittleshall, Norfolk, Coke's Latin epitaph makes a broad, bold assertion: *Integritas ipsa, verae semper causae constantissimus assertor, nec favore, nec muneribus violandus* (the soul of honor, ever the steadfast champion of the cause of truth, not to be corrupted by bias or bribes). Thanks to Nicholas Hills for making available information and photographs of the Coke monuments.

sary for the judge to face cheerfully "the many crosses and dangers of his calling." With the tenor of his prose rising to sermon pitch, Coke warned of the judge's duty to be evenhanded:

> *Et exultate*, but yet *cum tremore*, do all these things lest ye enter into wrath, and so ye perish from the way of righteousness; whereby it appeareth, that the greatest loss a judge or magistrate can have, is to give himself over to passion, and his own corrupt will, and to lose the way of righteousness, *et pereatis de via justa*.[29]

In commenting on a line from Magna Carta, Coke tied together these disparate strands of theory:

> *Justitiam vel rectum*. We shall not sell, deny, or delay justice and right. *Justitiam vel rectum*, neither the end, which is justice, nor the mean, whereby we may attain to the end, and that is the law. *Rectum*, right, is taken here for law, in the same sense that *jus*, often is so called. 1. Because it is the right line, whereby justice distributative is guided, and directed, and therefore all [judicial commissions] have this clause, *facturi quod ad justitiam pertinet, secundum legem*, and *consuetudinem Angliae*, that is, to do justice and right, according to the rule of the law and custom of England . . . . 2. The law is called *rectum*, because it discovereth, that which is tort, crooked, or wrong, for as right signifieth law, so tort, crooked or wrong, signifieth injury, and *injuria est contra jus*, against right: *recta linea est index sui, et obliqui*, hereby the crooked cord of that, which is called discretion, appeareth to be unlawful, unless you take it, as it ought to be, *discretio est discernere per legem, quid fit justum*. 3. It is called right, because it is the best birthright the subject hath, for thereby his goods, lands, wife, children, his body, life, honor, and estimation are protected from injury, and wrong: *major haereditas venit unicuiq; nostrum a jure, et legibus, quam a parentibus*.[30]

Significantly, this passage weaves together the idea of artificial reason with moral right and natural justice, linking both to the integrity of the judge. The process by which the law discovers wrong is the trial process through which the lawyer's artifice is applied. What appears to be the judge's right to exercise discretion is really a duty

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[29] COKE, *Preface to* 4 REPORTS, *supra* note 27.

[30] COKE, 2 INSTITUTES, *supra* note 7, at 56.

to follow the common law.[31] Wherever reasoning fails to conform to the common law, it is an indiscretion, a word which in Coke's day already connoted moral deficiency.

Coke buttresses his arguments on both pragmatic and traditional grounds. He identifies right and law with the protection of individuals' lives, property and honor and then underlines this realistic viewpoint by closing with a quotation from Cicero, flattering lawyers with the reminder that their everyday decisions partake of an ancient tradition and discipline. By linking this discussion of right and law to this specific clause of Magna Carta, Coke reinforces his praise for the judge's wisdom. To condemn corruption, those who would buy or sell justice, is another way of praising those wise and selfless adepts who uphold the law.

Significantly, the integrity demanded of the judge is not a sanctimonious abstention from misconduct. The good judge's integrity is active and energetic. For such a magistrate, Coke wrote, "three things are necessarily required, understanding, authority, and will." He elaborated:

> Understanding concerneth things and persons; that is, first what is right, and just to be done, and what ill, and to be avoided; secondly, what persons for merit are to be rewarded, and what for offenses to be punished . . . . Authority to protect the good, and to chastise the ill. Will prompt and ready, duly, sincerely, and truly to execute the law.[32]

Here, what seems a straightforward list of qualities is enriched by another lawyer's pun. For the lawyers of Coke's day (drilled in rhetoric for years, throughout grammar school and university), *authority* had numerous meanings. It could mean personal presence, the gravitas which Shakespeare's Kent recognized in his sovereign King Lear.[33] But *authority* could also be read in the scriptural or legal sense, to mean citation to precedent or doctrine, a reference to an accepted text.

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[31] The judge's authorization to follow his discretion could only be understood as an authorization to proceed according to the common law: *secundum sanas discretiones* had to be read *secundum legem et consuetudinem Angliae.* According to Littleton, *discretio* meant *discernere per legem,* "that is, to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion." COKE, CO. LITT., *supra* note 2, at 227b.

[32] COKE, *Preface to* 4 REPORTS, *supra* note 27.

[33] "Authority," Kent tells his liege-lord, is what is written on Lear's face: "you have that in your countenance which I would fain call master." WILLIAM SHAKESPEARE, KING LEAR, act 1, sc. 4, at 26–30 (1608).

By playing on words, Coke associated the judge's personal bearing and political rank with the professional resources which the judge could marshall.[34] To these definitions, Coke added a third, defining authority as a matter of protecting the right and punishing the wrong. This in turn connected the judge's comprehension of the law with his resolve to pursue its demands and necessary implications.

2. The Judge as Artist and Artisan

In one sense, Coke treats the judge as an artist, someone whose resolution of legal problems derives from individual talent, intuitive understanding and professional skill. From another perspective, he regards the judge as something of a master artisan, possessed of a due regard for the practices of his guild and unfailingly able to select the right tool for the job at hand. Beyond this, he sees the judge as an effective, pragmatic administrator, well able to shape doctrine and decision to the needs of the commonwealth.

The artistic model is a useful one for approximating Coke's understanding of artificial reason. Coke's vision of judicial lawmaking involves, unmistakably, a belief that the good judge will work within the established tradition of the law, appreciating the discipline's conventions and respecting the work itself—which is another way of saying that he will work from an aesthetic perspective. This is very different from, for example, Jeremy Bentham's vision of law as engineering—a matter of surveying the shortest route and razing whatever stands in the way.[35]

The way in which artificial reason may differ from natural reason, in both operations and results, has been fluently described by Charles Gray:

> One property gained by intense training in English law (beside sharpening of common intellectual faculties and stored-up knowledge of rules, cases, research methods, etc.) is an "aesthetic" feel for the system that operates as a control on stock responses. An initiate possessed of this property will sometimes be disposed to resolve first-impression cases in a

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[34] The other side of Coke's praise for the learning of judges and attorneys was a scathing contempt for unlearned men who meddled in the law. "To say the truth," he wrote, "the greatest questions arise not upon any of the rules of the common law, but sometimes upon conveyances and instruments made by the unlearned; many times, upon wills intricately, absurdly, and repugnant set down by parsons, scriveners, and other such imperites." SIR EDWARD COKE, *Preface to* 2 REPORTS (1602).

[35] *See generally* JEREMY BENTHAM, WORKS (Russell & Russell Co., 1962).

> different way than an exemplary lay reasoner . . . . Here the ordinary modern use of "art" may be a guide: A lawyer is an "artist," not only in the sense that he has a *techne* or skill . . . but also in the sense that long acquaintance with a certain type of artifact has given him a refined sense of "what fits," of what response is correct on an unexpected occasion.[36]

As Gray elaborates, artificial reason is a form of "legal imagination." Treating the law as a coherent system, it examines "ways in which a rule or ruling on one point fits with the given state of the law in other respects. Its attunement is to harmonies, and distant ones count, as they do in an artistic composition."[37]

Some explanations of legal rules, as Gray continues, are obvious. Some others can be discovered only by the trained talent. For example, if someone disseised from a feudal holding does not pursue that claim in a timely manner, because he or she was overseas, the traveler can nonetheless assert that claim upon returning to England. One reason for this (and the first one given by Coke) is that it would be impossible for the overseas traveler to make the requisite "continual claim." If impossibility operates to excuse inaction in other areas of the law, it ought to be held a valid excuse here. The legal artist, however, looks beyond this. A traveler in France might be able to keep informed of affairs in England, and thus be able to assert a timely claim. It might be fair to require a timely claim where the facts show such knowledge. "But then the artist thinks of something more remote," Gray comments. "It so happens that English law holds it impossible for juries to find events alleged to have taken place abroad . . . . If English law is blind to France in one respect, so—for the sake of artistic coherence—must it be in others."[38]

In short, the artifice of artificial reason lies in its use of proofs which are complex as well as elegant. The legal imagination, the lawyers' artificial reason, maps decisions into more than one plane of law, working from congruences that the lay intelligence would not consider.

Such explanations are very good as far as they go, and they go a long way. Nonetheless, Coke's view of law as artificial reason is both

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[36] Charles Gray, *Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke, in* CULTURE AND POLITICS FROM PURITANISM TO THE ENLIGHTENMENT 25, 61 (Perez Zagorin ed., 1980).

[37] *Id.* at 34.

[38] *Id.* at 64. Coke's discussion of continual claim is found at COKE, CO. LITT., *supra* note 2, at 250a–264a, and especially COKE, CO. LITT., *supra* note 2, at 260b–261b.

For the lawyer, like the rhetorician, the idea is to offer copious argument, several reasons for one party to prevail, several purposes served by a single accepted principle—numerous proofs, as many as possible. Where artificial reason means checking the places, brainstorming with checklists, the technique of analysis becomes the mode of analysis. The workings of artificial reason are seldom as close to the workings of artificial logic as at this juncture.

This preference for seriatim argument reveals itself throughout Coke's work. Coke's two most famous cases illustrate the point. In *Bonham's Case* (1610), Coke offered five grounds for holding that the College of Physicians could not imprison unlicensed practitioners; the rationale which originated judicial review was the fourth of these five.[43] In *Shelley's Case* (1581), Coke seems to have gained victory by erecting a bulwark of nearly a dozen arguments against the radical, ingenious propositions put forward by plaintiff's counsel.[44]

To approach legal argumentation as the seriatim presentation of different arguments makes for a jurisprudence which is guided by function rather than aesthetic. The advocate whose arguments range from the obvious to the subtle may be orchestrating distant harmonies within the law. More than likely, however, he may also be hammering, from all accessible angles, on the problem at hand. If several arguments are bundled together, this may not be because they all represent different harmonics of the same chord; they may be massed together to cumulate their weight.

B. *Jurisprudential Pragmatism and Coke's Focus on the Case*

With this argument-by-argument approach to reasoning goes a case-by-case perspective on jurisprudence. Coke constantly emphasizes the individual case: the specific facts which are at issue, the legal arguments which may be based on those facts. "Generalities never bring anything to a conclusion," he wrote in 1607, looking forward almost three centuries to Holmes's statement that abstract propositions do not decide concrete cases.[45] To be sure, Coke praises certainty

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[43] 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610); *see infra* notes 140–41.

[44] *See* Shelley's Case, 1 Co. Rep. 88b, 76 Eng. Rep. 199 (K.B. 1581); *Bonham's Case*, 8 Co. Rep. 107a, 77 Eng. Rep. 638. There are two great classes of legal thinkers, those who group together many different cases as illustrations of a single legal principle, and those who group many different legal principles together to support a single case. So to speak, these different groups are respectively jurisprudence's hedgehogs and foxes. *Shelley's Case* first made Coke's reputation, and deservedly so. Where Jeremy Bentham and C.C. Langdell are preeminent hedgehogs, *Shelley's Case* marked Coke as one of the most notable foxes.

[45] COKE, *Preface to* 6 REPORTS, *supra* note 27. Nor does Coke confuse symmetry with validity.

in law. "Certainty is the mother of quietness and repose," he wrote. On another occasion he noted that "[i]t is a miserable bondage and slavery when the law is wandering or uncertain."[46] In according this praise, however, he is not making a metaphysical claim that English law is perfect or sempiternally established. He rather reiterates his call for avoiding "incertain judgment."[47] Where *incertain* means *hasty* or *unreliable*, as it does here, *certain* means *sound* or *trustworthy*.[48]

The certainty to which Coke aspires is not the specious certitude of the legal metaphysician. Rather, it looks toward the economist's observation that the definition of rights is necessary for orderly commerce, because only what is clearly defined can be accurately valued or meaningfully exchanged. From the legal perspective, this ordering is reflected in the ability of attorneys and clients to predict the resolution of foreseeable disputes. Coke takes up this point with his observation that, "[i]n all my time, I have not known two questions made of the right of descent of escheats, by the common law, &c. so certain and sure thereof the rules be."[49] Indeed, he seems to have equated certainty in law with security of tenure. He wrote that by publishing his *Reports* he sought "the common good" of "quieting and establishing . . . the possessions of many."[50]

Coke clearly considers the case as an epitome of law. To the right reason of the law, he continues:

> [N]o one man alone with all his true and utmost labor, nor all the actors in them themselves by themselves, out of a court

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In *Mary Portington's Case*, Coke led the Common Pleas in declaring that no condition or limitation (no matter what its form) was good if it sought to restrain alienation. 10 Co. Rep. 35b, 77 Eng. Rep. 976 (K.B. 1614). In tracing degrees of consanguinity, an area in which the law might possibly draw lines of geometric precision, Coke also declined to insist on symmetry. He was willing to allow a widower to marry the daughter of the sister of his first wife, while maintaining that a nephew could not marry his uncle's widow (two relationships which mirror each other and involve identical degrees of kinship). *See* COKE, CO. LITT., *supra* note 2, at 235a.

[46] Sir Anthony Mildmay's Case, 6 Co. Rep. 40a, 42a, 77 Eng. Rep. 311, 316 (K.B. 1605) ("*Quod misera et servitus, ubi jus est vagum*"); COKE, CO. LITT., *supra* note 2, at 212a.

[47] *See* COKE, *Preface to* 6 REPORTS, *supra* note 25.

[48] In the same vein, Coke defined a legal maxim as "a sure foundation or ground of art, and a conclusion of reason." COKE, CO. LITT., *supra* note 2, at 10b–11a. The trustworthiness of a principle measures its worth; it is not to be accepted merely because it fits well with other postulates.

In calling for certainty, Coke also calls for a settling of the law—some sort of law reform. He expresses the same impulse which would lead Bacon to call for codification of England's laws. Where Bacon failed to revise the laws, due to the lack of state support, Coke's independent initiative would largely achieve this goal.

[49] COKE, *Preface to* 2 REPORTS, *supra* note 34.

[50] SIR EDWARD COKE, *Preface to* 1 REPORTS (1600).

> of justice, nor in court without solemn argument, (where (I am persuaded) Almighty God openeth and enlargeth the understanding of the desirous of justice and right) could ever have attained unto. For it is one amongst others of the great honors of the common laws, that cases of great difficulty are never adjudged or resolved in tenebris or sub silentio suppressis rationibus; but in open court, and there upon solemn and elaborate arguments.[51]

Here, Coke treats the judicial decision as a process by which law is made. What matters was the process of argumentation which lay behind the reports of the learned judges, rather than the ease with which the report could be understood. The case is to be trusted not because it could be easily understood, or because it framed the issues. It is to be trusted because the crystallization of the facts and elucidation of the principles had been established through the process of a trial.[52]

In the *Commentary Upon Littleton*, Coke makes a bilingual pun which reveals much about his theory of courts and justice. In discussing the term *regula*, law-Latin for *principle* or *rule of law*, he comments: "Regularly judges ought to adjudge according to the common intendment of law."[53] In the same passage, he translates *intendment* as *intellectus*, "the understanding or intelligence of the law." This suggests, in turn, that Coke connected the *regulae* of judicial decision-making with the regular, orderly observance of judicial practice: the open hearing of cases, the development of facts, and the argumentation which elucidated principles. He connected this, in turn, with the collective wisdom which the process focused. This connection reinforces his identification of artificial reason with the rightly decided case by emphasizing the process of decision-making.

In his *Treatise on Bail and Mainprize*, Coke reworked the same idea of artificial reason. The elaborations he provided at this juncture illuminate the close connections he drew between the skill which the judge employs and the specific facts on which the judge focuses:

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[51] Sir Edward Coke, *Preface to* 9 Reports (1613).

[52] Later Coke again made the link between argumentation and understanding: "And well doth [Littleton] couple arguments and reasons together, *Quia argumenta ignota et obscura ad lucem rationis proferunt et reddunt splendida:* And therefore *argumentari et ratiocinari*, are many times are taken for one." Coke, Co. Litt., *supra* note 2, at 395a.

[53] Coke, Co. Litt., *supra* note 2, at 78b.

> [I]t is a great contentment . . . and a good conscience, especially in cases that concern the life and liberty of a man, to follow the precedent of grave and learned men . . . . It is therefore very necessary, that the law and discretion should be concomitant, and that one to be an accident inseparable to the other, so as neither law without discretion, lest it should incline to rigor, nor discretion without law, lest confusion should follow, should be put in use: my meaning hereby, is not to allow of every man's discretion . . . but I mean that discretion that ariseth upon the right discerning, and due consideration of the true and necessary circumstances of the matter: and as commonly use to say, that common law is nothing else but common reason . . . .[54]

In conclusion, Coke reemphasized that he allowed and required of judges the same discretion "that either grave and learned men have used before or rise of the circumstances of the matter."[55]

As such passages show, Coke saw the determination of the individual case and the application of the legal principle as different functions linked by an equal sign. Or, to expand the equation: the common law equals common reason equals the right understanding of the individual case. For Coke, to follow a legal rule was not to adhere to a principle so much as it was to accede to the wisdom of judges who had previously considered similar cases.[56] The law can be rightly followed and applied only where the true facts of the case are fully understood.[57] Coke repeatedly emphasizes the circumstances upon which the judge acts, tying decisions to the facts. He equates the proper application of the law, of the legal rule, with the rightful, careful exercise of discretion by the judge—the judicious exercise of discretion, in every sense of the word.

Behind this outlook lies the inexorable, energetic pragmatism of Tudor law, with its steely desire to measure judicial decisions by state policy. The lawyers of Coke's day, deeply schooled in Ciceronian rhetoric, equated argumentation and adjudication with the government of

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[54] SIR EDWARD COKE, A LITTLE TREATISE OF BAILE AND MAINPRIZE 29–30 (Da Capo Press 1973) (1635).

[55] *Id.* at 31.

[56] Coke affirmed that the student of law would observe in English law, across the centuries, "the coherence and concordance of such infinite, several and divers cases (one, as it were with sweet consent and amity, proving and approving another)." COKE, *Preface to* 3 REPORTS, *supra* note 13.

[57] This understanding of adjudication focuses closely on the cases, so closely that Coke felt it necessary to begin his discussion by emphasizing that he saw rules beyond cases. It was truly

a commonwealth. Tudor judges were active agents of the royal will, directing the implementation of royal policy and gathering information across their assize circuits. Given this grounding in politics and commerce, it is no accident that Coke's jurisprudential touchstone was the soundness of individual decisions—individual resolutions of factual disputes—rather than the architectonic symmetry of legal principles.

Ultimately, Coke argues that artificial reason is not abstract reasoning. So to speak, it is law in action. To follow artificial reason is to respond, to apply discretion, to the specific facts developed by the case.

It is in this light that one must approach the closely-argued cases which appear throughout Coke's jurisprudence. So precise are the details insisted on in these cases, that the decisions may give the impression that the courts and lawyers are drawing distinctions when no real differences exist. However, this pattern of argument is not often an instance of legal hairsplitting; rather, it reflects a consistent practice of reading closely the facts before the court.

Under a given testator's will, should the surviving sons be able to make leases and settle property? That depends on the facts. If the sons are bachelors, and knights, they should be able to make leases and settle property on their wives; gentlemen of such rank are not likely to till and manure their estates themselves, and unless they can arrange good marriage settlements they will not be able to make good matches.[58]

When another testator, a yeoman, leaves one son property worth four pounds per year, requiring that the son pay forty shillings a year to each of his three brothers and one sister, the technical question of whether this is a condition or a limitation reflects the practical concern of whether the inheriting son can sell the property. This issue can only be settled by analyzing all of the facts—by recognizing that the total of eight pounds which the son must pay to his siblings in no way reflects a fair purchase price for the land in question. If the son is not paying

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said, he admitted, "that *Judicium est legibus & non exemplis:* And as the logician saith, *Exempla demonstrant, non probant.*" COKE, *supra* note 54, at 29. By *exemplum*, Coke meant an example: an incident, a parable, an illustration—a case. *See* Boyer, *supra* note 17, at 27–29.

The Latin maxims lend a veneer of idealism to a nominalist mindset. Coke quotes them only so that he may emphasize the contrary viewpoint—essentially, that lines of precedent are determined by similar patterns of fact rather than as illustrations of a common principle. At other times, Coke clearly adopted this perspective. In *Ognel v. Paston*, a case from his practice days, he explicitly stated: "And although the proverb, Exempla illustrant, non docent aut probant, may hold true in some arts and sciences, in our law, examples are good arguments." 2 Leon. 84, 86, 74 Eng. Rep. 377, 379 (Ex. 1587).

[58] *See* Read and Nashe's Case, 1 Leon. 147, 74 Eng. Rep. 136 (K.B. 1589).

the full value, it makes no sense, and the testator could not have intended, that he receive the full estate.[59]

What seem to be lawyerly debates over technical distinctions almost invariably mask disagreements which have significant practical consequences. If a parishioner agrees to pay five pounds to his minister, this may be either a covenant to pay money or a grant of tithes for life—but much hangs on the distinction, because a grant of tithes requires a written agreement to be enforceable, and five pounds may be half of the minister's yearly income.[60] There may be a critical difference between whether a mortgage is repaid when the creditor helps the debtor count the money and put it in bags, or when the debtor subsequently hands the money to the creditor in the porch of a specified church.[61] A dyer's vat fixed to the wall of a house may be a fixture, which sheriff's officers cannot seize for the payment of the dyer's debts, while a vat which stands in the middle of the floor is chattel property on which the officers can rightfully levy.[62]

Toward the end of his career, Coke took great care in describing a series of actions which had almost, but not quite, amounted to a crime:

> G. Leake a clerk of the chancery joined two clean parchments fit for letters patent so close together with mouth glue, as they were taken for one, the uppermost being very thin, and did put one label through them both, then upon the uppermost he wrote a true patent, and got the great seal put to the label, so the label and the seal were annexed to both the parchments, the one written and the other blank: he cut off the glued skirts round about, and took off the uppermost parchment (which was written, and was a true and perfect patent) from the label which with the great seal still did hang to the parchment, then he wrote another patent on the blank parchment, and did publish it as a good patent . . . . And upon conference had between the judges, upon great advisement and consideration it was in the end . . . resolved by the judges

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[59] *See* Wellock v. Hammond, Cro. Eliz. 204, 78 Eng. Rep. 460 (K.B. 1590).

[60] *See* Woodward v. Bugg, 2 Leon. 29, 74 Eng. Rep. 331 (K.B. 1588). On the uncertain financial situation of Elizabethan clergymen, see CHRISTOPHER HILL, ECONOMIC PROBLEMS OF THE ENGLISH CHURCH FROM ARCHBISHOP WHITGIFT TO THE LONG PARLIAMENT 110–13 (1956).

[61] *See* Winter v. Loveday, 2 Leon. 213, 74 Eng. Rep. 487 (K.B. 1589).

[62] *See* Day v. Austin, Owen 70, 74 Eng. Rep. 908 (C.P. 1595); *see also* COKE, CO. LITT., *supra* note 2, at 53a. All of the factual situations discussed in this paragraph—what proof is required to support a contract, the application of the perfect tender rule, and the vexed question of when a chattel becomes a fixture—continue to recur in contemporary litigation.

> (saving a very few) . . . that it was no counterfeiting of the great seal within [the] statute, that this offence was neither high treason, nor petit treason . . . and the party delinquent liveth at the present day.[63]

How much effort did it cost him to write that, his septuagenarian fingers scratching at the paper with a goose-quill pen? Yet Coke recorded it all, the details of the forgery and the great advisement and consideration which the judges gave. The sardonic note on which he closes, the observation that Leake was allowed to keep his head, underlines the discretion which the judges knew they were exercising. It reminds that slightly different facts might have sent things a very different way.

C. *Law, Lore, and Office Procedures*

Coke's vision of law as the lawyer's craft takes his jurisprudence into territory that is almost uniquely his own. His discussions of law constantly sweep into the concrete details of legal practice. They comprehend not only the law, but also the lore and the office procedure: the fundamental rules, the understandings which surround those rules, and the routines and formalities which must be negotiated. More than any other jurisprudent (with the notable exception of Karl Llewellyn), Coke approaches the lawyer's work on all these levels. He advises his readers that poor and middling men may safely accept royal grants passed under the Exchequer seal, "but to you who are rich, my advice is to pass your leases under the Great Seal, for that is the sure way."[64] He provides specific recommendations on how to prepare a will: have the scrivener use only one parchment, carefully sign any interlineations or erasures, and procure credible witnesses.[65] He lists the ten

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[63] COKE, 3 INSTITUTES, *supra* note 11, at 16; *see also* George Leak's Case, 12 Co. Rep. 15, 77 Eng. Rep. 1297 (K.B. 1607).

[64] Lane's Case, 2 Co. Rep. 16b, 17b, 76 Eng. Rep. 423, 430 (C.P. 1596). Professor Matthew Mirow of St. Louis University has reviewed Elizabethan readings on the Statute of Wills in a paper presented at the 1997 British Legal History Conference. Professor Mirow confirms that this emphasis on procedure and detail, even among attorneys of the same era, is almost uniquely Coke's.

In his own legal affairs, certainly, Coke showed painstaking attention to detail, as appears from inspection of what he called his "Great Book of Conveyances," Holkham MS. 764, a folio volume fully four inches thick, with impressive brass corner plates. For each of the estates Coke had acquired, this book records the early history of the property and recites verbatim chief documents in the chain of title. The final craftman's touch are the marginalia added in Coke's own hand, noting the nature of each transfer, e.g., whether by fine or by common recovery.

[65] *See* Butler and Baker's Case, 3 Co. Rep. 25a, 36a–36b, 76 Eng. Rep. 684, 709–10 (K.B. 1591).

parts of a deed.[66] He carefully records the etiquette to be followed in beheading a traitor of noble birth.[67] Polonius-like, he advised his children to carefully treasure up "evidences," the documents setting forth title to their estates.[68]

The lawyers' artifice, it thus appears, is not just intelligence and sensitivity, a cultivated appreciation of the law and its arcana; it also comprehends technical accomplishment and mastery of detail. Coke called for part of the apprentice's "long study" to be devoted to these aspects:

> It is requisite for every student to get precedents and approved forms not only of deeds, . . . but of fines and other conveyances, and assurances, and specially of good and perfect pleadings, and of the right entries, and forms of judgments, which will stand him in great stead, both while he studies, and after when he shall give counsel.[69]

Good pleading was so critical, Coke warned, that it was "a necessary part of a good common lawyer to be a good prothonotary."[70]

The end of artificial reason is not only to attain a true understanding of the law. It also means to follow the better practice, with all the everyday concerns which this entails. Indeed, Coke emphasizes that the sages of the law were to be consulted for points of conveyancing, no less than for guidance on thorny legal issues:

> [I]t is not safe for any man (be he never so learned) to be of counsel with himself in his own case, but to take advice of other great and learned men. *Non prosunt dominis quae prosunt omnibus, artes.* And the reason hereof is, *in suo quisque negotio hebetior est, quam in alieno.*[71]

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[66] *See* COKE, CO. LITT., *supra* note 2, at 35b.

[67] *See* Judgment and Execution in Treason and Felony, 12 Co. Rep. 130, 77 Eng. Rep. 1404 (K.B. 1616).

[68] *See* C.W. JAMES, CHIEF JUSTICE COKE: HIS FAMILY AND HIS DESCENDANTS AT HOLKHAM 323 (1929).

[69] COKE, CO. LITT., *supra* note 2, at 230a. Peter Goodrich has made the intriguing suggestion that this attitude reflects the fact that legal writing, and the transactions behind such writing, represent "a ritual system of inscription"—that the "scribal culture of feudal chirography (handwriting), of the engrossing and tabling of fines and charges relating to land, was gradually systematised by doctrinal writers into a legal *écriture.*" PETER GOODRICH, LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS 122, 139–44 (1990). The close connection between lawyers' learning and scriveners' procedure was acknowledged at an earlier juncture. A Jacobean edition of William West's *Symboleographie* was dedicated to Coke. *See* CATALOGUE, *supra* note 10, at 30.

[70] COKE, CO. LITT., *supra* note 2, at 303a.

[71] *Id.* at 377b.

Because the concept of artificial reason is so closely tied to profession and craft, defining law as artificial reason privileges what a lawyer would call arcana and what a nonlawyer would call technicalities. Coke's view of law accords respect to the lawyer who picks apart the record and wins a case by finding a flaw in the pleadings.[72] It smiles on legal sophistry, the ability to argue both sides of a case. As a practicing lawyer, at different times and in different cases, Coke argued both that small errors voided indictments and that small errors did not void indictments.[73]

Coke and his fellow professionals distrusted change,[74] but they applauded ingenuity, the masterful ringing of changes within the existing system. Coke himself was well able to twist pleadings to his client's advantage, as a case from his practice days shows:

> Action of trover in London. The defendant pleaded, that long time before the conversion supposed to be, J.S. was possessed of these goods, as of his own goods, at B. in Norfolk; and that he before the conversion supposed did casually lose them, and they came to the hand of J. Palmer by trover, who gave them to the plaintiff, who lost them in London; and the defendant found them, and afterward did convert them to his own use, by the command of the same J.S. as it was lawful for him to do. It was moved that this is no plea, for it amounts to the general issue.—But all the justices held it a good plea; for it confesseth the possession and property in the plaintiff, against all but the lawful owner.—*Nota.* This plea was devised by Coke to alter the trial.[75]

To devise a plea to alter the trial: however tricky and technical that sounds to Coke and his fellow professionals, that was part of a lawyer's proper work.[76]

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[72] Coke himself had done so on numerous occasions. *See, e.g.*, Hasset v. Payne, Cro. Eliz. 256, 78 Eng. Rep. 511 (K.B. 1591); Gomersall and Gomersall's Case, Godbolt 55, 78 Eng. Rep. 34 (K.B. 1586).

[73] *Compare* Anonymous, Godbolt 65, 78 Eng. Rep. 40 (K.B. 1586) (Coke argued that small errors should not void an indictment), *with* Martin van Henbeck's Case, 2 Leon. 38, 74 Eng. Rep. 339 (Ex. 1588) (Coke argued that an indictment for false labeling of pipes of wine was insufficient because it failed to show the exact number of vessels improperly labeled), *and* Goslen's Case, Cro. Eliz. 137, 78 Eng. Rep. 394 (K.B. 1589) (which saw an "indictment quashed for bad Latin," following an argument by Coke).

[74] *See infra* text accompanying notes 103–04.

[75] Rockwood v. Feasar, Cro. Eliz. 262, 78 Eng. Rep. 517 (K.B. 1591).

[76] By contrast, Lord Ellesmere suggested that such pleadings be banned. In a memorandum on law reform, Ellesmere urged:

Coke unhesitatingly accepted the use of fines and common recoveries as ways of transferring title to land.[77] He was concerned that fines and recoveries be executed properly—not with whether there might be simpler ways of transferring title, or whether sham lawsuits might represent a cancer on the legal system. He noted how Chief Justice Dyer had "with great gravity and some sharpness" reproved an utter-barrister who spoke against common recoveries. Coke quoted Dyer approvingly, to the effect that "he was not worthy to be of the profession of the law, who durst speak against common recoveries, which were the sinews of assurances of inheritances, and founded upon great reason and authority."[78]

"Relations are but fictions in law," Coke wrote.[79] This sentence speaks volumes. It shows that Coke equated a perspective that is explicitly counter-factual, which is established only by consensus (the legal fiction) with a perspective which derives easily from observable fact (the relation). Moreover, Coke was wholeheartedly willing to make use of fictions. The years in which he sat as chief justice of the King's Bench were among those in which that court was using *latitat* to expand its jurisdiction.[80]

> That actions upon the case, upon false surmises and fictions in law videlicet that corn, hay, lead, tin, wood, and etc. which was growing in Cornwall or Yorkshire, and was lost and found in London or Middlesex and etc., be not hereafter suffered for trial of the estate, right, or title of lands lying in foreign counties. For this is a novelty and a trick newly devised, and hath no precedent or example in the Register, or in the books of the law, and is contrary to the ancient institution, and true grounds of the law.

KNAFLA, *supra* note 9, at 275.

[77] *See, e.g.*, Mary Portington's Case, 10 Co. Rep. 35b, 43a, 77 Eng. Rep. 976, 989 (K.B. 1614) (Coke specifically equated the collusion and fictions of the common recovery with the "common conveyance and assurance of lands."); Dormer's Case, 5 Co. Rep. 40a, 40b, 77 Eng. Rep. 115, 115 (K.B. 1593). In *Dormer's Case*, he virtually confessed that he saw no alternative to such sham proceedings, "et saepenumero necessitas vincit communem legem, & quod necessarium est licit' est." 5 Co. Rep. at 406, 77 Eng. Rep. at 117.

[78] *Mary Portington's Case*, 10 Co. Rep. at 40a, 77 Eng. Rep. at 984.

[79] COKE, 2 INSTITUTES, *supra* note 7, at 590.

[80] In *latitat* proceedings, a plaintiff alleged that an imaginary trespass had been committed, in order to have the defendant arrested, then followed up with a genuine complaint once the defendant was in custody (which could include being out on bail). Using this fictitious action allowed the plaintiff to sue via a bill in the King's Bench, rather than using an original writ to start the action in the Common Pleas (a more cumbersome and expensive procedure). Most fictional trespasses were notionally alleged to have occurred in Middlesex, where the King's Bench sat. Because most defendants could not be found in Middlesex, "one further rigmarole" was needed: "the plaintiff had to inform the court that the defendant 'lurks and roams about' (*latitat et discurrit*) in some other county, say Yorkshire; the court then issued a writ called a *latitat* to the sheriff of that county, who was able to effect the arrest." J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 51 (3d ed. 1990).

To define law in terms of the lawyers' artificial reason gave a particular privilege to the legal caste. It invested the terms of legal documents with the meanings used by lawyers, irrespective of other meanings which such words conveyed.[81] This was one of the most significant achievements of Coke's era, and one of its least happy. For the next four centuries, whenever the terms of a legal document required definition, English courts would apply the private, technical meaning current among the bar. When construing contracts, courts arrogated to themselves the construction of disputed terms, refusing to hear what the parties themselves had meant. The street argot of Chancery Lane increasingly diverged from the language of the testators whose wills were construed there. According to the judges, the term *descendants or relations* did not cover illegitimate children, and

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Baker has noted that:

> [F]rom a trickle of latitats at the end of the fifteenth century, and a few hundred rolls a year, within a century the court was issuing—according to a contemporary estimate—20,000 latitats a year and filling 6,000 rolls. Between 1560 and 1640 the increase in King's Bench suits was particularly dramatic, perhaps as much as tenfold.

Id.

[81] *Shelley's Case*, 1 Co. Rep. 88b, 76 Eng. Rep. 199 (K.B. 1581), the facts and stratagems of which are penetratingly reconstructed by A.W.B. Simpson in his recent *Leading Cases in the Common Law* (1995), reflected this shift. The case involved a grant to *A and his heirs*—specifically, a transfer which limited an estate "to the use of A for life, remainder after 24 years to the heirs male of the body of A in tail male." In past centuries, under feudalism, the law had understood a grant to *A* and to *A*'s heirs as the transfer to *A* of a freehold estate. *A* would hold the property for life, in fee simple, and then his heirs would have it. The heirs received nothing immediately; they were considered to receive the property ultimately by descent from their ancestor *A*.

In *Shelley's Case*, the lawyers pried open deeper levels of meaning in this language. Counsel for plaintiff Richard Shelley, taking advantage of the case's peculiar facts, argued that the phrase *and his heirs* was actually a term "of purchase," describing who took an immediate interest (if Richard took as an heir, by descent, he would lose the property at issue because a closer heir had subsequently been born; but if he were a purchaser, he immediately received an interest which later events could not rob him of). To counter this argument, Coke produced more than half a dozen reasons why Richard could take only by descent.

In winning the case, Coke achieved a result consonant with precedent. The assembled judges of England held that the language did not make Richard Shelley a purchaser. But while preserving the results which the medieval common law would have reached, *Shelley's Case* marked the ascendancy of a radically different mode of reasoning. As John Baker has written:

> What in medieval times had been a feudal rule was now turned into a rule of construction . . . . No full reasons seem to have been given, but it is significant that the judges rejected the defendant's argument that it was simply a matter of giving effect to the settlor's intention.

BAKER, *supra* note 80, at 324.

Under the feudal regime, the language of the law had been the common tongue of the legal, social, and political realms. The words creating a freehold transfer had a single meaning in all these different areas. With the era of *Shelley's Case*, law became the language of the lawyers.

when family members drowned in the same maritime disaster, courts refused to say that their deaths coincided.[82]

If the law remained artificial reason, reason had petrified within the artifice. Not until the 1950's, prodded by Lord Denning, would the English bench once again begin to read documents in terms of the parties' original intent. The legal regime which Coke had helped install during the reign of Elizabeth I endured until the reign of Elizabeth II.[83]

Conversely, just as Coke identified the legal idea with the idealized judicial opinion, so he conceived the law's shortcoming in terms of badly-decided cases. Behind his distrust of reform lay a refusal to believe that the system could be flawed. "I affirm it constantly," he wrote, "that the law is not incertain *in abstracto*, but *in concreto*, and that the incertainty thereof is *hominis vitium*, and not *professionis*."[84] Judges might make wrong decisions, or lawyers might disagree, but these contretemps could not be considered to impair the law's character as *summa ratio*.

There is heartfelt self-congratulation in this perspective.[85] What redeems this understanding of law, preserving it from self-absorption in arcana and lazy self-contentment with the existing order, is its hard core of reliance on duty and responsibility. Coke's insistence on the good judge being *eo ipso* a good man is matched by his insistence that the lawyer maintain the responsibilities of his role. The heart of the law is good pleading, Coke maintained. This attitude reflects the lawyer's concern with framing an issue so that a court can only address it squarely. It also reflects the judge's concern that an issue be squarely framed so that it can be properly decided. The attorney's concern with

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[82] *See* LORD DENNING, THE DISCIPLINE OF LAW 23–53 (1979). The two egregious cases cited are, respectively, *Sydall v. Castings Ltd.*, 1 Q.B. 302 (1967), and *Re Rowland*, Ch. 1 (1963).

[83] Whether Coke himself would have persisted in such readings of legal language remains doubtful. His practice had often involved construing the terms of documents drafted to the satisfaction of people who should have known better. See, e.g., *Higham v. Horwood*, Moore 221, 72 Eng. Rep. 542 (K.B. 1585), in which the will of a prosperous but illiterate yeoman failed to define *appurtenances* sufficiently. In *Blamford v. Blamford*, the lawyers' debate over the terms of a will provoked a growl from the chief justice: "Lay-men do not know what a survivor means." 3 Bulstrode 98, 101, 81 Eng. Rep. 84, 86 (K.B. 1611).

[84] COKE, *Preface to* 9 REPORTS, *supra* note 51.

[85] As Peter Goodrich has pointed out:

> The tradition, in other words, precisely as tradition, is perfect . . . . [T]here is no place for criticism in that custodial task of exposition of a law too rich and deep to be fully comprehended in any one body in any one lifetime. The law is always greater, in other words, than its servants, its practitioners: any apparent faults or contradictions are the errors of men and not of the law.

GOODRICH, *supra* note 69, at 50.

preparing the individual client's case shaded into the judge's concern with the exercise of his rightful powers.

D. *Artificial Reason and Activist Jurisprudence*

Defining law as artificial reason gave tremendous power to the judges. The judges' learning and authority gave them power to revise and develop doctrine. As Samuel Thorne wrote:

> Sentences beginning "For it is an ancient maxim of the common law," followed by one of Coke's spurious Latin maxims which he could manufacture to fit any occasion and provide with an air of authentic antiquity, are apt to introduce a new departure. Sentences such as "And by these differences and reasons you will better understand your books," or "And so the doubts and diversities in the books well resolved," likewise indicate new law.[86]

The great cases of Coke's era—brooded over for years by the King's Bench and Common Pleas, while long lines of counsel argued and reargued troublesome points—were referenda on statutes and doctrines. *Butler and Baker's Case* (1591)[87] elucidated the Statute of Wills, *Chudleigh's Case* (1595)[88] ironed out the language of the Statute of Uses, and *Slade's Case* (1602)[89] broadened the availability of contract actions. In *Calvin's Case* (1609), the judges handled a constitutional matter too sensitive for Parliament, whether James Stuart's accession to the English throne gave his Scottish subjects the legal rights of Englishmen.[90]

Nor were great issues the only ones addressed. In Coke's own publications, one finds a broad-fronted effort to move the law forward in many different areas. Under the guise of settling "diversities" (that is, reconciling conflicting precedents or open questions; a way of

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[86] Samuel Thorne, Address to the Selden Society, *in* SIR EDWARD COKE 1552–1952, at 7 (1957).

[87] 3 Co. Rep. 25a, 76 Eng. Rep. 684 (K.B. 1591).

[88] 1 Co. Rep. 113b, 76 Eng. Rep. 261 (K.B. 1589–95).

[89] 4 Co. Rep. 91a, 76 Eng. Rep. 1072 (K.B. 1597–1602). John Baker's articles on this decision offer what is probably the most detailed analysis on how such disputations unfolded. *See* J.H. Baker, *New Light on* Slade's Case, 29 CAMBRIDGE L.J. 51, 213 (1971).

[90] 7 Co. Rep. 1a, 77 Eng. Rep. 377 (K.B. 1609). *See generally* David Martin Jones, *Sir Edward Coke and the Interpretation of Lawful Allegiance in Seventeenth Century England*, 7 HIST. POL. THOUGHT 321 (1986); Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case, 9 YALE J.L. & HUMAN. 73 (1997); Russell, *supra* note 12.

proceeding which hid in plain sight the fact that new law was being made), Queen Elizabeth's judges would define the time for performance of conditions, settle points of pleading and decide when tendering back rent preserved a lessee's rights.[91]

As early as Bracton, England's judges had claimed that the common law was consonant with reason. What distinguishes Coke and his age is the energy with which judges used reason to assert their control over the law. Defining law as artificial reason gave tremendous authority to the judges. It allowed them to review customs, ordinances and, finally, statutes. What they found reasonable, the judges approved; whatever failed to meet the test of reason, they struck down:

> What was demanded . . . if English law [were] to exist as a unified system was a technique of binding precedents. Somehow, someone had to find a principle that could be used to survey the vast array of judicial "examples" that had been accumulating since early medieval times and that would enable jurists to select those that could serve as broad precedents. Coke provided it. His definition of law as "perfect reason" became the standard against which the facts of law were measured.[92]

Coke's own definition of *reasonable* shows how sharp a tool he had found in this concept. Again glossing Littleton, he wrote:

> *"By reasonable time."* This reasonable time shall be adjudged by the discretion of the justices before whom the cause dependeth; and so it is of reasonable fines, customs, and services, upon the true state of the case depending before them: for reasonableness in the cases belongeth to the knowledge of the law, and therefore [it is] to be decided by the justices. *Quam longum esse debet non definitur in jure, sed pendet ex*

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[91] *See* Six Carpenters' Case, 8 Co. Rep. 146a, 77 Eng. Rep. 695 (K.B. 1610); Crogate's Case, 8 Co. Rep. 66b, 77 Eng. Rep. 574 (K.B. 1608); Bothy's Case, 6 Co. Rep. 30b, 77 Eng. Rep. 298 (C.P. 1603); Ughtred's Case, 7 Co. Rep. 9a, 77 Eng. Rep. 525 (C.P. 1588).

In *Lord Buckhurst's Case* (1598), the first case printed in the First Part of the *Reports*, Coke reported the satisfactory resolution of a troubling diversity. *See* 1 Co. Rep. 1a, 76 Eng. Rep. 1 (K.B. 1598). If *A* and *B* were jointly enfeoffed, with *A* being given the documents reflecting their title, and *A* then died, his joint-tenant *B* (rather than *A*'s heir) was to receive the deeds. Although Coke stated that he printed this case first because it had been decided in the Chancery, the point at issue was hardly earth-shaking. Possibly, Coke may have given this case such prominence because it was so characteristic.

[92] John Underwood Lewis, *Sir Edward Coke: His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory*, 84 LAW Q. REV. 330, 336 (1968).

> *discretione justitiariorum.* And this being said of time, the like may be said of things incertain, which ought to be reasonable; for nothing that is contrary to reason, is consonant to law.[93]

Here, even more than usual, Coke's gloss amplifies what Littleton said. He extends the judges' authority; *any aspect of a matter, not just its timing, may be measured by its consonance with reason.* Moreover, Coke ties reason to the judges' learning and wisdom. (Bracton might have referred to the judges' familiarity with the custom at issue; Coke specifically treats the issue as "the knowledge of the law," a matter of the judges' learning.)

In Coke's rereading of Littleton, established doctrine is given a cutting edge. Whatever is uncertain ought to be decided by reason. In this context, this maxim is simply another way of saying that *any* unresolved issue may be decided by the judges.

"It is better, saith the law," Coke wrote, "to suffer a mischief that is peculiar to one, than an inconvenience that may prejudice many."[94] It was better "that a private person should be punished or damnified by the rigor of the law, than a general rule of the law should be broken to the general trouble and prejudice of many."[95] In Latin and in Law French, *inconvenient* meant *inconsistent.* Coke continued: "*Nihil quod est inconveniens, est licitum.* And the law, that is the perfection of reason, cannot suffer anything that is inconvenient."[96]

The ideas of avoiding inconvenience and explicitly preferring the public interest appear throughout the cases which Coke reported.[97] This suggests that there was something deliberate in the pressure which Coke applied to the law. He preferred decisions that avoided inconvenience—preferred decisions that swept broadly and promoted overall consistency in the legal system—over decisions which carved out individual exceptions for single cases. Treating law as the perfection of reason pushed inexorably toward perfecting the law through the invocation of reason. Applying artificial reason meant polishing out inconsistencies; that was part of adaptive change.

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[93] COKE, CO. LITT., *supra* note 2, at 56b.

[94] *Id.* at 97b.

[95] COKE, *supra* note 54, at 30.

[96] COKE, CO. LITT., *supra* note 2, at 97b.

[97] *See, e.g.*, Countess of Rutland's Case, 5 Co. Rep. 25b, 26a, 77 Eng. Rep. 89, 90 (K.B. 1604);

II. From Artificial Reason to Judicial Review

One of Coke's most important contributions to the history of the law grows out of the energy of the Elizabethan courts. This contribution is judicial review, the idea that judges may invalidate statutes passed by the legislature. Coke's opinion in *Bonham's Case* is supported only tangentially by precedent, and it is settled on without great concern for theory. What might seem its deficiencies only highlight the confidence Coke reposed in the judges' skill and insight. The tradition of judicial activism traces back through *Marbury v. Madison* to *Bonham's Case*, decided by Coke's Common Pleas bench.

To believe that the law is the artificial reason of the judges is to be blindly hostile to statutes, to be predisposed to invalidate them in the name of the higher wisdom of the unwritten law. Rather, to believe that the law is the artificial reason of the judges is to believe that judges may apply, enlarge or eviscerate statutes to the same extent that they review, uphold or revise the unwritten law.

A. *Coke and Statutes*

For all Coke's reputation as a master of the unwritten law, he worked comfortably with statutes.[98] The law had three parts, he wrote—common law, statute, and custom.[99] To understand "what the body or text of the common law is, and consequently where a man might find it," Coke considered, the student should look to the statutes:

> I do affirm, that the statutes of Magna Carta, Charta de Foresta, Merton, Marlebridge, Westm' 1, De Bigamis, Glouc', Westm' 2, Articuli super cartas, Articuli Cleri, Statutum Eboraic', Praerogativa Regis, and some few others, that be ancient amongst which, the statute of 25 Ed.3 is not to be omitted, touching treasons (which for the most part are but declarations of the common law) together with the original writs contained in the Register concerning Common Pleas, and the

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Case of Alton Woods, 1 Co. Rep. 40b, 53b, 76 Eng. Rep. 89, 120 (K.B. 1600); Wyat Wyld's Case, 8 Co. Rep. 78b, 79a, 77 Eng. Rep. 593, 594 (C.P. 1609); *see also* Agnes Gore's Case, 9 Co. Rep. 81a, 82a, 77 Eng. Rep. 853, 854 (K.B. 1611); Wade's Case, 5 Co. Rep. 114a, 114b, 77 Eng. Rep. 232, 233 (C.P. 1601); Henstead's Case, 5 Co. Rep. 10a, 10b, 77 Eng. Rep. 63, 64 (C.P. 1591).

[98] *See generally* Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1908).

[99] *See* Coke, Co. Litt., *supra* note 2, at 115. The only distinction which Coke appeared to draw here seems to relate to the issue of proof. "Acts of Parliament appear in the rolls of Parliament, and for the most part are in print," he continued. "Particular customs are to be proved." *Id.*

> exact and true forms of indictments and judgments thereupon in criminal causes, are the very body, and as it were the very text of the common law of England.[100]

Indeed, Coke considered that Year Book cases and other reports of judicial decisions were to be valued not only because they expressed the common law, but also because such "book-cases and records are also right commentaries, and true expositions of statutes and acts of Parliament."[101]

In selecting which cases to report, Coke asserted that he had chosen decisions which elucidated recent statutes. The cases he printed had been chosen "for the better understanding of the true sense and reason of the judgments and resolutions formerly reported; or for resolution of such doubts as therein remain undecided."[102]

At the same time, Coke was deeply ambivalent toward the changes which statutes produced. For all the changes he had witnessed or engineered, he took a blithely, confidently conservative stance. What others might have called reforms, he termed inventions or novelties. His unruffled tone intimated that it was right, proper and inevitable that the common law would absorb such disruptions:

> Out of all [the] books and reports of the common law, I have observed, that albeit some time by acts of Parliament, and some time by invention and wit of man, some points of the ancient common law have been altered or diverted from his due course, yet in revolution of time, the same (as a most skilful and faithful supporter of the commonwealth), have been with great applause, for avoiding of many inconveniences, restored again.[103]

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[100] SIR EDWARD COKE, *Preface to* 8 REPORTS (1611). Coke's reliance on statutes is masked by his introductory statement that "the grounds of our common law at this day [are] beyond the memory or register of any beginning," which seems to locate the law's origins in the unknowable British past. *Id.*

[101] *Id.*

[102] COKE, *Preface to* 3 REPORTS, *supra* note 13. Coke went on to specify details:

> [I]n my former Reports I have reported and published for the explanation and exposition of the statute of 23 H.8 c. 10 Porter's Case: of the broad spreading statute of 27 H.8 c. 10 of uses, the cases of Chudleigh, Corbet, Shelley, Albany, and the Lord Cromwell's Case: of the Statute of 34 H.8 cap. 20 of Recoveries, Wiseman's Case; of the Statute of 13 Eliz. cap. 7 of Bankrupts, the Case of Bankrupts; of the Statute of 34 H.8 cap. 21 of Confirmation of Letters Patent, Doddington's Case; of the Statute of 31 H.8 of Dissolution of Monasteries, and of the Statute of 1 Ed. 6 of Chantries, the Archbishop of Canterbury's Case; and of one branch of the great and general statutes of 32 and 34 H.8 of Wills, Bingham's Case.

Id.

[103] *Id.*

Elsewhere, Coke was clearer about why such innovations failed. They were put down:

> Commonly a new invention doth offend against many rules and reasons (as it here appeareth) of the common law; and the ancient judges and sages of the law have ever (as it appeareth in our books) suppressed innovations and novelties in the beginning, as soon as they have offered to creep up, lest the quiet of the common law might be disturbed.[104]

The ancient judges and sages were the same grave and learned men upon whose wisdom the common law rested. Suppressing novelties was part of fining and refining the law.[105]

Coke's comments on statutory law were broad, varying, and by no means entirely consistent. His varying statements reflect different aspects of his continuing ambivalence. Sometimes Coke asserted that statutes (Magna Carta in particular) were not new law, but only reflected what the common law had always been.[106] The care which he took in explaining the preambles to statutes suggests that he generally viewed the growth of statute law as an attempt to deal with specific problems.[107] And he was always willing to praise a statute which resolved a problem. He found good words, for example, for the Parliamentary bill which put an end to the long-running litigation over title to the lands of the Dean and Chapter of Norwich Cathedral.[108] In many cases,

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[104] COKE, CO. LITT., *supra* note 2, at 379a–379b.

[105] Coke was by no means alone in these opinions. Sir John Dodderidge wrote that "laws were never in any kingdom totally altered without great danger of the evercion of the whole state." Sir Francis Bacon, likewise, argued that "alteration of laws and customs" was one of the chief "causes and motives of seditions." *See* BURGESS, *supra* note 6, at 23–24.

[106] Magna Carta, Coke wrote, "was for the most part declaratory of the principal grounds of the fundamental law of England, and for the residue it is additional to supply some defects of the common law." COKE, *Proeme to* 2 INSTITUTES, *supra* note 7. Moreover, by statute, Parliament had adjudged that Magna Carta should be taken as the common law. *See id.*; *see also* COKE, 2 INSTITUTES, *supra* note 7, at 166 (Statute of Westminster I, on wrecks of the sea, declares common law); *id.* at 567 (*Articuli Super Cartas* made in affirmance of the common law).

[107] *See generally* COKE, 2 INSTITUTES, *supra* note 7. If Coke believed that the common law eternally triumphed over attempts to change it, he also portrayed the story of the law as an eternal struggle by subjects to find ways around their sovereign's will. For example, he suggested that the statute of Quo Warranto (1290) had been enacted because Edward I had tried to establish that all franchises had to derive from a royal charter, only to be defeated by his subjects' stubborn insistence that long possession alone gave a valid title. *See id.* at 495; *see also* T.F.T. PLUCKNETT, LEGISLATION OF EDWARD I 45–48 (1949).

This suggests that Coke was ultimately unconvinced that passing new laws could ever mean true reform. However statutes might shift and alter the terrain, the human struggle which flowed across it remained the same, the same struggle by bad men to evade the law and by able judges to perfect and enforce it.

[108] *See* COKE, 3 INSTITUTES, *supra* note 11, at 191.

where a statute had clearly wrought a revolution in the law—the Statute of Uses or the Statute of Wills, for example—Coke matter-of-factly treated such laws as what they were; landmarks dominating the legal landscape. He did not attempt to argue that they declared the common law. Instead, he focused on how the lawyer might negotiate the difficulties which they posed.[109]

Significantly, all of these comments measure statutes by the template of the common law. To focus on the practical, technical issues which a statute posed was to transfer to statutory interpretation a perspective attained in applying common-law doctrine. Statutes which addressed single issues could be likened to judicial decisions which resolved diversities. Statutes which declared or restored the common law could be treated as the functional equivalent of the common law. In all these ways, long before *Bonham's Case*, Coke implicitly subjected the written law to what Samuel Thorne has called "the customary process of juridical logic," the same process by which the judges controlled and policed the unwritten law.[110]

B. *The Equity of the Statute*

Bonham's Case was not the first occasion when Coke showed himself willing to subordinate the written law to the wisdom of the judges. Years before he struck down a statute, Coke had experimented with the idea of using traditional means of statutory interpretation to expand judicial authority.

Coke's ambivalence toward statutes showed most intensely in his dissatisfaction with one particular statute, De Donis Conditionalibus ("De Donis") (1285).[111] Not coincidentally, De Donis was a statute that Coke was willing to rewrite through interpretation, by taking advantage of "the equity of the statute." Coke's distrust of De Donis and his willingness to reshape doctrine were the two sides of a coin. Taken together, they prefigure his assertion of the judges' right to control the written law.

Long before Coke, common lawyers had been familiar with a way of broadening a statute's application. Since the days of the Year Books, judges had recognized the doctrine of "the equity of the statute." This was a power of interpretation, based on a "construction reasonable-

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[109] *See, e.g.*, Butler and Baker's Case, 3 Co. Rep. 25a, 36a–36b, 76 Eng. Rep. 684, 709–10 (K.B. 1591) (advice on preparing a will).

[110] *See* Samuel Thorne, *The Equity of a Statute and* Heydon's Case, 31 U. ILL. L. REV. 202, 211 (1936).

[111] 13 Edw., Statute of Westminster II, ch. 1 (1285).

ment," which allowed judges to apply a law to factual situations which were not within its actual letter.[112] A statute specifying the warden of the Fleet Prison might be read to refer to other gaolers; a statute giving rights to life tenants and tenants for years might be extended to cover tenants holding for half a year.[113]

The equity of the statute was not judicial review. It did not even support far-ranging judicial activism. However much the doctrine promised, it was strictly limited by tradition-minded judges. Case law consistently refused to apply statutory equity to penal laws or statutes which abrogated the common law. "The general attitude . . . is one of jealousy for the common law which was not to be modified by statute more than could be avoided," Samuel Thorne wrote, "thus a statute which inflicts a penalty upon malefactors in parks [would] not extend to malefactors in forests."[114]

The question of whether royal courts could protect copyhold tenants' rights (an issue gradually resolved in the copyholders' favor over decades of case-by-case litigation) was one of the great, recurring questions of Coke's age. An issue which often surfaced in such cases was whether De Donis, which by its terms applied only to freehold estates, could be extended to copyhold interests.[115] De Donis made possible entailed estates by forbidding the alienation, in perpetuity, of lands transferred in fee tail. The only way to bar the entail and allow such family property to be sold was by sham lawsuits and judicially-sanctioned fraudulent transfers via common vouchers and common recoveries.[116]

Coke was of counsel in several landmark cases on copyhold, including *Hill v. Morse* (1585),[117] *Bullen v. Grant* (1589)[118] and *Gravenor v. Todd* (1593).[119] In all these cases, the issue was whether De Donis applied to copyholds; in the last, the arguments probed whether the statute's history could justify a liberal reading of its terms. In the same period, in a different area of the law, Coke was wrestling with the problems which entails posed for freehold estates. Sometimes he

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[112] *See* Y.B. 4 Hen. 7, Trin. 6 (1489), *cited in* Thorne, *supra* note 110, at 206.

[113] *See* Thorne, *supra* note 110, at 210; BAKER, *supra* note 80, at 240, *citing* Plat v. Sheriff of London, 1 Plowden 35, 75 Eng. Rep. 57 (Ex. 1550).

[114] Thorne, *supra* note 110, at 208, 213, *citing* Y.B. 21 Hen. 7, Pasch. 8 (1506).

[115] *See* CHARLES M. GRAY, COPYHOLD, EQUITY, AND THE COMMON LAW 109–21 (1963).

[116] *See* BAKER, *supra* note 80, at 318–20. On the muddled draftsmanship of De Donis, and how the perpetually enduring entail was created by the judges' refinement of the statute rather than the statutory text, see PLUCKNETT, *supra* note 107, at 131–35.

[117] 42 Moore 188, 72 Eng. Rep. 523 (K.B. 1585).

[118] Cro. Eliz. 148, 78 Eng. Rep. 406 (K.B. 1589).

[119] 4 Co. Rep. 23a, 76 Eng. Rep. 922 (K.B. 1593).

worked his way through the melée of a lawsuit, seeking to convince the court that the estate his client possessed was truly a fee simple.[120] At other times, feeling his way carefully, he mapped out inch by inch the course which an estate plan should follow, across a minefield of litigation risks.[121]

From this background, Coke emerged with a thorough loathing for De Donis. He wasted no opportunity to denounce it. "Infinite were the scruples, suits, and inconveniences" which De Donis had introduced, Coke wrote:[122]

> When all estates were fee simple, then were purchasers sure of their purchases, farmers of their leases, creditors of their debts, the king and lords had their escheats, forfeitures, wardships and other profits of their seigniories: and for these and other like cases, by the wisdom of the common law all estates of inheritance were fee simple; and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, daily experience teacheth us.[123]

Perhaps because of this practice experience, Coke connected De Donis with the doctrine of the equity of the statute. Certain passages in his writing make this clear. Early in the *Commentary Upon Littleton*, addressing a passage in which Littleton discussed entails and De Donis, Coke broke into a long discussion of judicial equity, how the "construction made by the judges" could stretch the reach of a statute beyond its literal terms.[124] Nothing in Littleton's text called for so long an explanation of equity at this juncture. This suggests that the connection was personal. Reflexively, Coke made the leap from his frustration

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[120] *E.g.*, Smith v. Haws, Cro. Eliz. 96, 78 Eng. Rep. 355 (K.B. 1588).

[121] Between 1584 and 1592, Coke helped draft an estate plan for Henry, 9th Baron Scrope. *The Compleat Clerke*, a 17th Century manual providing forms for conveyancing, includes an estate settlement drafted by Coke (among others) for the family of Henry, 9th Baron Scrope. Internal evidence shows that this was drafted between 1584 and 1592. (Prof. Thomas G. Barnes brought this to light in his introduction to the Legal Classics edition of *Commentary Upon Littleton*.) *See* Thomas G. Barnes, *Introduction* to COKE, CO. LITT., *supra* note 2, at 9. However, in the late 1580s, no matter how careful the planning had been, Coke went to court in a lawsuit between claimants to Lord Scrope's estate. *See* Ross and Morrice's Case, 2 Leon. 23, 74 Eng. Rep. 326 (K.B. 1588). Further research may establish whether this was collusive litigation, meant to give a questionable settlement the seal of judicial approval, or whether the estate plan blew up in the draftsmen's faces. Either of these scenarios could only have deepened Coke's skepticism of De Donis's value.

[122] COKE, *Preface to* 4 REPORTS, *supra* note 27.

[123] COKE, CO. LITT., *supra* note 2, at 19a; *see also* Sir Anthony Mildmay's Case, 6 Co. Rep. 40a, 40a–40b, 77 Eng. Rep. 311, 313 (K.B. 1605) (De Donis upset true policy of common law).

[124] COKE, CO. LITT., *supra* note 2, at 24b.

with this statute to a doctrine which offered the possibility of rewriting statutory text.

Beyond this, Coke looked to more forceful ways of dealing with written law. He found that earlier judges had construed De Donis "according to the rule and reason of the common law, and that in divers and sundry variable manners."[125] Through different interpretations of the same statutory phrases, some alienations had been voided, some found merely voidable, all in the discretion of the sages of the law.

Coke's exasperation with De Donis echoed in the tenor of his remarks about statutory law. As early as 1600, Coke spoke with condescension, even contempt, of legislative draftsmanship. Great questions of the common law, he wrote, "oftentimes" arose "upon Acts of Parliament overladen with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law."[126]

Given this background, it is hardly surprising that one of Coke's first attempts to assert the judges' authority over written law would involve De Donis. It is equally unsurprising that Coke would seek to apply the doctrine of statutory equity more broadly across the law. Coke resented De Donis and looked toward statutory equity as a way of correcting its defects. Where other statutes shared its shortcomings, where they had been suddenly or clumsily penned by the unlearned, it was only natural to apply the same remedy.

When Coke wrote the preface to the First Part of his *Reports*, he was carrying in his manuscript notebooks his notes on what had been decided in *Heydon's Case*. This was an Exchequer decision of 1584 that Coke would not publish until 1602. Sometime during the interim, Coke evidently decided to use his report of the decision to break with the crabbed, literalistic tradition of statutory interpretation.

Heydon's Case involved the question of whether De Donis applied to certain copyhold properties, formerly monastic properties. The case is remembered, however, for what it held about statutory interpretation. Coke wrote that the judges had announced four rules "for the sure and true interpretation of all statute[s]." The procedure was to consider what the common law had been, where the common law had fallen short and what remedy Parliament had provided, and finally "the true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance

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[125] *Id.* at 327a–327b.

[126] COKE, *Preface to* 2 REPORTS, *supra* note 34.

the remedy . . . according to the true intent of the makers of the Act, *pro bono publico*."[127]

These resolutions amounted to a new standard. Without giving the judges absolute carte blanche, Coke was urging that they follow the sense of a statute rather than limit themselves to its actual words.

This was a liberal (but not revolutionary) broadening of judicial power.[128] Even so, this is one of the junctures at which Coke pushed the law. The neat four-part test which he says the Exchequer adopted does not appear in other reports of this decision. The enduring "mischief rule" of statutory interpretation, for which *Heydon's Case* remains known to English courts today, seems to reflect only the casual dictum of Chief Baron Manwood, reported by Coke as settled law.[129] As John Baker has noted: "It is easy to sympathize with Coke's desire to present such an attractive statement as a 'resolution' by the judges"—but the textual record suggests that Coke's report went beyond the judges' holding.[130]

In the name of judicial reason, Coke was willing to rewrite the law. He had pushed to its broadest ambit (perhaps beyond) the doctrine of the equity of the statute. He had noted where the judges had silently amended De Donis. In 1602, his chief way of shaping the law was in the way he reported it. The appointment which came to him five years later, to the chief justiceship of the Common Pleas, would give his ambition greater scope.

C. *Judicial Review of Government Bodies*

Under Elizabeth and James, the central courts took an increasingly active role in the work of government. Immemorially, royal judges

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[127] Heydon's Case, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (Ex. 1584).

[128] As Samuel Thorne explained, the holding in *Heydon's Case* was "much closer to what courts were groping toward by means of the equity of the statute: an understanding of the *ratio legis* rather than the *ratio verborum*, an effort to make the interpretation of statutes . . . something more than merely a grammatical exercise." Thorne, *supra* note 110, at 215.

[129] According to Coke's manuscript notes, Chief Baron Manwood's original words seem to have been these:

> And he said that he did not take any certain ground for the construction of statutes, be they penal or beneficial, restrictive or enlarging of the common law, but only to consider the mischief which was before the statute and the remedy which the parliament intended to provide, and upon this to make construction to repress the mischief and to advance the remedy according to the intent of parliament.

J.H. Baker, *Coke's Notebooks and the Sources of His Reports*, 30 CAMBRIDGE L.J. 59, 76 (1972) (Baker's translation from British Library MS. Harl. 6687).

[130] Baker uncovered this in his comparison of Coke's manuscript notes of this case, which make clear the casual nature of this comment and the case as printed in the *Reports*, where these comments appear as a full-fledged rule. *See id.*

had supervised the shires, supporting the work of the justices of the peace. Now, however, the judges increasingly asserted the right to review and correct the work of other municipal bodies. In 1599, in *Rooke v. Withers*, the King's Bench held that "the rule of reason and law" limited the Commissioners of Sewers' power to assess taxes to pay for draining marshlands.[131] Coke reported this decision; later, as a judge, he would further limit the Commissioners' powers.[132] From the courts on which Coke sat, an increasing number of prohibitions went out barring prerogative and ecclesiastical courts from hearing cases which common-law courts could decide.[133] At the same time, expansive new readings of the writ of *habeas corpus* gave judges new powers to intervene outside the court system.[134] Coke was neither the first judge nor the last to issue prohibitions or feud with the Chancery, but his decisions raised the pitch of the debate. No prior judge had dared to free prisoners committed by the Lord Chancellor or suggested that the common-law courts could prohibit the Chancery itself from hearing a case.[135]

Using the writ of mandamus, the common-law courts began to review the actions of municipal governments.[136] The high-water mark of this movement came in *Bagg's Case* (1615). In this case, Coke aggressively announced:

> [F]irst, it was resolved, that to this Court of King's Bench belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or any manner of misgovernment; so that no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law.[137]

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[131] 5 Co. Rep. 99b, 100a, 77 Eng. Rep. 209, 210 (C.P. 1599).

[132] *See* Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. REV. 345 (1956).

[133] *See* BAKER, *supra* note 80, at 166; *see also* CHARLES M. GRAY, THE WRIT OF PROHIBITION: JURISDICTION IN EARLY MODERN ENGLISH JURISPRUDENCE (1994).

[134] *See* Baker, *supra* note 80, at 168–69.

[135] *See* J.H. Baker, *The Common Lawyers and the Chancery: 1616*, 4 IRISH JURIST (n.s.) 368, 374–78 (1969); John P. Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 U. ILL. L. REV. 127 (1936).

[136] *See* BAKER, *supra* note 80, at 169–70.

[137] 11 Co. Rep. 93b, 98a, 77 Eng. Rep. 1271, 1277–78 (K.B. 1615). Thomas Egerton, Lord Ellesmere, felt that Coke had gone too far with this decision: "In giving excess of authority to the King's Bench he doth . . . insinuate that this court is all sufficient in itself to manage the state

These lines of decisions bounded government in all its aspects, subordinating all of the king's other servants to the authority of the judges. Ineluctably, the authority of the judges would also be measured against the authority of the king's loyal subjects, the peers and commons of England, sitting in Parliament.

III. Coke Applies the Power of the Common Law

A. *Thomas Bonham and the Royal College of Physicians*

Thomas Bonham was a medical practitioner in London. He held a bachelor's degree from Cambridge, and seems to have held an M.D. from that university as well. As early as 1602, he was associated with surgeons who practiced in the capital, and as early as 1605, he had begun to have trouble with the Royal College of Physicians. The College was authorized, by statutes passed under Henry VIII, to fine any person who practiced medicine in London without being licensed by the College. The College was also authorized to govern the medical community of London. A second clause in the statute allowed it to punish malpractice with powers including the ability to fine and imprison.[138]

In 1605 and 1606, the College denied Bonham's application for membership and then fined him when he continued to practice. In November 1606, after Bonham defiantly told the College's *comitia censorum* that the body had no authority to regulate medical practice by university graduates, the College jailed him. Within a week, however, Bonham was released. His attorney had obtained a writ of *habeas corpus* from the Common Pleas, over which Chief Justice Coke presided.

In May 1607, at an informal conference held at the house of Thomas Egerton, Lord Chancellor Ellesmere, six judges agreed that the College had the right to govern all medical practitioners in London, even those holding university degrees. Thus encouraged, in early 1608, the College sued Bonham in the Court of King's Bench, seeking

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. . . as if the King's Bench had a superinterdependency over the government itself." Knafla, *supra* note 9, at 307–08.

[138] The most detailed history of the litigation between Bonham and the College is supplied in Harold J. Cook, *Against Common Right and Reason: The Royal College of Physicians Versus Doctor Thomas Bonham*, 29 Am. J. Legal Hist. 301 (1985), upon which the following discussion draws. *See generally* Raoul Berger, Doctor Bonham's Case: *Statutory Construction or Constitutional Theory?*, 117 U. Pa. L. Rev. 521 (1969); Charles M. Gray, Bonham's Case *Reviewed*, 116 Proc. Am. Phil. Soc'y 35 (1972).

a fine of sixty pounds. Bonham then countersued in the Common Pleas (in his turn, seeking one hundred pounds damages for false imprisonment). In early 1609, the King's Bench found Bonham guilty of illicit practice. In 1610, however, the Common Pleas ruled that the College lacked the power to punish Bonham—setting Bonham free, and levying a forty-pound fine against the College.

Coke offered five reasons for freeing Bonham. One drew on the *lex talionis.* Coke suggested that only the doctor whose malpractice harmed his patient should himself be punished "in his body," i.e., be jailed; the physician whose sole fault was unauthorized practice might be punished in some other way, but not through imprisonment.[139] Three other reasons were essentially technical, close readings of the two relevant statutory clauses: Coke found that the first clause, the one under which Bonham had been prosecuted, did not authorize the College to imprison him (a power available only for prosecutions under the second clause).[140]

The last reason (fourth of the five, as Coke marshalled them) was the one holding the gunpowder. Referring expressly to the first clause, authorizing action by the College, Coke struck this down because it allowed the College to retain half of the fines it imposed on unauthorized practitioners:

> The censors cannot be judges, ministers, and parties: judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem suae rei esse judicem* . . . . And it appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.[141]

To support his conclusion, Coke cited four cases, precedents which were less than truly compelling. In one, *Tregor's Case,* Coke elabo-

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[139] *See* Bonham's Case, 8 Co. Rep. 107a, 117b, 77 Eng. Rep. 638, 652 (C.P. 1610).

[140] The differences in sanction showed that the clauses were distinct and parallel. If they were read as linked, they would improperly give the College power to punish twice for the same offense. Moreover, the first clause allowed fines to be imposed only after one month of unlicensed practice, while the second clause allowed immediate action for malpractice.

[141] *Bonham's Case,* 8 Co. Rep. at 118a, 77 Eng. Rep. at 652. On the history of the cited maxim, see D.E.C. Yale, *Iudex in Propria Causa: An Historical Excursus,* 33 CAMBRIDGE L.J. 80 (1974).

rately misquoted the text; only what he added suggested that the common law might override a statute.[142] In another, the court had considered, but not actually ruled on, the conflict caused when statute law and canon law prescribed different rules for custody of monastery seals.[143] In the third decision, *Stroude's Case*, the court did nothing more than clarify that the statutory phrase *rent service* also meant *rent charge*.[144]

Only one precedent squarely supported Coke: a Year Book case, dating back more than three centuries, in which the court had refused to allow a plaintiff to maintain an action allowed by statute.[145] In this decision (and some closely related cases, also decided under the Plantagenets), common-law judges had refused to give effect to the text of statutes. Nonetheless, as T.F.T. Plucknett noted:

> The courts in these cases did undoubtedly "disregard the plain meaning of an Act of Parliament"; but in telling the story Lord Coke has made the important addition of the words "because it would be against common right and reason, the common law adjudges the said act of parliament as to that point void." There is no judgment as this in the report; the statute is not held void; it is just ignored. *To this fact Coke has really added an explanation and a theory all his own.*[146]

If the theory and the explanation were Coke's own, so too was the reading of the case law—decisions which he strained to the breaking point.[147] In voiding a statute, Coke was breaking new ground.

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[142] Y.B. 8 Edw. 3, Pasch. 26 (1335). The most rigorous analysis of these precedents remains that of Theodore Plucknett. *See* Theodore Plucknett, Bonham's Case *and Judicial Review*, 40 HARV. L. REV. 30 (1926). Italicizing what Coke added to *Tregor's Case* shows how much he added: "Herle saith some statutes are made *against law and right*, which those who made them *perceiving*, would not put them into execution." *Id.* at 35.

[143] *See* Plucknett, *supra* note 142, at 36–37 (citing ANTHONY FITZHERBERT, *Annuitie 41*, *in* NATURA BREVIUM (1553); NICHOLAS STATHAM, *Annuitie II*, *in* ABRIDGEMENT (circa 1490)).

[144] 1 Anderson 45, 123 Eng. Rep. 345, 3 Leon. 58, 74 Eng. Rep. 539, 4 Leon. 40, 74 Eng. Rep. 715 (C.P. 1575).

[145] *See* Plucknett, *supra* note 142, at 45 (citing HERBERT, *Cessavit 42*, *in* NATURA BREVIUM, *supra* note 143).

[146] *Id.* at 36 (emphasis added).

[147] Significantly, of Coke's four brethren on the Common Pleas bench, only one was persuaded by his reasoning. Two dissented, and it seems that Justice Warburton gave Coke his 3–2 majority only because he concurred in the outcome.

Coke hinted at moderation, suggesting that the common law might usually "control" statutes and only "sometimes" adjudge them void. Coke's statement that judges would strike down "repugnant" law, however, gave the lie to this. In Coke's lexicon, *repugnant* meant "contrary to common law." *See* COKE, Co. LITT., *supra* note 2, at 206b (legal conditions "repugnant to the state" equated with conditions "against some maxim or rule in law").

Rather than rely on the judges' power to construe a statute, he reached out to assert that they held this fundamental authority.

It cannot be denied, in the end, that Coke acted in the belief that courts could strike down statutes which offended the common law—that is, which the judges in their wisdom found unreasonable.[148] Nor can it be denied that Coke understood fully what he was doing. He wrote out the relevant passage from *Bonham's Case*, in two different manuscripts, in his own hand—a fact that suggests he understood what his words might unleash.[149]

Any doubts as to Coke's intentions were dispersed in 1612, when the Common Pleas decided *Rowles v. Mason*.[150] Without citing *Bonham's Case*, Coke used *Rowles* to reiterate that the common law "corrects, allows, and disallows both statute law and custom, for if there be repugnancy in a statute; or unreasonableness in custom, the common law disallows and rejects it."[151] In this same year, Coke handed down another decision which reaffirmed the judge's power. In *Mary Portington's Case*,[152] he ruled that entailed estates (made possible by De Donis) could be barred by the use of common recoveries, no matter what form such perpetuities took. Coke did not claim that the common law could control statutes, he did not announce that the provisions of De Donis were repugnant or void; rather, he gave whole-hearted judicial sanction to evasions of the statute. When he praised common recoveries, hailing them as crucial to landholders' rights, he denigrated De Donis in a back-handed way. To privilege common recoveries implied that De Donis was against public policy. This was a subtler assertion of judicial power than *Bonham's Case* had offered, but it

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[148] Even Samuel Thorne, who argued ably that Coke did not base *Bonham's Case* on a theory of judicial review, acknowledged that "judges had wide powers of statutory interpretation, but Coke's disregard of the express words of the Act probably went beyond them." Samuel E. Thorne, Doctor Bonham's Case, 54 L.Q. REV. 543, 551 (1938). And as R. A. McKay observed, the decision is ultimately predicated upon an idea of fundamental law. If Coke reached his result by strictly construing the statute, nonetheless, "the only reason for the existence of this power is to bring the statutes into general conformity with the fundamental law." R. A. McKay, *Coke—Parliamentary Supremacy or the Supremacy of the Law?*, 22 MICH. L. REV. 215, 230 (1924).

[149] These passages are found in Cambridge University MS. Ii.2.21[2], fo. 93v, and the manuscript formerly known as Yale Law Library MS. G.R24.1, fo. 157v. This manuscript is now in Yale University's Beinecke Library.

[150] 2 Brownlow 192, 198, 123 Eng. Rep. 892, 895 (C.P. 1612).

[151] *Id.* Even after 1613, when Coke was transferred to the King's Bench, the Common Pleas continued to follow the path he had set. The principles of *Bonham's Case* were followed by Sir Henry Hobart, Coke's successor as chief justice of Common Pleas. In *Lord Sheffeild v. Ratcliffe*, Hobart even expanded on Coke; he spoke of "that liberty and authority that judges have over laws, especially over statute laws, . . . to mould them to the truest and best use." Hobart 334, 346, 80 Eng. Rep. 475, 486 (Ex. 1615).

[152] 10 Co. Rep. 35b, 77 Eng. Rep. 976 (K.B. 1614). For further discussion, see *supra* notes 78–79, 122–30 and accompanying text.

arrogated just as much power to the bench: judicial authority, once again, effectively controlled and voided a statute.

B. *Coke Refuses to Recant*

Bonham's Case was controversial in its day, possibly as controversial as any other case in which judges have invalidated any law. Coke's decision drew criticism from his opponents and displeasure from his king. Where there is pressure, there is resistance. Coke steadfastly refused to take back what he had written. His refusal to recant followed through on what he had held; he had asserted the superiority of the judges' wisdom, and now he maintained that. His steadfast assertion of judicial independence bore witness to his assertion of judicial supremacy.

After *Bonham's Case* was published, Coke came under fire for its holding. Coke's rivals saw very clearly what the decision meant. Lord Chancellor Ellesmere noted the decision with special emphasis in his criticism of Coke's *Reports*. Ellesmere wrote that *Bonham's Case*

> derogateth much from the wisdom and power of the parliament, that when the three estates—the King, the Lords and the Commons—have spent their labors in making a law, then shall three judges on the bench destroy and frustrate all their points because the act agreeth not in their particular sense with common right and reason, whereby [Coke] advanceth the reason of a particular court above the judgment of all the realm . . . . For it is *Magis Congruum* that acts of parliament should be corrected by the same pen that drew them, rather than to be dashed in pieces by the opinion of a few judges.[153]

Nor can it be said that Coke held back from the dispute. When he published *Bonham's Case*, he added what might have seemed an innocuous postscript. The case was one of first impression; he wrote,

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[153] KNAFLA, *supra* note 9, at 306–07. Ellesmere stood for the authority of the Chancery as fiercely as Coke asserted the power of the common-law courts. More than that, he was Coke's peer at the bar, fully competent to judge the quality of Coke's lawyering. His comments thus show not only the assertiveness of Coke's statement in *Bonham's Case*, but also indicate that this assertiveness lacked foundation.

Nor were Coke's friends slow or reluctant to read *Bonham's Case* as a ground-breaking decision. In another Jacobean case, *Rouswell v. Ivory*, argued in the Chancery in 1619, Serjeant Ranulph Crewe, Coke's friend and kinsman, cited *Bonham's Case* as holding that common-law judges might overrule statutes, and argued that the Chancellor likewise might overrule acts of Parliament. *See* Gray, *supra* note 138, at 51–53. *Rouswell v. Ivory* is reported in British Museum Lansdowne MS. 1080, 40b ff., Trinity 16 James 1.

"the first judgment on the said branch concerning fine and imprisonment which has been given since the making of the said charter and Acts of Parliament, and therefore I thought it worthy to be reported and published."[154]

To those who knew Coke well, this postscript was not innocuous. When Coke took a controversial stance, he typically offered a transparently disingenuous explanation. When he held that the High Commission could not administer the *ex officio* oath to Puritan dissidents, he asserted that he did so out of regard for the examinees' souls; to let the oath be administered might tempt them to perjury.[155] Asked to explain why the Chancery was a lower court than King's Bench, he stated that the blazon of the King's Bench was the true royal insignia, while the blazon of the Chancery was that of a cadet branch.

As Christopher Hill has noted, Coke made such suggestions with "naive cunning."[156] Superficially, such statements were soft and conventional enough to turn away wrath. In fact, because these explanations were so patently insufficient, they raised the pitch of the controversy. Coke was playing dumb in order to goad his opponents; to give an obviously false explanation only underlined the obstinacy (or arrogance) with which he held his position. Coke's closing words on *Bonham's Case* are of a piece with other such challenges. He was not printing the case because it was the first to explicate the statute—as everyone knew. He was printing the case because it struck down the statute—as everyone knew.

The dispute over *Bonham's Case* was only one of the factors which cost Coke his sovereign's confidence. He had carried on a lifelong feud with Sir Francis Bacon, who now served as Attorney-General and held the ear of King James. He had simultaneously pressed a second feud with Ellesmere, a dying lion who roused himself for one final battle. Between them, Bacon and Ellesmere brought Coke down.[157]

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[154] *Bonham's Case*, 8 Co. Rep. at 121a, 77 Eng. Rep. at 658.

[155] Of Oaths Before an Ecclesiastical Judge Ex Officio, 12 Co. Rep. 26, 26, 77 Eng. Rep. 1308, 1308–09 (K.B. 1607), *discussed in* Berman, *supra* note 6, at 1682–84; *see also* ROLAND G. USHER, THE RISE AND FALL OF THE HIGH COMMISSION (Oxford Univ. Press 1968) (1913); Mary H. Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts of England*, *in* ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD MCILWAIN 199 (C.F. Wittke ed., 1936).

[156] *See* CHRISTOPHER HILL, SOCIETY AND PURITANISM IN PRE-REVOLUTIONARY ENGLAND 404–05 (1964).

[157] His discharge as chief justice, Coke bitterly noted, had been "procured by the importunity and labor of Egerton, Lord Chancellor, and Bacon, Attorney [General]." Historical Manuscripts Commission, *supra* note 28, at 373 (marginalia in Holkham MS. 727). This may oversimplify. By

In the summer of 1616, when Coke would ordinarily have ridden the assize circuit, he was ordered to "reform" his *Reports*, "wherein there be many dangerous conceits of his own uttered for law."[158] If James expected that he would recant, Coke did not. He again played dumb. After three months, he declared that he could identify only five "animadversions" in his eleven volumes of cases:

> [I]n the prince's case he had found out the French statute, which was "filz aisné," whereas the Latin was "primogenitus;" and so the prince is duke of Cornwall in French, and not duke of Cornwall in Latin. And another was, that he had set Montagu to be chief justice in Henry VIII's time, when it should have been in Edward VI's, and such other stuff . . . .[159]

This was defiance, and James took up the gauntlet. If Coke would admit only five trifling errors, he would demand that his obstinate Chief Justice explain five of his most dangerous conceits, chief among them his opinions in *Bonham's Case* and *Bagg's Case*. Again, Coke refused to take back what he had said. On *Bagg's Case* he yielded very little.[160] On *Bonham's Case*, he yielded nothing. He had made no new law, he asserted; he had only related "such authorities of law, as had been adjudged and resolved in ancient and former times, and were cited in the argument" of the case. "[A]nd therefore the words of my book are these, 'It appeareth in our books, that in many cases the common law shall control acts of parliament, and sometimes shall adjudge them to be utterly void . . . .'"[161]

Coke seemed to deflect responsibility, to say that what he had held was only what the law required. If this answer was not the recantation which James had sought, it also seemed studiously non-objectionable.

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this time, Coke had worn out King James's patience; he had failed to defer to the crown's view of its prerogative powers and right to out-of-court consultation on pending cases. He had worked to restrict the powers of prerogative courts. He was at odds with the Church of England; he had perpetuated the friction between common-law courts and ecclesiastical tribunals. He had squabbled with the Duke of Buckingham over a choice bit of political patronage—which, given the Duke's place as royal favorite, may have been the last straw. *See also* KNAFLA, *supra* note 9, at 123–81; Baker, *supra* note 80, at 368–92; Dawson, *supra* note 135, at 127–52.

[158] 2 SIR FRANCIS BACON, WORKS 500 (n.p., Basil Montagu ed., Hart, Carey & Hart 1853).

[159] 13 SIR FRANCIS BACON, WORKS 352 (n.p., Basil Montagu ed., William Pickering Co. 1831).

[160] Coke restated his opinion without clarifying it. He stated that he had claimed for the King's Bench the power to correct the "misgovernance" of "inferior magistrates," without clarifying further which magistrates were inferior to King's Bench. *See id.* at 376–77.

Clearly the burgesses of Plymouth, whose actions were reviewed and corrected in *Bagg's Case*, ranked below the King's Bench justices. To Coke, however, even the Chancery might be inferior to the King's Bench. That was a point at issue and that was a point which Coke's answer left open.

[161] *Id.* at 373.

Nonetheless, coded into Coke's language may have been a stronger answer, at once more subtle and more defiant.[162] On Coke's tomb, the Latin epitaph would say *dum vixit bibliotheca viva*, one who while he lived was a living library. If this epitaph offers any sort of self-portrait, if the learned judge was a counterpart of the texts he had studied, Coke may have claimed responsibility while seeming to deny it. The textual authority of the precedents meshed with the personal authority of the judge. The books which controlled in *Bonham's Case* may have included the learning which Coke carried, *bibliotheca viva*, within his human frame.

C. *The Fall and Rise of Judicial Review*

The idea of judicial review gradually petered out in England, and was dead by the end of the seventeenth century. Sir William Blackstone buried the doctrine, using words which have an oddly modern ring:

> I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power . . . to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.[163]

When he passed this judgment, Blackstone was an Oxford don; he had not yet been picked for the bench. He would always live farther

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[162] In his institutional writings, Coke did not repeat, but did not retract, what he had said in *Bonham's Case*. He did not mention *Bonham's Case* when he discussed the powers of Parliament, as logic might have demanded. He referred to the case four times, however: once when discussing the powers of the College of Physicians, three times in discussing cases in which courts ignored statutes or interpreted them to meet the test of underlying fundamental law. *See* SIR EDWARD COKE, FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 251 (William S. Hein Co. 1986) (1797 ed.); COKE, 2 INSTITUTES, *supra* note 7, at 402, 561, 588. If Coke held back from recapitulating the doctrine he had set loose—he had already been sent to the Tower once, and he may have rightly feared that a second confinement would kill him—he nonetheless took care to ensure that its implications would not be missed. *See also* JAMES R. STONER, COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 48 (1992).

In Britain, emphasis has focused on indications that Coke later changed his mind, and came to believe that what Parliament passed, the judges could not question. *See* BAKER, *supra* note 80, at 242 (citing SIR EDWARD COKE, FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 37, 41 (William S. Hein Co. 1986) (1797 ed.)).

[163] SIR WILLIAM BLACKSTONE, 1 COMMENTARIES *91 (1st ed. 1765).

from the political world than had Coke. He spoke first of reasonable statutes, second of the power of the judges, and he rejected his great predecessor's boldest constitutional declaration.

On the American mainland, by contrast, the idea of judicial review had already taken hold. As early as 1647, the General Court of Massachusetts had ordered copies of Coke's *Reports* and his *Commentary Upon Littleton.*[164] By the end of the century, judicial authorities had begun to invalidate legislation which violated "fundamental law in nature."[165] In 1772, as rebellion and revolution began to kindle in Virginia, several individuals of Indian descent asked the courts to strike down a statute which made them slaves. In their arguments, the plaintiffs drew on the authority of both God and man:

> [A]ll acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; whose authority can be superseded by no power on earth . . . . Such have been the adjudications of our courts of justice. And cited 8 Co. 118a *Bonham's Case.*[166]

In 1772, John Marshall was seventeen. *Robin v. Hardaway* arose in the commonwealth he knew, not that far from his native Fauquier County. Around this time, Marshall's father bought him a copy of Blackstone's *Commentaries*, but for some reason the boy did not take to it.[167] He may have taken more interest in ideas like those put forward in *Robin.* The decision, after all, was reported by his cousin, Thomas Jefferson.

The idea that judges could strike down unjust laws was now a tradition, deep-rooted in the country. With Marshall and Jefferson emerged the *dramatis personae* who would play out the conflict on a new, broader stage.

The idea behind *Bonham's Case*, the "theory" upon which Coke based judicial review, is his belief that common law, statute and custom were the three parts of the law. This understanding ranks together judicial doctrines, legislative enactments and popular practice. All three of these realms are treated as subjects which the judge must

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[164] *See* Plucknett, *supra* note 142, at 61–62 (citing HILKEY, LEGAL DEVELOPMENTS IN COLONIAL MASSACHUSETTS 66 (1910)).

[165] *See* Giddings v. Browne, 2 Hutchinson Papers 1–15 (Prince Society ed., 1865); Plucknett, *supra* note 142, at 60–63.

[166] Robin v. Hardaway, 1 Jeff. 109, 114 (Va. 1772). The plaintiffs also cited *Day v. Savadge*, Hobart 85, 87, 80 Eng. Rep. 235, 236–37 (K.B. 1615), in which Hobart had followed Coke.

[167] *See* KENNETH UMBREIT, OUR ELEVEN CHIEF JUSTICES 120 (1938).

master, in both meanings of this word: areas which the judge must understand and areas which the judge may control. If the judge may rightfully interpret doctrine and weigh the merits of custom, the judge may just as rightfully review legislative enactments.

The artifice with which the judges reasoned drew on the rhetoricians' figures and techniques. Beyond that, Coke's theory of law as artificial reason reflects a broader aspect of the rhetorical tradition. The rhetoricians taught that the wisest, soundest, most public-spirited argument would also be the most persuasive one. What was good and just would be persuasive. Coke's reasoning relies on the same equation. What is good and just, the judge (in his wisdom) is persuaded to enforce as law. Conversely, when the judge encounters something that is wrong or unjust, he is persuaded against it and strikes it down. That is the essence of common-law adjudication, and that is the mainspring of *Bonham's Case.*

"It is the merit of the common law that it decides the case first and determines the principle afterwards," wrote Oliver Wendell Holmes. "Judges know how to decide a good deal sooner than they know why."[168] Holmes' aphorisms were never more penetrating than in their teaching about this decision. To decide *Bonham's Case,* Coke did not need a theory of natural law.[169] He needed only to believe (as in fact he did believe) that legal decisions by judges are likely to be sounder than legal decisions enacted by legislatures: Judicial decisions are more likely to be considered in greater depth, subtler and more flexible in responding to the facts of individual cases and crafted with greater professional skill.[170]

IV. Conclusion

Rather than command and obedience, the matching halves of positivist jurisprudence, artificial reason emphasizes intelligence, re-

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[168] Oliver Wendell Holmes, His Book Notices and Uncollected Letters and Papers 63, 90 (Harry Shriver ed., 1936).

[169] As Samuel Thorne wrote, *Bonham's Case* introduces "an idea of some superior 'right' only when read in the light of St. German's and Fortescue's natural law." Thorne, *supra* note 148, at 550.

[170] There is a tension, never explicitly resolved, between Coke's praise of Parliament as the highest court in the realm and his belief that judges had the authority to correct statutes. The point was considered in detail by Charles Howard McIlwain at the turn of the last century. *See generally* Charles H. McIlwain, The High Court of Parliament and Its Supremacy (1910). McIlwain concluded that Coke saw no clear line between legislation and adjudication, so that Parliament operated as the highest judicial court in the realm. If one wishes to believe that Coke accorded first place to one of the two conflicting constitutional ideas, no better explication has yet been offered.

sponsibility and consensus. This vision of law is healthier than most. As John Underwood Lewis has noted, in an insightful study of Coke's jurisprudence:

> [A] definition of law in terms of "reasonableness" is better able than a voluntaristic one of giving a realistic account of legal obligation. The proposition that a man ought to obey a law because it directs him to do what is reasonable can readily be seen to be more defensible than the view that his obligation flows from a sovereign will; for when the reason given for obedience to a law is simply the ruler's wish that it be obeyed, what ought to be done in the legal order comes to be equated with what is enforceable. This is, of course, the "bad man" theory of law; and while it may explain why bad men do in fact obey laws, it cannot by itself explain why they ought to. Nor, more importantly, can it explain why good men obey them.[171]

The personification of artificial reason, the figure whom Coke would trust to define the law most truly, is the learned, reflective, experienced judge. This mythic figure best embodies the qualities which Coke prizes—but it is equally important to note whom the learned judge is not. The learned judge is not the law-giving monarch, the figure who stands behind Justinian's *Institutes* or Hobbes' *Leviathan*—the personification of command theories of law. To define law as the judges' wisdom pays scant attention to the argument that law represents the commands of the sovereign. Under Coke's theory of artificial reason, the law exists and the state runs smoothly, without the need for a king. This was a revolutionary concept in Coke's era. It would grow more overtly revolutionary during the century which opened with the publication of Coke's *Reports*. Coke dethroned the monarch only in the realm of law. The Long Parliament, whose members voted to publish Coke's *Institutes* on the same day that they watched the beheading of the Earl of Strafford, would carry matters much farther.[172]

The archetype of the learned judge stands in sharp contrast to another figure who casts a long shadow across the law: the worldly machiavel who defines law in the realm of positivist jurisprudence, the "bad man" (as Oliver Wendell Holmes put it) who cares only about

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[171] Lewis, *supra* note 92, at 342.

[172] *See* C.V. WEDGWOOD, THE KING'S PEACE 1637–41 430 (1955).

what the courts will do in fact.[173] The bad man's part is a negative one. He does not care to comprehend the law; he seeks to evade it. He seeks to forecast or react to individual decisions; he does not care to integrate the action of the law with the life of the society. This means that he cannot shape the law as it evolves across a series of decisions.

This limited and reactive viewpoint is the opposite of Coke's vision of law. As a way of defining law, artificial reason knowingly sets an elevated standard. It is framed on the idea of duty and intelligence—understanding of what is right and just, awareness of how to protect the good and censure the wrong. It relies on initiative, will prompt and ready, as Coke put it. Positivism offers a jurisprudence for those who fear the law and want to evade it. It is a jurisprudence for rulers and subjects. Artificial reason, by contrast, is a jurisprudence for citizens.

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[173] *See* OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 173 (1920).