

I. PROCEDURE

Introduction

I propose first to look at cases which test in a general and relatively simple way how much "favor in law" the Prohibition enjoyed. These cases turn on points of procedure. They can be expected to suggest one or the other of two attitudes on the part of the courts: (a) The courts might tend to make things as easy as possible for parties suing Prohibitions by fashioning and interpreting procedural rules in a liberal spirit. (b) They might tend to insist on strict observance of such rules and allow the adversary party the advantage of technicalities. Those alternative attitudes are of course always open in the administration of law. Courts may see it as their duty to help people vindicate their substantive rights with as little waste motion as possible and therefore to minimize the effect of the procedural mistakes litigants will inevitably make. They may, on the other hand, set a high value on correct procedure and spare little pity for parties who by bad advice or negligence stand in danger of losing what they are entitled to. Either attitude may be generally characteristic of the courts in a given period. On the other hand, the courts may widen or narrow the gates of procedure according to the context. Some rights may seem so important that procedural rules and other technical habits of the courts—such as rules of construction—should not stand in the way of their enforcement. Other rights may seem so relatively inconsequential that high standards of "art" should not be sacrificed to them. As the maxim had it, the common law favors life, liberty, and dower. On the other side, there were claims which the common law would prevent from being asserted to the limit of the judges' ability to pick holes in them. For example, the courts of the 16th and 17th centuries sought to discourage actions for defamation by construing away the slanderous sense of scurrilous utterances when schoolbook logic and grammar permitted. A pedantic chapter of the law was written for the worthy end of repressing vexatious litigation. "Actions on the Case for words," having gained enough favor to get in the door, were rather disfavored when they threatened to overwhelm the courts with fishwives' quarrels. The "favor in law" enjoyed by Prohibitions will be subject to various tests, among which the strictness of procedural requirements is perhaps the most straightforward.

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In general, one does not expect a free and easy attitude toward procedure from the common law courts. Common law procedure was a complex inheritance of time and practice, in which the profession took pride and in whose mazes it won profit. The fine art of pleading was a monument to lawyerly skill and judicial conservatism, if also to pedantry and the greed of clerks paid by the page. Tenderness toward clumsy litigants was not typical. The Prohibition raises some special considerations, however.

In the normal run of life, a legal right may be seen as primarily a thing of value to the individual to whom it belongs. If one approves of a legal system, one presumably desires *on the whole* to see individuals assert the rights which the system gives them to the extent they desire. The social interest is *in a general way* identified with the successful vindication of rights. But if reasonable procedural rules (or other enabling rules, such as those prescribing the form in which a will or conveyance must be made) sometimes stand in the way of an individual's assertion of his rights, the loss is ordinarily thought of as falling on that person alone. The loss is a consequence of his failure to use skillfully the instrumentalities the law provides for him. It is not thought of as particularly harmful to society at large. Sometimes, however, more will seem to be at stake than the individual's advantage. In a liberal society, for example, "civil rights" might almost be defined as those rights considered to be especially tied up with the moral welfare of society as a whole. A judge who stretches the rules, say, to review the fairness of a criminal trial on *Habeas corpus* after ordinary opportunities for appeal have been allowed to pass may seem justified, whereas analogous stretching of the rules in everyday civil litigation would seem unduly lax. One could describe the difference between the two situations simply by saying that some rights are more important than others, but it would also be appropriate to refer to the wider *scope* of the interests involved, saying, perhaps, "The moral credit of the state and every good citizen's capacity to identify with his government will suffer if men are condemned to prison without a fair trial, whatever technical reasons there are against letting this man raise objections to his trial."

From one point of view, the rights asserted by the Prohibition are a straightforward example of rights in whose vindication society at large was thought to have a special stake. In theory, a man who sought a Prohi-

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bition was conceived as calling attention to an infringement of the "royal dignity." For practical purposes, infringing the royal dignity meant infringing the jurisdiction of the common law. In post-Reformation circumstances, that meant infringing the jurisdiction of *one* branch of the King's judicial system. In a practical mood, one might ask whether the general interest of society was especially involved with the jurisdiction of one set of courts, except in the sense that it is involved with the observation of the law as a general rule. I.e.: One might think it important for the lines of jurisdiction prescribed by the law to be upheld on the whole, but consider their occasional breakdown unimportant.

There is indeed a sense in which jurisdictional rules may be regarded as *especially* safe in the hands of individual litigants: If a plaintiff sues in the wrong court and the defendant makes no objection, society loses nothing in letting that court decide their case, no more than if the parties had resorted to an arbitrator by agreement. There is therefore nothing objectionable *per se* about a court's deciding questions which the general rules of law say are outside its competence. Therefore, one may argue, jurisdictional rules exist primarily for the benefit of such individual litigants as choose to take advantage of them and take the trouble to do so correctly. If a defendant is neglectful to claim his advantage in proper form, fairness to the plaintiff arguably requires that the latter be allowed the advantage of suing in the court of his preference.

This line of argument becomes less persuasive when the judges of one court have some sort of expertise that those of another lack. Within limits, that was true of the system we shall be dealing with. The ecclesiastical courts, Admiralty, and Court of Requests were manned by civilians -- i. e., men trained in the universities in Roman law, as opposed to the Inns-of-Court products who manned the common law. Owing to the existence of two separate legal professions, questions raised in the wrong court could come before judges without the appropriate technical training.

But several qualifications must be put on that objection to the argument that jurisdiction is a relatively indifferent matter from a public point of view. (a) Much litigation requires no special expertise because it depends on the ascertainment of facts. (b) Lack of expertise must not be confused with ignorance of another jurisdiction's law. We have asked: What does it matter if an ecclesiastical court, say, decides a given case or

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issue, considering that one party wants it to and the other has not properly taken the steps available to him to prevent it? *Of course* it matters if the case should be decided by common law rules. If the ecclesiastical judge presumptively does not know those rules and cannot discover them, then of course he should not be handling the case. But that begs the question. We *assume* that ecclesiastical judges may decide issues before them by their own law. We ask: So what?

There is a limited answer to that, a residuum of validity in the argument from the danger of inexpert judges. Suppose there is a subject-matter field in which the judges of one court have no training or experience. Their law has no such topic, nothing from which to draw a solution. Perhaps it would not be so bad, in that case, if the judges went by the law of nature. The trouble is, that is unlikely to happen. The judge confronted with a strange situation is likely to draw consciously or unconsciously on what he takes to be the relevant law of another jurisdiction. If the law is technical enough and the judge inexpert enough, a botched job may ensue. There is something a little worse — a little more unfair to even a negligent party — about an intended, but misconceived, application of positive law than about a decision honestly based on common sense and fairness alone. To apply this point realistically to the old English system: The English law of real property — to some extent other fields, but pre-eminently property in land — was a very special kettle of fish. An inexpert ecclesiastical judge faced by a property question of any complexity would have to be a strong man not to try to apply the common law and a quick study to do it right. (The other side of the realistic coin is that the chance of a *complex* property question's coming before an ecclesiastical court was slight. But we shall have enough of realism anon.)

(c) The danger of the inexpert judge diminishes if there are facilities for supplying his deficiencies. Actually, the old English system was rich in such facilities. Common law courts often decided cases dependent on questions of ecclesiastical law. Insofar as they believed that correct solution to such questions was necessary for their purposes and beyond their legal control (i.e., that they had no choice but to follow the ecclesiastical law as “given”), they took steps to inform themselves. They did not plunge recklessly into waters beyond their expertise. In some circumstances, ecclesiastical courts supplied definitive certification of a case's standing so far as it involved ecclesiastical law; in others, civil lawyers

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were consulted informally; in still others, they were admitted to appear as adversary-advocates on points of ecclesiastical law, informing the inexperienced judges as to where the ambiguities or disagreements in ecclesiastical law lay and what authorities could be urged both ways. With that much help, non-experts can do pretty well. For another example: The Chancery —though in our period manned by common lawyers at the top —was habitually careful to refer points of law arising in equity cases to the common law judges. In short, the system we are dealing with had practiced ways of dealing with the inexperienced judge.

Our argument for the "public indifference" of strictly enforced lines of jurisdiction obviously loses power proportionately as greater public value is given to uniformity throughout the legal system. A party perhaps has no complaint if, owing to his own negligence, his case is decided in Jurisdiction A differently than it and analogous cases would be decided in Jurisdiction B. But it is possible to see societal ill in anomaly as such - i.e., apart from whether A's rule is better or worse than B's, and apart from whether the source or tradition from which the one rule is drawn (common law, ecclesiastical or civil law, natural law) has a higher claim to general prevalence than that from which the other is drawn. Interjurisdictional anomaly as such may seem a vague threat to the cohesion or "oneness" of a society. (For an analogy: Is it bad, or less-than-optimum, if Ohio has a different rule than Kentucky on some point of law? If the legislature or courts of a given state are presented with the opportunity to create new law or resolve an ambiguous or unsettled point, ought they to have a high regard, relative to other considerations, for the law of other states where the law is better settled on the point in question? Is there a duty, *ceteris paribus*, to strive towards an "American law," partly in the interest of the metaphysical, but perhaps important, "national identity"?)

Such "metaphysical" concerns quickly fade into practical ones. We must adhere to our hypothesis: An *individual* who suffers the wrong court to decide his case has no complaint. If an ecclesiastical court says his lease is invalid, and in another suit a common law court says it is valid - well, the anomaly is his fault. But will other people, "innocent bystanders," perhaps be injured? Yes, they may be, though in somewhat subtle ways. The accumulation of anomalous results may have a deleterious effect on legal predictability. Grant that "the law of the jurisdiction" is the proper basis for projection. I.e.: If one is trying to design his conduct by

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estimating what the common law courts are likely to do, he should leave out of consideration what ecclesiastical courts are likely to do in comparable situations. But when confronted by complex or ambiguous problems, people may be tempted into irrelevance: "Leases of this sort have been held invalid by ecclesiastical courts. What a common law court is likely to do with one looks like anybody's guess. Well, I'll sue anyhow. Perhaps we can use the ecclesiastical results persuasively even though they are not strictly relevant." If this way of figuring is wrong -- i.e., if the common law court would adamantly refuse to listen to argument from the ecclesiastical results -- then someone has been led into a miscalculation. It could perhaps have been avoided by seeing to the enforcement of jurisdictional lines without regard for the behavior of individual litigants (i.e., by minimizing the chance that ecclesiastical courts would ever be invited to pass on leases -- a realistic example of the sort of thing that was often prevented by Prohibition.)

If the calculation above is *not* flatly wrong, there is still a disutility. The presence of avoidable anomalies -- and of multiple lines of cases in different jurisdictions, some clearer and fuller than others -- at least raises problems for the courts. Should they allow some persuasive influence to results outside the jurisdiction? If so, how much? If not in general -- in mere "like cases" - does the identical case raise a special problem? E.g.: A particular lease was found invalid by an ecclesiastical court, and now the very same lease comes in question in a common law case. Should the decision outside the jurisdiction be given a *res judicata* or estoppel effect? If not, should the court at least be disposed to produce a concordant result if possible? If not in principle, is there danger of its doing so unconsciously? Whether or not these questions seem especially hard to answer, and whatever the right answers, they *are* problems. Multiplication of jurisdictions deciding the same sorts of questions, insofar as it can be avoided, creates openings for litigants and their lawyers who might otherwise be persuaded to settle. For the courts, it creates legal problems of such an order of abstraction that they may be hard to resolve consistently.

The gravity of those problems partly depends, however, on the strength of the offsetting institutions discussed above in the context of the "inexpert judge": i.e., the effectiveness of communication within the legal system. In addition to the examples of intercommunication above, and better for immediate purposes, is the situation presented by the principal courts,

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the King's Bench and Common Pleas (to a lesser degree the Exchequer, because it was a more specialized court). Historical accident and competition produced two courts with very nearly concurrent general common law jurisdiction. The King's Bench and Common Pleas each looked to its own precedents and usage—to "the law of the jurisdiction". There was some risk that one court would insist on its own usage in the face of explicit conflict with the other. But the risk was minimized by prevailing habits and institutions. Decided cases in the other principal court were highly persuasive—perhaps, at a time before *stare decisis* was a strict principle, virtually as persuasive as cases within the jurisdiction—and the mere clerical and procedural usages of one court could also be influential on the other. In addition, the judges of one court often consulted with those of the others in doubtful cases—either informally or by adjournment into the Exchequer Chamber for definitive decision by all the common law judges. Communication and cooperation among the common law courts was of course relatively easy. The judges shared one allegiance to the common law and one profession, saw one another all the time through their highly collegial societies (including the "judges' club," Serjeants' Inn), and exercised jurisdiction in error over each other (which put an obvious premium on avoiding conflicts that could lead to reversal). Avoiding conflict *de facto* would not have been so easy as between common law and non-common law courts, had the latter been freer to create it than they actually were. But the very existence of channels for conflict-avoidance within the common law system would have served as an example and a pressure, an emblem of a frame of mind much readier to say "Get together" than "Go your own way, come hell or high water." The model of cooperation within the common law system probably had a beneficent influence on relations with the Chancery. So with the Star Chamber, whose peaceful coexistence with the major common law courts through most of its career was based on the role of the Chief Justices as advisers to the court.

The civilian courts were farther removed from the professional milieu of Westminster Hall and the Inns of Court. Even so, it is hard when one comes down to it to imagine their developing much law of their own on common law subjects, assuming they had had greater nominal opportunity than they did. The examples above are deliberately unrealistic. The chance of ecclesiastical courts' leading the way with respect to the validity of a certain kind of lease would have been extremely slight. Given

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common sense preference for avoiding conflict, reinforced by habits of cooperation in analogous contexts, ecclesiastical courts left free to pass on leases from time to time would probably have looked to the common law for advice. Aside from all else, there was where the relevant, persuasive law on ordinary secular relationships was to be found. On subjects *of that sort*, most of the traffic would have been one-way. Other subjects, principally ones with a distinct ecclesiastical flavor, such as the law of tithes, are a different story. There were true conflicts between ecclesiastical and common law—cases in which to prohibit was to cause an issue to be resolved one way, and not to prohibit was to allow it to be decided otherwise. My point here is only that opening the way to *more* parallel case-lines than there were would not necessarily have added significantly to the incidence of legal conflicts.

In the limited areas where non-common law courts regularly decided the same sorts of questions as the common law courts, there is little to suggest disturbing substantive "static". For example, the Admiralty decided a lot of contract cases, having unexceptionable jurisdiction if the contract was made on the high seas. It clearly entertained many suits on contracts not made at sea, simply because the defendant had no motive to bring a Prohibition. No one would have disputed the Admiralty's general right to go its own way, and it presumably did so to a degree, as by giving allowance to mercantile custom in ways the common law would not. There are contexts, however, in which objection to the law of contracts applied in the Admiralty on the ground that it violently conflicted with the common law would tend to come out if it existed. (E.g.: The courts were inclined to see acquiescence in the Admiralty's jurisdiction when a defendant did not seek a Prohibition on local grounds --"not on the high seas as alleged" -- as soon as possible. That inclination suggests basic faith that the Admiralty would settle the case as the common law would.) I am inclined to infer that the Admiralty maintained fairly satisfactory working contact with the common law. In many ways the mixed English system of laws and jurisdictions conditioned to avoid the conflicts it invited.

From one angle, the ecclesiastical and other civilian courts may be seen as wanting full membership in the "club," including participation in its channels for minimizing conflict. In the controversies over Prohibitions, they tended to suggest that they were less likely than the common lawyers assumed to run off in their own direction. The suggestion was

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only half-ingenuous, for of course they wanted jurisdiction primarily because certain bread-and-butter interests would prosper better in their hands—the parson's interest in his tithes, the hierarchy's interest in its authority. To some degree, such interests would do better in ecclesiastical hands for incidental reasons --because ecclesiastical *procedure* would tend to favor parties asserting them, because common law juries unfriendly to ecclesiastical interests would not get the chance to subvert them by unfavorable verdicts. Part of the point, however, was to enable ecclesiastical courts to apply substantive rules that *did* conflict with the common law. On the other hand, as I have argued, there were areas in which the possibility of creating new conflicts by giving non-common law courts wider scope was probably more theoretical than real. There is a sense in which the idealized or propagandistic case for fuller acceptance of non-common law jurisdictions --i.e., for fewer Prohibitions - could take advantage of that point.

Idealistically or propagandistically (both modes figure in the picture), defenders of the non-common law courts wanted the mixed legal system to be conceived as a *mere* division of labor. The system should be seen as an organic totality. All courts were agents of one king, partners in a common enterprise of governance. Of course each court should stay within its bounds, each member discharge its own special function and only that. Jurisdiction is certainly not unimportant. In controversy, both sides accepted its importance, disagreeing as to who failed to perceive and stay within his proper bounds. On the other hand, the purpose of dividing a common task --and insisting as a general rule that each participant stick to his special function --is only to get it done as well as possible. The end presupposes more than an efficient division of labor and self-restraint by separate participants. It presupposes trust that each part can and will have regard for the welfare and purpose of the whole. An aspect of that is trusting all parts to cope with moments of disequilibrium, as it were --when one part is a little freer than usual to follow its own bent or operate without the supervision of the part whose function is to supervise.

The point to be made here is that this way of thinking acquired a certain color from existing institutions of collaboration and from assumptions so basic to the English legal system that they hardly required stating. There is a sense in which being opposed for practical purposes to the interests and point of view of the common law was almost never a matter

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of being flatly "anti-common law." It testifies to the common law's strength that most rivalry with it started by conceding its seniority, copiousness, and right to lead the way. There is a very basic sense in which the common law *was* the law of England, by everyone's consent. Rivalry with it tended to take the form of claiming that the common law was not really threatened by other jurisdictions --that its rules would be followed by other courts when cases to which they were straightforwardly appropriate came up, and that its "spirit" would in any event be respected. The most striking example of this comes from the common law's relationship with the Chancery. Although practical habits and mechanisms helped keep conflict down, there were episodes of trouble. There was also an element of persistent doubt as to the legitimacy of separate courts of equity. In consequence, there is a certain amount of literature in defense of the Chancellor's equitable jurisdiction. The significant point about it is that before Hobbes and a few other Interregnum writers there is no such thing as a *real* defense of equity --i.e., a frank argument for the superiority of the style and assumptions of equitable jurisprudence over the custom- and precedent-oriented jurisprudence of the common law. From St. German in the early 16th century on, "defense" was a matter of playing down the appearance of conflict between equity and the common law; of struggling to make good on the pious platitude that equity "follows" the law and fulfills it; of making out that the common law's supremacy was unchallenged by its equitable supplement. In that line, there was a good deal of double talk and cloudy thinking. It contained wishful thinking, and also realistic thinking --for it amounted to the clumsy theoretical counterpart of many working arrangements, whereby equity not only consulted with the common law, but treated a core of common law rules as immune from equitable scrutiny.

To conclude: What the ecclesiastical-civilian courts wanted was not innocent. It cannot be reduced to "full membership in the club," to being trusted to follow the common law whenever the opportunity not to occurred and whenever common law rules were straightforwardly applicable. (Neither was equity in fact innocent of overriding *some* common law rules.) But there was an implicit theory on the non-common law side which said two things: (a) predictively, or wishfully, less stringently prohibited courts would not permit multiplication of conflicts with the common law; (b) ideally, all courts ought to be expected so to work together that their shared end would be fulfilled --*affirmation of well-settled and*

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important common law rules, and hence basic consistency within the system, being part of that end. With respect to our immediate question -- Does the public interest in consistency throughout the system justify enforcement of jurisdictional lines even in favor of procedurally negligent parties? - subscription to the "ideal" part of the theory arguably ought in itself to influence conduct. I.e.: Even if one were not sanguine about avoiding conflict *defacto*, one ought perhaps to take a certain risk for the sake of affirming the ideal and giving it a chance to work on judges' consciences. The risk might pay off in the evolution of a *modus vivendi* comparable to that obtaining between the common law and equity --not *perfect* absence of conflict, but delimitation of conflict such as to encourage the myth that it did not exist at all. In a real sense, the Chancery belonged to the club. It enjoyed the benefit of a clubby spirit - the imputation of harmonious intentions in spite of a certain amount of ill-will among the members. Should one try to bring the ecclesiastical-civilian courts under the umbrella of that spirit, as they wished? Should an effort be made, even in the face of dubiety, to recognize the community of interest and intent that ought to prevail among all the King's courts in these latter days? (In these latter days, remember, the Church was integrated with the state, so that the ecclesiastical courts were no longer instruments of a foreign power --an imperialistic, usurping power, all right-thinking English Protestants believed.)

We have now considered two objections to the thesis that there is not a very strong public interest in 100% enforcement of rules on the distribution of jurisdiction within a mixed legal system --(a) the argument from inexpert judges; (b) the argument from the inconvenience of multiple case lines. Both have merit, but both are subject to qualification in application to the particular mixed legal system we are concerned with. A third argument is less precise and more portentous.

Everyone has an interest in "good justice," or the best possible justice. Even those who neglect to insist on it for themselves should enjoy it. "By-standers" should be able to believe that the society they are members of does its best to insure it to all who become involved in justiciable controversies. The best reason to enforce the lines of jurisdiction, even for the benefit of parties who neglect to insist on their enforcement in proper form, would be the belief that justice according to the law is really less likely to be obtainable in one jurisdiction than in another. But the best of

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reasons is also the hardest to be frank about. Waiving the special problem of the inexpert judge: The morale of a mixed legal system depends on trust in the basic capacity of all courts to supply equally competent justice --to ascertain disputed facts as reliably as possible, to weigh legal arguments with care and informed rationality, to observe impartiality. Different courts may have different rules, procedures, and methods. People may argue academically that one way is better than the other. But if the mixedness of the system is to retain its legitimacy, there must be confidence that all routes lead to substantial justice, subject to the randomly distributed human failings of the judges and lawyers who travel different ways. Things are bad if it is widely believed that some courts with an unquestionable "positive" place in the system are in fact very poor instruments of justice. If one believes that, one can only believe that those courts are degenerate heirs of institutions that once had value, or true heirs of an irrelevant past --unless they are usurpations of the seat of justice in some still simpler sense. If offending members cannot be immediately cut off or reformed, they ought at least to be restricted by such means of jurisdiction-control as are available.

In the community at large, such beliefs are dangerous to social cohesion, but there is no preventing their being held if they happen to be, however justifiably. The legal community -- those responsible for administering some particular sector of the mixed legal system, those charged with the control of the jurisdiction -- is in a special position. Distrust in the basic availability of justice in some parts of the system may exist *de facto* within that community, but it cannot be admitted. At any rate, feelings must be very strong to be acknowledged openly. Their truth and fairness must be very strongly believed in. For administrators of law in a mixed system have a clear duty to do what they can to foster confidence. If you like, they have a duty to pretend, if necessary, to what they do not believe. The duty is partly owed to the people they immediately serve. It does no good to say or seem to say, "I must regrettably remit your case to Jurisdiction X. I wish I did not have to, for I have very little confidence that you will get a fair trial there." Pious fraud it may be, but it does the addressee no good to undermine whatever naive faith he may have that the arcane zigzags of the law pursue the contours of justice. To subvert the same faith in "bystanders" is at best to play politics from the Bench.

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Nor should the Judge's own reputation be put in jeopardy. "I must unfortunately dismiss you to an unjust fate in another court" passes quickly to "I am the sort of judge who cares about the letter of the law, justice be damned," or "I am a judge who is generally capable of cynicism -- capable of believing that what we do here is something less than the closest attainable approximation to justice." Pious fraud it may be, but surely it is desirable that judges be believed to believe that there is no better justice than intelligent dispensation of the law they administer.

Finally, the legal community owes a duty to the legislative process. In one way, that duty qualifies the faith or profession of faith a judge owes to the law. In another way, it is part of it. The judge has scope to say, "The road of the law seems to me to end somewhere short of attainable justice. Nonetheless, I must follow it, for extending or redesigning the road is the legislature's business." Yet the tone in which he says that should not imply a grudging positivism. "This is a terrible rule, but, alas! I must consign you to an unfair trial." For not only are the facilities for law-amendment part of the law to which faith is due -- so that belief in the correspondence between existing law and justice acquires part of its justification from the law's openness to change. (As if to say: "Insofar as the law is not optimally just, yet it is potentially juster. It is a thing being tried out, the object of no final commitment -- as a good man is good partly because he stands "under correction." Needless to say, a man detracts from his goodness by being as bad as he can imagine, subject to correction. He may also detract from it by trying too hard to improve himself -- not abiding the intervention, whether of mature conscience or an external authority, on which he has let his experiment in a manner of life depend.)

Not only is the law's openness to change part of the law -- and part of its righteousness. In addition, the legislature's silence, its acquiescence in what may seem less-than-optimum justice, is an important check on private judgement, an important reason for the judge to doubt, qualify, and repress his own sense of discrepancy between the law "as is" and as it might ideally be. One need not say that the voice of the whole community represented by the legislature is right, though perhaps one should be ready to entertain the possibility that it is righter than oneself. The clearer duty is to take that voice as an indication of the community's available sense of justice -- if you like, of its tolerances, compromises and imper-

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fection. If the legislature leaves the law in a given state, some level of satisfaction with the law is implied -- positive satisfaction, rough or grudging satisfaction, absence of the kind of consensus that legislated change tends to require, or absence of such passion for reform in some sector of the community that change can emerge from the trading-off among sectors and interests that is intrinsic to the legislative process. As the courts have a duty to foster confidence in the law's basic concordance with justice, so they have a duty to encourage people's acceptance of the legislative voice. "It is just because the legislature suffers it to be" is at weakest shorthand (or pious fraud) for "whether or not the treatment you receive is really optimum justice, your membership in the community es-tops you to claim a more perfect form of justice than your community can bring itself to demand."

To apply the last point to the system we are immediately concerned with: Parliament had unquestioned power both to define the lines of jurisdiction and to regulate the law applied in the several jurisdictions. With specific regard to the ecclesiastical courts, the Reformation had insured that statutes could impose on those courts any substantive and procedural rules Parliament saw fit. Although there were special problems as to how it should be done, statutory restrictions on the freedom of ecclesiastical courts were enforced by Prohibitions. The same points apply equally to other non-common law courts, including courts of equity. In short, there was no basis for contending that the quality of justice outside common law jurisdiction failed to enjoy the approval or sufferance of Parliament -- whether or not it was optimum. Moreover, the theory of Parliament was precisely such as to give sanction to the ideas stated abstractly above. The idea that justice is what the legislature says it is a "Hobbist" idea (not held in an unqualified sense by Hobbes). It was not part of the legal culture of 1600. But the proposition that an act of Parliament is every man's act was an ingrained platitude of that culture. Its function was to say what I say above: Men cannot be allowed to divorce themselves from the body of the community by holding up a standard of justice the community is unable to embrace. If judges in a democratic society owe a certain "positivism" to democracy (i.e., the duty to commend people to the processes of democratic politics if they would change the existing law), the judges of an undemocratic society permeated with a corporate, communitarian ethos owed and acknowledged a duty to reinforce men's identification with the community. The mixedness of the legal system was part of

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England's inheritance from the ancestral community. It enjoyed the continuing approbation of the living community. It provided justice up to the standard those communities were able to embrace. So, I think, the judges we are concerned with were bound to hold -- by their situation, their ethos, and their "faith." As I have been arguing, however, these ideas can be given a special backhanded application to problems of jurisdiction; if it is benign for Jurisdiction X to handle the cases the rules of the system unquestionably assign to it, it cannot be too unbenign for Jurisdiction X to handle a few more. Allowing a court any jurisdiction at all implies faith in its basic capacity to do justice. Therefore any cases which "spill over" to it (by virtue of such arguably valid principles as insisting on procedural correctness and making a certain presumption in favor of the plaintiff who chooses a given court) must be supposed to be in good hands. The very beneficence of the system militates against the necessity of 100% enforcement of rules defining the internal division of labor.

There is, however, one important countervailing argument. Suppose that in the non-legal community there really is strong and widespread lack of confidence in one part of the judicial system. As I have argued, the legal community has a duty to work against such feelings so long as the law provides a mixed system and the legislature takes no note of inadequacies in any part. But perhaps there comes a point at which the stronger duty is to accept incorrigible public opinion, hence to take advantage of every opportunity to prevent parties from being remitted to what will be widely regarded as inferior justice. At that point, the lesser evil is to forget about maintaining the integrity of the whole system and do what one can to prevent breakdown of confidence in the jurisdiction-controlling part of the system. Better, that is to say, to acquiesce in the public's disbelief in the non-common law courts than to endanger the common law's reputation for caring about justice. It would be understood that turning cases over to the non-common law courts could often not be helped; the pretense that there was no public interest in keeping as many cases and issues as possible out of those courts would not be accepted.

Was there then in fact "strong and widespread lack of confidence" in the non-common law parts of the system? As a question about public opinion, I can only answer it impressionistically. The degree to which the common law courts shared or acknowledged such lack of confidence, or the degree to which mistrust entered into their judicial behavior, at least

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in principle lends itself to a more precise approach through all the cases following. We must reserve judgment on that. All we can do here is adumbrate the attitudes that probably were in the air, part of the atmosphere in which the courts had to perform their delicate tricks of balancing value against value. The following claims to be nothing more than my best guess.

Three non-common law jurisdictions were subject to Prohibition: ecclesiastical courts, minor equity courts, and the Admiralty. I can see practically nothing to suggest that the Admiralty was suspect on the score of its basic capacity to do justice. Its heavy users, merchants and shippers, including many foreigners, probably considered it a fair and expeditious court, comparing favorably to the common law. *Apropos* of all the non-common law courts, one must beware of inferring mistrust of the quality of justice from the mere occurrence of Prohibitions. Parties will inevitably maneuver for advantage -- if not to wear the other party down by sheer maneuvering, then to get their case to a court where for all sorts of reasons they think they will fare better. People frequently prohibited the Admiralty, without necessarily distrusting it. *Per contra*, the Chancery was never prohibited, yet by 1600 there was certainly a vein of opinion to the effect that Chancery procedure was abusively long-winded and expensive (which may, of course, mean "over cautious in the interest of fairness"). The lesser equity courts that were frequently prohibited -- the Requests and regional councils -- were probably not models of procedural rectitude and high judicial standards, but they were valued by plaintiffs as supplementary agencies of a heavily burdened legal system (as the never-prohibited Star Chamber was). Popularity with plaintiffs is a symptom of people's basic trust in a court's brand of justice, though not a sure-fire test. (Plaintiffs with weak cases have a motive to gamble on low-quality courts -- the worst they can do is lose on claims that would be more likely to lose in a better court. If low-quality courts -- say the Requests as compared to Chancery -- are considerably cheaper, people have a motive to go there even if the court's reputation is not spotless.) On the whole, subject to the great uncertainty that surrounds these matters, I doubt that the secular non-common law courts suffered from pervasive dislike and distrust -- from dislike and distrust going so straight to the quality of justice that many would have said, "It were better if those courts were abolished."

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The ecclesiastical courts were at least the object of much more complex attitudes. We may distinguish three main ways of seeing them in an unfavorable light: (a) They had certain objective strikes against them. Most important, they were not, as it were, "formally" impartial courts, however fair they may have been between party and party in practice. In the last resort, they were courts of a privileged franchise -- privileged to protect the corporate interests of the church by way of their jurisdiction over ecclesiastical persons and so-called "spiritual claims." To take the most typical of cases: When a parson sued for his tithes in an ecclesiastical court, he was in one sense suing for himself. For all we know, ecclesiastical courts on the average were scrupulously fair between parson and parishioner in disputed tithe cases. Nevertheless, the suspicion of bias in practice was inevitable because bias of a kind was built in. The church had a corporate interest, across the board, in seeing that claims to tithes succeeded and defenses failed. For thereon depended the Church's collective capacity to support its ministry and perform the work of God. When one man sued another in the Admiralty, the court had no interest in who won. If the Court of Requests was sloppy about fact-finding and over-eager to provide equitable remedies (I do not assert it was either, but if it was), still the court had no interest in anything but justice by its imperfect lights (unless one counts the interest in attracting business by providing relief, a temptation to which any court is open). In many cases within its undisputed jurisdiction, though by no means all, the Church had a long-run interest in the outcome, however successful its judges were in ignoring that interest. (The best modern analogy is a regulatory agency with judicial powers. However scrupulous between party and party such tribunals are, they are usually identified with some sector of the public interest deemed worthy of special protection -- as the Church was with what in its time was the most undisputed of public interests: providing for the ministration of religion. No such agency can quite enjoy the putative indifference of a court of general jurisdiction -- the supposed concern for nothing but "calling the shots" in cases of many varieties, which, as it were, appear out of nowhere, stated for decision as the parties plead. It should be noted that the Church was not the only judicial authority in the old English system with a "special interest" orientation. Franchises, manorial courts, "courts" that were also administrative agencies -- including the Exchequer and Court of Wards: such bodies were also ambiguously bound to do justice between party and party *and* to look out for corporate, private, or royal interests. The system made demands on people's capac-

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ity to trust the interested to be indifferent. We should speculate on their attitude toward the Church in awareness that they were not conditioned to a "liberal" preference for courts of general jurisdiction, as modern people heavily dependent on bureaucratic justice are not. On the other hand, the Church courts may have served as the main archetype for what emergent "liberal" attitudes were coming to question.)

A second problem for the ecclesiastical courts derived from the Reformation's failure to reform them. The intention of doing so in a thorough way sprang from the Supplication against the Ordinaries, persisted through Cranmer's lifetime, and failed to get off the ground again under Elizabeth. It is not at all easy to say what the consequences of neglect were for the objective quality of justice in the ecclesiastical courts. However that may be, the failure to carry through a conscious remodelling must in itself have had an adverse effect on the courts' reputation. How much reforming in the sense of *changing* they needed is an open question. But their legitimacy under the new Anglican order surely needed to be established by a comprehensive act of codification and reemphasis. That was the proposal when the Reformation was young: to go over the ecclesiastical law systematically; to decide what parts of it should be retained, dropped, or amended; to come forward with a code for the future which would enjoy the sanction of the state and represent a consistent system for the whole realm. As things turned out, the Church courts were left to find their own way, drawing on their pre-Reformation tradition, subject to the considerable body of new legislation that impinged on them and to such shake-ups of tradition as the abolition of formal university training in canon law. Under these conditions, the courts could hardly escape the stigma of heirs of the "Popish" past -- in some measure, of guilt-by-association, of being "up to no good" in all the unspecified ways the prejudices of a Protestant culture were disposed to assume. In addition, the absence of "codification and reemphasis" left ecclesiastical law open to the imputation of uncertainty and inconsistency from court to court. However much practice belied the suspicion, it is probable that people felt less sure of where they stood in the ecclesiastical courts than in the secular, that they warrantably or unwarrantably felt that to become involved in litigation there was to be plunged into a world where black-letter guidance and informed advice were less forthcoming than in the environs of Westminster Hall. Such feelings are not equivalent to distrust in the courts' "basic capacity to do justice," but they trench close to it.

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(b) *De facto*, apart from the built-in disadvantages to which they were subject, ecclesiastical courts obviously did not enjoy a brilliant reputation with the man in the street. Let us put it that way and soon surcease, for this topic -- the sheer mass of popular prejudice -- is too large to deal with properly here. It is hard to discriminate the justified from the unjustified in that mass of prejudice, hard to discount the element of mere interest-edness. People who got in trouble with ecclesiastical courts were going to find reasons for disliking the treatment they received. Many of the functions of ecclesiastical courts were intrinsically invidious -- e.g., their role as tax-courts deriving from jurisdiction over claims to tithes; their criminal jurisdiction over moral offenses, including the defamatory imputation of such offenses, whereby people were called in question about intimate aspects of their lives. Apart from the more articulate religious objections (discussed below), ecclesiastical courts stood directly in the line-of-fire of all those attitudes we vaguely label "anti-clerical." Perhaps the tap-root of "anti-clericalism" is the inevitable discrepancy between pretense and performance when men of God get involved with the world. If the Church does not withdraw to some safe Sion -- if it aspires to make its authority felt in the Cities of the Plain -- it is hard to put to escape the grubby roles of cop and tax-gatherer. At best, one cannot stay clean in those roles. Coercive authority must make decisions in ambiguous cases and be satisfied with the rough procedural justice of this world. It cannot be above reproach, and yet churchmen cannot expect to be judged by standards no higher than those which concede a grudging acceptance to the imperfections of secular justice. Their flesh and blood shortcomings are magnified. Every failure to furnish justice at least as good as temporal courts supply looks larger than it perhaps is, for churchmen should aspire to do better. A tradition of cynicism develops, passes from generation to generation, from the pre-Reformation world to a world less evidently reformed than it is cracked up to be. An inheritance of "anti-clericalism" colors men's encounters with the Church's courts. What one experiences or witnesses is filtered through "negative expectations" -- through the image of meddlesome and greedy bishops; authoritarian clerics, puffed-up, readier to snare and fleece their sheep than lead them beside still waters; parasitic laymen -- the civilian crowd -- taking their corrupt price for doing the clerics' dirty work. In short, there was a fund of ready-made responses available to anyone with reasons of his own to object to the ecclesiastical courts. It is accordingly difficult to evaluate the hostile expressions that occur in the 16th and 17th centuries, as they

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had before. How widespread, how serious, how freshly responsive to real experience, how disengaged from private grudge or party purpose were such expressions? Was "you'll never get fair treatment there" a really pervasive attitude, however conditioned by prejudice? Or was it more typical to think of ecclesiastical courts as no better or worse than officialdom generally -- to be borne, as likely as not to treat people as they more or less deserved? It is hard to say. My guess would be that complaints occurred enough to signify something -- that there was enough ingenuous experience of venality, delay, unfair procedure, and legal uncertainty to reinforce the fund of prejudice, and enough reiteration of stock complaints to reinforce their credit. On the other hand, one should not be too hasty to infer massive distrust of ecclesiastical justice from even a considerable body of hostile talk.

(c) Puritanism was opposed in principle to ecclesiastical jurisdiction in anything like its traditional form. That is to say, there was an articulate minority position which took off from, but transcended, stock misgivings about churchmen in the world. Insofar as Puritan propaganda influenced people outside the movement, it reinforced the fund of "negative expectations." Insofar as Puritans were objects of public hostility, they may have given the reputation of the bishops and their courts a helping hand. I suspect the first flow of forces was the more important, just because the "fund" was there to be augmented.

It is a mistake to suppose that Puritans objected to ecclesiastical courts only because they tended to be in trouble with them. They certainly complained for that reason, the more effectively because they were equipped to take every just and unjust offense against themselves as a malevolent stroke at God's people. But they also had purer objections. The original and controlling idea of orthodox English Puritanism (orthodoxy must be carefully distinguished from the Independent, sectarian, and proto-liberal offshoots of Puritanism that became so prominent in the revolutionary decades of the 17th century) was that true doctrine deserved and demanded true "discipline." "Discipline" -- the government and rites of the Church, the whole mode of organizing the *opera* of the Church of Christ in and on the real world (as distinct from its naked *fides*) -- meant different things in different contexts. It persistently meant, I think, whole-hearted refusal to accept ecclesiastical jurisdiction as inherited from the Catholic past (partly, of course, *because* its ancestry was "Popish") and as

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domesticated under English Erastianism. As the word "discipline" suggests, the Puritans certainly did not propose giving up the coercive powers and state backing that the Church already enjoyed. Their essential dialectical formula may be stated this way: To be effectually disciplinary -- to coerce to some purpose, to "make a difference," save souls and glorify God -- the Church must liberate itself from the forms of ordinary secular coercion. The existing form of "discipline" -- the judicial system of the Church of England--was both too weak and too strong. It was perverted both ways because it was not *sui generis* -- the *Church of Christ* working on the world for its unique ends, by its unique means. The existing system was a mere *simulacrum* of temporal justice. In one direction, it abused the awful and unique powers of the Church by using them for ends that could just as well be accomplished by secular law. In another direction, it abused the sanctions of the Church -- especially its ultimate weapon, excommunication -- for workaday purposes. Lacking other sanctions and condemned to a misconceived role, the ecclesiastical courts cut men off from Christian communion to enforce process. Like other mere courts, they would let a sinner off on a technicality. They would punish a man for a trivial offense without exhausting the resources of admonition. Having punished him by sanctions which for the submissive were very mild, they would send him hence to sin again, caring nothing for his "rehabilitation." For ordinary temporal courts, it was enough to care about a man's "body" -- acquit him if he's innocent as charged, convict him if he's guilty; if you don't hang him, lock him up or flog him, and when he has paid his price let him go. The ecclesiastical courts, charged with men's souls, were institutionally unequipped to care about anything but "outward flesh," plus costs.

The Puritans were not precise by lawyerly standards about what they would substitute. Perhaps they were starry-eyed to put their trust in the general alternative they had in mind -- reinvigorated local congregations that would bear down both hard and mercifully on local sinners; local authority checked and kept on its toes by a Presbyterian hierarchy; the new ecclesiastical system meshed with the state more effectively than the old -- less overlapping in functions, methods, and personnel; supplementing temporal law by spiritual discipline, instead of adding "more of the same"; better able to call on the State for necessary Christian purposes because less mixed up in its temporal business. Right or wrong, the Puritans levelled a real attack on "misplaced ecclesiastical legalism."

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Traditional "anti-clericalism" aimed vaguely at the same thing, but the Puritans were much more precisely on target, much abler to conceive a concrete alternative to "the King's spiritual jurisdiction," if not quite to come down from the clouds of idealism and deliver a blueprint. At least some people in the England we are concerned with were beyond commonplace trust or distrust in the ecclesiastical courts. At least some people, with an indeterminate influence on others, were so disposed to see the whole system of ecclesiastical law as illegitimate that nothing the ecclesiastical courts did would be favorably, or perhaps fairly, judged. I suspect that this disposition among Puritans was constant and cumulative -- i.e., that it did not fluctuate with the ups and downs of the overt "Presbyterian movement." I doubt that the dwindling of hell-bent Presbyterianism and the achievement of something of a *modus vivendi* with the Establishment in the pre-Laudian 17th century imply a diminution of the hope that someday, somehow, ecclesiastical legalism would give way to a Gospel *modus operandi*.

Over against negative attitudes toward non-common law courts, at least the ecclesiastical system, we should consider notably affirmative ones toward the common law itself. On the one hand, there was a body of feeling, however pervasive, that would tend to distrust the quality of ecclesiastical justice, or, short of doing that quite pointedly, at least to see a strong public interest in keeping the churchmen and their minions in the narrowest possible room. Was there on the other hand a pervasive disposition to prize and celebrate the common law, even to overrate it? Was there a tendency in the larger community, if not necessarily to doubt the non-common law courts' *basic* capacity to do justice, at least to think that the common law provided consistently *superior* justice? When they were confronted with jurisdictional problems, did the judges hear voices telling them that every effort should be made, even in behalf of negligent parties, to allow men the special blessing of common law determination?

Here again, one must deal cautiously with appearances. It seems to me that there are three main clusters of attitude to be considered: (a) In a general sense, the reputation of the common law undoubtedly took on a

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new glow towards the end of the 16th century. For that iridescence, Sir Edward Coke was largely responsible, though, as with all key intellectual figures in history, it makes a question how much Coke contributed from the idiosyncratic resources of his own mind and personality and how much he formulated and reflected a point of view that was becoming commonplace in his culture. This is not the place to deal with the huge complexities of the phenomenon. In very sketchy terms: I think there was a coalescence, in the first instance, between an extremely high-level (or vague) shift in the "cultural mood" outside the legal world and changes within that world. In the second instance -- though this only happened slowly, in cumulative response to the unhappy experience of Stuart government -- the product of that coalescence passed into politics. There was something of a "nativist revival" in late-16th century England, something of a reaction away from the more cosmopolitan orientation of Renaissance humanism and the original Protestant movement (the dominant themes of earlier Tudor culture). The trend can be seen on the level of "vulgar patriotism": -- in consciousness of England as a "Chosen Nation" (essentially because she was the major Protestant nation-state), reinforced by her role as successful champion of the Cause of Light in the great war against Spain. It appears in Anglicanism's heightened sense of itself from Hooker on, in the British mythology of the *Faerie Queene*, in growing interest in national antiquities and topography. In the legal world, the spread of printing made the sources of medieval English law more accessible to the profession just as its members became more generally educated and its collective prestige crested. The Inns of Court came into their heyday -- reflecting the status-value English legal studies already had, and throwing some of the lustre of new social fashionableness back on the serious lawyers. "The third university of England" (i.e., the Inns) is a meaningful phrase: Studying Gothic law in medieval French (or at least ostensibly poring over Littleton) could hold its own -- as intellectual discipline and gentleman's pursuit -- with the international learning of the Schools and the classics.

It was in the light of such a cultural reshuffling, inside and outside the law, that Coke could seriously call Littleton's *Tenures* "the most perfect and absolute work that was ever written in any human science." Lawyers achieved a sharper, better-informed consciousness of their distinctive tradition, and a pride in it that was both more exaggerated and more intelligent than their ancestors'. Such consciousness and pride were not new.

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The distance that divides Sir John Fortescue's 15th century *Laudes* of English law from the "legal nativism" of Coke's generation (like that between Littleton and Coke-on-Littleton) is distance on a single road. By and large, the road ran straight in the 16th century, cumulating toward the accretion of knowledge, sophistication, and business that gave common lawyers and their art the unique prestige and confidence that called forth Coke. That is to say, it did not go underground to avoid "Tudor despotism." The Tudors were careful to stay on the right side of the common law, and the increased dependence of a magnified state on the technical services of lawyers was a major factor in the accumulation of professional prestige. The true story of "English law and the Renaissance" is not a melodrama -- a narrow escape from reception of Roman law and displacement of traditional courts by new prerogative agencies. It is rather the story of steady development of the native legal tradition, offset in reality and obscured to the eye by the competition of new intellectual interests, new career-paths, and preoccupation with foreign and religious politics (as distinct from constitutional issues). Saving our reverence for the middle ages: Fortescue praised English law (and Littleton wrote his practical primer on land-law) in a thin culture -- the old-fashioned world of international Catholicism, clerical universities, an aristocracy still civilized primarily by the European ethos of chivalry. The "discovery of England" implied in Fortescue's realization of the distinctiveness and greatness of the common law is very significant. The rediscovery in Coke's generation is significant in a very different context. The consciousness and pride of "legal nativism" reemerged on top of a much more crowded scene. If the lawyers furnished a "third university," it was over and above two others doing a big business in lay-gentry education. In Fortescue's day, legal education for the well-born (to which he pointed with pride) stood more nearly alone as a layman's path to book-learning. Littleton wrote a craftsman's manual, reflecting the high development of a native English craft; Coke exaggerated its "scientific" virtues because for him the common law had portentous claims as against its cultural competitors; the commentary outweighs the text in proportion to the distance in self-consciousness between "legal nativists" a century apart.

In sum: On the vague but important plane of attitude/association/reputation, the common law ca. 1600 had acquired the status of Good Thing to an especially acute degree. The profession's sense of itself and its subject matter fed into the lay community with exceptional ease, owing in signifi-

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cant measure to the institution of sub-professional legal education at the Inns and the contact with the law to which an active lay magistracy was exposed. Reinforcement came from a diffuse "nativism." As the century went on, further reinforcement came from political feeling. The sense in which the common law was a Good Thing was enriched by association with the English political tradition that embraced it -- the English political tradition that was increasingly perceived as threatened. Nothing could have given "nativism" a bigger boost than the accident of a foreign King. James I's specific quarrels with the lawyers helped focus patriotic attachment to the common law he failed to understand. His larger political infelicities forwarded the alienation of a substantial part of the community -- most notably participants in the local and legal power-structures which the Central government could not effectively control -- from the King and his courtiers. The disastrous acceleration of that process under Charles I produced a revolution. In the mentality the Great Rebellion hatched from, loyalty to the common law as a portentous Good Thing was profoundly and confusedly intermixed with political phobia. The English political tradition was perceived as threatened, both justly and paranoically; the common law and its mythic offspring Fundamental Law were seen as the ground of an English "inheritance" beset by alien and "innovative" forces.

These large phenomena have a clear bearing on our immediate concerns. In some degree, the judges must have felt a pressure -- from within their professional souls and from the attitudes of the public -- to favor common law jurisdiction just because the operations of the common law were wrapped in favorable associations. Ironically, the stigma of foreignness may have adhered the more stubbornly to the non-common law courts the more native they became in fact. The very ambiguity of the word "foreign" is indicative. The non-common law courts were sometimes spoken as "foreign" jurisdictions in a neutral sense -- "extrinsic," courts which were over-and-above and distinct from those which administered the main body of English law, "outside supplements" whereby the legal system dealt with some special relationships and was able to handle a wider range of matters than the common law was equipped to take up. But the other sense of "foreign" was close at hand, perhaps the more so as consciousness of the common law as an invaluable native possession was heightened -- "un-English," "imported," unavoidably or at least lawfully present, like a resident alien, but not really congenial to the English way of doing things. The sense in which the ecclesiastical courts, in particu-

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lar, could be seen as an import from Rome and a leftover from "Popish times" was obviously available. Giving a man over to "foreign" justice could be deplored without much realistic regard for the quality of justice he would receive. Yet it was such associations of "foreignness" that defenders of the non-common law courts most reasonably resented. With the passing of time, they became evermore settled native institutions. Owing no allegiance except to the King and such aspects of the public interest as came within their protection (including, of course, common justice according to the law), what difference did it make that the historic roots of their procedures and doctrines were extra-English? In the case of the ecclesiastical courts, the very "nativism" that reflected glory on the common law ought to have shed a portion of radiance on another peculiar institution -- the judicial organs of a church which, in addition to being stubbornly different from any foreign model, defended the national community's right to fashion the outward or "indifferent" aspects of the Church (including its organs of discipline") in accord with its unique history and "genius." Alas! Reality and perception, "is" and "ought," can move in different directions and into terrible tangles. When they do, the sense of alienation or "foreignness -- and plain distrust -- dividing antagonistic interests may grow exacerbated.

One must, however, put a caveat on the considerations above. Especially before the prestige of the common law got mixed in with the passions of a deteriorating political scene, there were of offsetting forces. (*After* the political heat intensified, the judges were under pressure -- moral and otherwise -- to check any tendency they may have had to indulge a mere preference, in themselves or in the public, for common law jurisdiction.) On the high level of articulate thought, the Cokean proclivity to make extreme claims for the common law encountered definite resistance. I do not refer here to the resistance of those who understood little of the matter except that their interests were offended by arrogant lawyers. It is a little insulting to put a foreign, eccentric, fantasy-ridden, obstinate, but highly intelligent monarch in that category, but I do not refer primarily to James I. The most significant resistance to the excesses of "legal nativism" came from within the professional community.

It is explicit in Francis Bacon, who came close to a fully articulated realization of what was happening in his generation: absolutization of the provincial perspective of the prestigious legal caste. Bacon was an ex-

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tremely able lawyer. It was his advantage to have a much more inclusive and balanced intellect than most lawyers, but there is no serious sense in which he betrayed the "faith" of his profession. He was unquestionably an ambitious royalist politician and personal rival of Coke's in the politics of the law, but I can see no sign that he fulfilled one kind of possibility implicit in such a situation -- the possibility of becoming one of those lawyers who ceases to care about the values and traditions of the law, who comes to regard his skill in it as a mere instrument for personal or political ends. Though a great critic of established assumptions, Bacon was no legal iconoclast in the manner of Hobbes or the Levellers or Bentham. Generally, indeed, the critical impulse in Bacon was not very revolutionary. "Everything's been done wrong -- Let's forget it and start over right" was not his fundamental theme, though something like it occurs in some contexts. Much more fundamentally, he was the high priest of intellectual "jurisdiction." The intellectual flaw he most consistently jumped on was "absolutizing": the tendency of particular disciplines, methods, interests, points of view, or traditions to claim too much for themselves, to exceed the "jurisdictions" within which each has a limited but valuable contribution to make. Bacon saw how the literary humanism that so dominated the horizons of the educated in his time had long since flooded the real world with undue reverence for idle words. He criticized the Platonists for projecting the mathematical mind onto realities that would not obligingly submit to it. By precisely the same token, Bacon the intellectual General Surveyor observed the urge to excess in his own profession -- as if statesmanship required nothing beyond the training and experience of a lawyer; as if the law did not need sometimes to be considered from the outside, as one instrumentally among others for the preservation and improvement of civilized life; as if, so regarded from the outside, it could never need formal amendment or informal flexibility in order to serve ends whereof it was not the only servant; as if the built-in conservatism of the law -- its necessary insistence on standing by its rules and the inherited values they incorporate -- were the key to an inclusive social wisdom; as if all social wisdom boiled down to the faith that institutions which have resisted change deserve the immunity from it that tried legal rules -- qualified in many cases and made the basis for private expectations -- in some measure do deserve.

Ex hypothesi, Bacon's critique of overreaching particularism was affirmative of particularistic viewpoints *within* their several "jurisdictions."

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Ultimately, he was syncretistic. To see real, but limited, good in many ways of thinking and doing was the beginning of wisdom. Many "jurisdictions" pulling together, each pulling *only* the weight it was capable of, was his ideal. Bridled particularists would learn to appreciate the value of each other's understanding of the same object, and hence the valid possibility of abstractifying and simplifying knowledge. The false abstraction that consists in imposing a limited category on material too complex for it would give way to the patient search for truly informative analogies -- for the "footprints" which nature leaves in different media, for the level of abstraction at which different approaches to knowledge employ a common conceptual alphabet and in a sense "say the same thing." The parallelism between Bacon's thought and his experience as a lawyer is so striking that one wonders which was the cart and which the horse. In fellow lawyers, he encountered an example of "overreaching particularism." As a lawyer in the thick of controversy over jurisdiction -- and a representative of the royalist-ecclesiastical-civilian-equity interest -- it is perhaps not too fantastic to suggest that he encountered an "informative analogy": antagonism among courts and lawyers reflective of men's general unwillingness to accept the limits of their own "arts" and professions, to appreciate the community of purpose that would enable different jurisdictions to work together if each could contain its self-esteem.

Intra-professional reaction against extreme claims for the common law is beautifully illustrated at another level by Lord Chancellor Ellesmere's concurring opinion in Calvin's Case. (*2 State Trials*, 659.) On straight legal matters, Ellesmere, rather than Bacon, was Coke's sharpest critic. In Calvin's Case, he found himself in complete practical agreement with Coke, i.e., they favored the same resolution of the case for largely the same reasons. Ellesmere went out of his way, however, to prepare (and publish) an elaborate separate opinion. His doing so was technically appropriate. The situation was that substantively identical suits were brought at common law and in the Chancery (i.e., in order to allow the Lord Chancellor to participate, and by way of totally "wrapping-up" the case -- a case contrived for political reasons, to get a judgement that Scottish *post nati* were capable of maintaining actions for land in England and thus were not aliens -- a routine equity suit for discovery of deeds was brought alongside a novel disseisin at common law. The equity suit depended entirely on the common law suit and was not argued separately at the Bar: if Calvin could maintain the common law writ even though born

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in Scotland of Scottish parents -- the point to be established -- it followed virtually automatically that he could maintain a Chancery suit to recover evidences relating to the land in England which he claimed). As Lord Chancellor with an equity suit to be decided solely by him, Ellesmere had perfectly proper occasion to discuss the case in full. But it is manifest from the content of his opinion that his motives were not routine. In the form of a highly concurring opinion, he wrote a critique of the tone and general ideas in Coke's elaborately stated opinion on the common law side. Ellesmere's opinion is not concurring in the ordinary sense -- same-result-for-quite-different-reasons. In terms of the reasoning leading directly to a solution in the case, Coke and Ellesmere were virtually at one. The issue between them was philosophical.

Ellesmere wrote his opinion to put down dangerous doctrine. In part, it was aimed at the politically charged legal ideas urged against the resolution of the case which the government badly wanted and all but two of the common law judges favored (let it be said, lest political prostitution seem imputed, for perfectly sound, if not necessarily conclusive, legal reasons.) In his argument for the majority position, Coke too attacked that sort of "dangerous doctrine." Ellesmere's other target was the unbalanced estimation of the common law written into Coke's opinion. I cannot do justice here to the complex encounter of two great lawyers that the two opinions represent. In brief: Calvin's Case gave Coke a golden opportunity to glorify the common law. (For his opinion, 2 *State Trials*, 607.) The government had resorted to a trumped-up lawsuit to naturalize the *post nati* because it was unable to do so through Parliament. The technique was widely and justly criticized. It was widely believed that there was no ordinary legal solution to the unprecedented problem that the case raised. No foreign King had ever inherited the English throne before. Consequently English law had never had to ask whether subjects of the King's foreign crown born after his accession to England are naturalized in England. This new question only admitted of a legislative solution. If a judicial solution was demanded, the judges could only do what judges ought not to do -- viz., legislate in effect; fetch a solution out of such sources as "mere reason" or natural law, not from the precedents and usage that ought to determine the common law. To the refutation of that line of reasoning, Coke devoted a major share of his energy.

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He began by accepting its premise: The courts ought not to legislate. They can never justifiably say, "there is nothing in the common law's storehouse from which a solution in this case can be drawn, therefore, let us decide it by common reason." Having conceded that, Coke turned around and asserted the "copiousness" of the common law in highly general terms. He came very close to saying that there is no such thing as a case incapable of ordinary common law solution. The common law represents so infinite a fund of experience and wisdom that it is next to inconceivable for an actual case to be put to it which it cannot solve by its own canons of problem-solving, its own "art," without resort to the natural reason no special "art" can claim as its own. To the degree that cases do not admit of absolutely straightforward solution by common law canons -- simple deduction from well-known rules or inference from obviously similar cases -- they ought not and need not be decided by natural reason. They always should be and always can be solved by the "artificial reason" of the law. That is to say, a solution can be drawn out of the common law fund by those trained to use it right -- to see the less obvious sort of analogy; to appreciate, and hence extend to unfamiliar territory, the general ideas and values implicit in well-known rules and concrete cases. The lay or "natural" mind cannot do that. Its tendency is to "vulgar rationalism," which supposes there is no legal solution when there is not a patent one. Supposing that, "vulgar rationalism" will come up with its own superficial answer to problems which in fact admit of better resolution through the time-tested standards implicit in the law and accessible only to trained lawyers.

These ideas were the heart of Coke's jurisprudence. Calvin's Case was a golden opportunity to state them, first because they had been doubted by critics of the government's resort to a lawsuit, and secondly because they could be demonstrated in the case itself. Doubters said the problem in the case was not appropriate to judicial solution; Coke would show them. In fact, there were reasonably good legal sources for solving the case. Although England had never been inherited by a foreign King before, problems of naturalization had occurred in analogous circumstances (in the latter days of the Plantagenet empire, when Gascons could be born subjects of the *person* who was King of England -- like the Scottish *post nati* -- without being born in England, since Gascony -- like Scotland -- was not incorporated into England or subject to its laws).

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There was some judicial authority fairly directly in point (i.e. suggesting that Gascons in a position arguably analogous to Calvin's were not aliens in England). Coke by no means rested his argument on the narrow grounds he claimed were sufficient. He in fact ranged far and wide, arguing, *inter alia*, from natural law, though with a carefully emphasized common lawyer's twist: the common law takes notice of the law of nature -- cases cited to provide the same -- therefore to show that a certain rule is required by nature is at least to establish the presumption -- confirmed by "cases directly in point" -- that it is a rule of the common law. But though Coke did not confine himself to the straightforward kind of authority, he had some. *Quod erat demonstrandum* -- the common law was perfectly up to this seemingly novel case, no judicial legislation or natural law adjudication required. For the rest, Coke demonstrated "artificial reason" at work -- the trained legal intelligence finding all kinds of support for the truth the common law revealed and "vulgar rationalism" could too easily miss: that allegiance is a personal tie between king and subject, and "citizenship" depends on allegiance.

Lord Ellesmere took no exception to Coke's positive legal reasoning, much less to the conclusion. He took precise exception to the overreaching generalization -- not to saying that *this* case was well-covered by relevant precedents, but to maintaining that the common law *cornucopia* is adequate to any case. In the jurisprudential fight waged under the surface of concurring opinions, Ellesmere took the more modern position, for he defended judicial legislation as inevitable and therefore legitimate: Common sense and common morality are sometimes the only basis for deciding cases. Every case was once a new case. The first time a problem occurs, there are no "artificial" resources to draw on. Let the courts not deceive themselves as to what they do in fact, let them not blush to do what they sometimes must and always in some degree may. It is fatal to the court's authority for judges to doubt their title to resolve a truly novel case. The courts are indeed up to any case that comes before them, but not for Coke's reason -- not because the common law is infinitely "copious," but because it's the judges' duty and right to solve the case with whatever resources are available and relevant. Common sense and common morality are always relevant and sometimes exclusively available. Let there be no shame about relying on them exclusively if need be, and let them not be represented as something else than the natural faculties they are.

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Ellesmere went as much out of his way to say these things as Coke did to say the opposite. He did not consider the instant case a novel one. He did not need to fall back on "natural reason" to solve it. (Though having asserted natural reason's claims, he applied it in ways that "artificial reason" would probably have to frown on. If the instant case had been novel, Ellesmere said in effect, sources extraneous to the books, records, principles, and traditions of the law would have perfectly respectable relevance -- e.g., the King's own opinion and the Council's; extra-judicial opinions of the judges. As it were: When -- as to some degree it always is -- the question is simply "What is reasonable?," the opinions of responsible, rational, authoritative men are always relevant.) I think there can be no doubt that Ellesmere in Calvin's Case wrote a conscious "anti-Coke." Both men saw an opportunity to take up the big current issues of jurisprudence. Each had his eye on the other. Both spoke to persuade -- Coke to explain and demonstrate his "legal nativism" and the extended claims he made for the common law as the vehicle par *excellence* of social wisdom; Ellesmere to oppose just that, in a practical legal context, with ideas gained from a lifetime in the law.

I have dwelt at some length on the high-level, classic encounters -- Coke *versus* Bacon and Ellesmere -- to make a point that leads back to our immediate concern. The general reputation of the common law was undoubtedly at a high pitch around the end of the 16th century. Associations of special beneficence surrounded it, tending no doubt to favor its claims to jurisdiction and to put competing courts in a second-class light. But the prestige of the common law was not unchallenged. There were forces pulling the other way, forces evoked by the very semblances of exaggeration, of overreaching professional particularism, that attended the concentration of prestige -- intellectual, moral, social-fashionable -- in the law and its practitioners. The reaction did not all come from outside the law. Exaggeration was opposed by experience of the common law's limitations gained by men who spent their lives inside. Of course Bacon and Ellesmere were King's men and equity judges. They had experience and commitments which gave them perspectives on the law different from those that experience solely in common law practice would conduce to. But it trivializes the thinking of such men about the law itself to see it as merely political, merely expressive of their devotion to the King's interests and the equity courts. There were serious issues among serious men.

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Their practical positions and interests influenced what they thought about the law, but their minds were all too large to be bounded by their immediate perspectives. Coke, for his part, was a government lawyer for most of his pre-judicial career, a Privy Councillor, a courtier-politician with the rest of them. He had experience enough of life outside the law. If he tried to make the values and mentality of the law carry a great deal of weight, perhaps more than they would bear -- to absolutize the law, exalt a native tradition over against its intellectual competitors, depose Reason herself and set "art" upon the throne -- it was because he thought his way through the diverse materials of experience to that mode of organized belief. So, to different conclusions, did his opponents. Coke was not a provincial who knew no better, an insular mind, literally and figuratively, who by some half-comic extravagance of personality managed to impress a ludicrous overestimation of the common law on other provincials. I hope that in sketching his approach to Calvin's Case I have given some sense that he had a jurisprudence -- not just a mind piled deep with curious legal erudition, but a theory as to how such a mind was conditioned and equipped to solve problems more wisely than other kinds of mind. That his theory was wide open to criticism does not detract from its seriousness. On the contrary, because there was such a thing as "Cokeanism" -- because claims for the special status of the common law were impressively advanced; because new, distinctive, serious, and profoundly dubious ideas in jurisprudence were on the floor -- equally distinguished lawyers and lawyer-philosophers felt the need to challenge it. There were serious issues among serious men.

There is no more jejune belief in English history that the tendency to think of common lawyers as an intellectual and political monolith -- a bloc allied with an equally imaginary fixed quantity called Puritanism against Stuart monarchy. The element of truth in that picture is vitiated by oversimplifying it. Not only were lawyers divided against each other politically. Their political differences were partly reflective of, and partly independent of, divergent strains of jurisprudence provoked by an intensified level of awareness and debate. When one descends from the peak occupied by very great men, modesty is the most useful attitude to take along. We do not and cannot know a great deal about the general thinking of the legal profession as a whole and the parts of the lay world that caught ideas more or less directly from the legal. The relatively small group of successful practitioners at the Bar, it is worth noting, was in an

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intrinsically ambiguous situation. On the one hand, such men belonged to the official world. The *cursus honorum* to which their ambitions looked ran into various paths of officialdom. If the common law judiciary was the chief prize, positions in the equity system, government law, and numerous posts in the half-legal, half-administrative departments of government were eligible objects of aspiration. Many lawyers were exposed to the kinds of experience that helped such especially gifted men as Ellesmere and Bacon appreciate the limitations of the common law and the excesses of "Cokeanism." It is quite possible that lawyers as a social group were less liable than the "Country" community -- the gentry whose *fora* were local government and Parliament -- to fall into the looser modes of exalting the common law -- exalting it into a political symbol, an "inheritance" calling forth the responses of ancestor-worship and visceral nativism, a portentous Good Thing. On the other hand, common lawyers were anything but a bourgeois-official caste, a *noblesse de la robe*. They took ideas and attitudes from the "Country"-J.P.-Parliamentary-gentlemanly world to which they intimately belonged, as well as imparting ideas and attitudes to it. In the end, there is probably no reason to doubt that "Cokeanism" was stronger than "anti-Cokeanism," that the ties between the legal community and the "Country" community were stronger than those binding lawyers as a group to the government. But any such reality is only a net reality -- a prevailing pattern in a very complex tapestry, or better, a sequence of patterns increasingly influenced by the dynamics of political history.

Our immediate question is whether highly general attitudes about the common law constituted a pressure on the judges -- a *de facto* pressure and for reasons discussed above a legitimate one -- to favor common law jurisdiction in problematic situations -- e.g., when liberal application of procedural rules in Prohibition cases was necessary to give a party the benefit of common law adjudication. My best guess is "yes" -- in an indeterminately "net" sort of way. En route to that conclusion, we have been looking at the body of attitudes most ready-to-hand as an influence on judicial behavior -- attitudes in the legal profession and the part of the lay community that traded ideas with the profession. If we look toward popular attitudes in a wider sense, another set of cross-currents and uncertainties will come into view. On the one hand, there are signs of popular interest in the law, indeed enthusiastic faith in its arcane virtues. The complicated phenomenon of litigiousness, of whose virulence ca. 1600

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there are plenty of signs, probably has one root in the sheer prominence of law on people's cultural horizons. Suing is *one* way to deal with conflicts. *Inter alia*, the propensity to sue may reflect a half-conscious wish for the self-importance of involvement in the impressive career of a lawsuit. For modern people, the law is usually remote -- part of a business-government world presided over by experts whose language one does not pretend or care to understand and whose services one hopes and expects to call on rarely at most. Litigation tends to be thought of as "bad news" and the last resort. Of the contrary phenomenon, "the sheer prominence of law on people's cultural horizons," American history up to relatively recent times provides good examples: rural societies where the courthouse was a social center and the trial a form of entertainment; where a man saw jury service and sometimes, literally or vicariously, found himself in the shoes of the party-plaintiff or -defendant; where the learned man who crossed one's path, save for the preacher with his Bible, was the lawyer with his Blackstone; where the lawyer's role as "culture hero" reflected his mastery of an art with whose lingo the laymen had picked up some familiarity, of whose virtuosity he fancied himself a judge. Comparable experiences were available to people in rural and small-scale urban England. They were more apt to be made something of by the late-16th and early-17th centuries than ever before, owing to the undoubted, though hard to measure, cultural progress of middling people -- the prosperity, literacy, and constant hunger for knowledge and status which, in one dimension, created a market for the sermonizing and lay participation in religious affairs that Puritanism tended to furnish or agitate for furnishing. Legal knowledge and attitudes of vicarious loyalty to the law fed into the same market. Those products were enjoyed by the upper-class participants in subprofessional legal education, lay magistracy, and a legalistic brand of politics. Thus invested with status-value, they were accessible to lesser men as well. As the sermon was an oral, collective, relatively inexpensive vehicle of divine knowledge, so a certain familiarity with a useful and highly touted species of secular lore -- at least with the vocabulary of the law -- could be acquired by an ordinary man of observant habits in the everyday run of experience. Law, like divinity, could be had after a fashion this side of the barrier between "English" and "Latin" culture that separated the upper orders from the respectable-aspiring. In both of those spheres, from several upper-order points of view, a little knowledge was all-too dangerously acquirable.

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For this side of the coin I can do no better than quote a 17th-century character-speech by a "common yeoman": "...I have a verie great desire to have some understanding of Lawe, because I would not swim against the streame, nor be unlike unto my neighbours, who are so full of Law-points, that when they sweat, it is nothing but Law; when they breath, it is nothing but law; when they neese [sneeze] it is perfite law; when they dreame it is profound law. The booke of *Littletons Tenures* is their breakfast, their dinner, their boier, their supper, and their rere-banquet: Everie ploughhswayne with us may bee a Seneschall in a court Baron: He can talke of Essoines, Vouchers, Withernams, and Recaptions: And if you control him, the booke of the Groundes of the Law is his portresse, and readie at his girdle to confute you. Surelie, sir, my neyghbours are full of sension and tention, and so cunninge, that they will make you beleeve that all is gold which glistereth:" (from William Fulbecke, *A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of this Realme of England*, 1601 -- Part II, unpaginated.)

As for the other side of the coin: for every yeoman who was proud of knowing what a Withernam was, for every plain man who "identified" with the strange and potent lore of the common law, how many suffered the law's delay? How many experienced law and lawyers as mystifying and greedy? For every happy litigative warrior, how many people were dragged into litigation by the law's frightful obscurity and their society's incapacity to provide alternative devices for avoiding and resolving conflict? How many perceived their own ruin as the correlative of some lawyer's enrichment? How much of the visceral resentment of a class society was focused precisely on common lawyers -- the worst of the worse, a close, monopolistic band of upper-class scions conspiring to frustrate justice and engross power by keeping the law as needlessly complex in substance as it was unintelligible in Law Franch? We should look ahead to the Leveller and Evangelical onslaught on the common law in the middle decades of the 17th century. There was little in that critique that had not in some form been said before. Old veins of explicit popular hostility to common lawyers, as to the ecclesiastical courts, must have been underlaid by deeper funds of inchoate feeling. The Levellers had something to draw on and give coherence to. We should take note of the high incidence of non-common law litigation, some of which may reflect people's desire to avoid the common law or belief that better justice was

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obtainable elsewhere. One must be very careful about ascribing that significance to use of non-common law courts. Often one had no choice about where to sue, and even when one does, choosing the court that for one reason or another seems likely to serve one's turn need not imply very far-reaching general attitudes. But it is possible that part of the motive behind some suits in the Admiralty, Star Chamber, Requests, and regional councils was express feeling that delay, expense, mystification, and dubious justice were more likely to accompany common law litigation. The justifiability of such feeling insofar as it existed is a further question, concerning which we should not jump to conclusions, for the real workings of the non-common law courts are still largely uninvestigated. Use of the Privy Council as a subjudicial organ for avoiding litigation or expediting it is another practice of indeterminate significance for attitudes about the regular legal channels. The ecclesiastical courts were the part of the non-common law system most likely to be denigrated as, and because, the common law was exalted, but even in that case the mix and relationship of attitudes is hard to know. If we take the more neutral sorts of ecclesiastical business, such as probate jurisdiction, did average experiences and presuppositions make for hostility to the Church courts? Would people who were free from any religious inclination to disapprove of clerical involvement with worldly things have thought it a good idea to turn all testamentary jurisdiction over to the common law (a measure that would have had some advantages for legal simplification, but one that was not taken when episcopacy was abolished, a special court being created to handle the civilian specialties)? In their jurisdiction over defamation, the ecclesiastical courts provided a clearly popular facility -- a place for the offended and the quarrelsome to go when the common law would not listen to them (and sometimes, by choice, when it would.) Piety untouched by Puritanism may have furnished a good deal of affirmativeness toward the ecclesiastical courts in principle, which many people's experience may have done nothing to undercut. To some degree, in some contexts, using the ecclesiastical courts may signify happy expectations, even relative to the common law. The comparative expense of litigation as between the non-common law and common law courts (including the courts' handling of costs) would furnish an important clue to attitudes if we had any precise information about it. Rough impressions, predominantly of the ruinous costs of common law litigation (plus some early intimations of *Jarndyce v. Jarndyce* with respect to the Chancery), can be very misleading because of the immense variety in types of litigation and

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circumstances and "stakes" of particular cases. Even so, there is probably a reminder on the non-common law side -- a body of thankfulness that there were places to sue less costly than Westminster Hall.

Once again, on the level of popular feeling, my guess would be that net prejudice ran in favor of the common law. For example, I would be inclined to discount the argument from Levelling and the mid-17th century reform movement. Even apart from the large question as to how many people were really convinced by the radical critique of the law, there are important senses in which that critique was forged in the exceptional heat of revolutionary experience. In the thought of the Leveller intellectuals themselves, hostility to the law developed in some degree from disillusionment and from a dialectical or "transvaluing" tendency in their mentality, whereby the native legal tradition that was once an object of loyalty came to be seen as a part of a pattern of "usurpation" upon a still more primordial and authentic "English way." But once again, any net tendency was only a net tendency, offset by cross-currents and uncertainty.

(b) Apart from highly general attitudes bearing on the acceptability of consigning people to non-common law justice, we should consider attitudes toward jury trial specifically. Insofar as facts were in issue, to let a case out of common law hands was to let the disputed facts be tried by interrogation of witnesses and judicial determination thereupon. To keep a case in common law hands was to insure trial of disputed facts by verdict of twelve. If we discount all partisan feelings -- i.e., parties' or prospective parties' belief that they will do better with jury or non-jury trial -- was there a residuum of pro-jury prejudice? If people would not typically have doubted the non-common law courts' capacity to do *basic* justice, including fair and accurate fact-finding, would they still have said that non-jury trial is second best, that where there is any option the value of giving a man a trial by jury outweighs all or most competing values? Here let us sound a note of skepticism and surcease. There are of course good grounds for answering the questions affirmatively. To defend the common law as against foreign systems means first of all celebrating the superiority of the jury. It was praised by Fortescue in the 15th century and defended in a much more sophisticated and closely reasoned way by Sir Mathew Hale after the middle of the 17th (*History of the common Law, Ch. 12*). Fortescue was not really capable of technical comparative law. When he came down to it, the jury was about the only specific fea-

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ture of English law he could make a case for. Hale's capacities were much greater, but even his concentration on the jury testifies to its abiding status as Exhibit A.

On the other hand, the history of the jury mystique is complex and obscure. The jury system can be valued for many different reasons, some of them entirely practical, some quite mystical. There is a difference, for example, between considering juries the optimum device for judging the truth on the basis of specific evidence and valuing them precisely because their function is more complex and less rational than that (e.g., because they can represent the norms of the community, because they cannot be entirely prevented from violating the evidence and the law in the interest of rough justice.) The history of attitudes toward the jury must be correlated with another complicated story -- the history of the practical workings of the institution (e.g., the amount of informal and legalized control over juries exercised by trial judges) and ways of conceptualizing it (essentially, as between the poles of "judges of fact" and "those who know.") It is not easy to say where the period ca. 1600 stands on the historical spectrum of attitudes toward the jury. The spectrum as a whole is too ill-understood. To some degree, I suspect, the embalming and sanctification of trial by jury came after the period we are concerned with here. Late-medieval experience of corrupt juries must have had a deleterious effect on the vague reputation of the institution, over and above its specific effects: legal and legislative efforts to control corruption, attempts to evade jury trial by resort to the Council and Chancellor. People no doubt continued to have bad experiences with juries in the 16th and 17th centuries, and the evasion motive probably still figured in the election of non-common law courts, especially the Star Chamber. Whether their experiences with non-jury trial were good or bad, people were likely to have some experience with it in the heyday of the ecclesiastical and "prerogative" courts. That is to say, trial by jury could not be taken for granted to the extent that was possible after the Great Rebellion. Perhaps it came to be more valued as a touchstone of the "English way" after it came closer to being the only form of proceeding people were likely to encounter. (It was not, of course, literally the only form, since equity, Admiralty, and ecclesiastical courts continued to function and to use the civil law, interrogatory method of fact-finding.) In sum: Though trial by jury was undoubtedly valued -- as part of a diffuse "nativism," but the most focused

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part -- there is some reason to be skeptical as to the weight of feeling on that specific score.

In connection with the jury trial, we should raise one further question: Was consigning a man to a non-common law court giving him over to something *worse* than trial without a jury? Was it perceived as relegating him to fact-finding methods less rational or less fair than a non-jury system need be? The full answer to these questions depends on matters to be considered at large in this study. In brief: (1) Ecclesiastical courts were to a degree prevented by Prohibitions from enforcing certain evidentiary rules which the common law judges considered unduly rigid and formalistic. The judges sometimes saw to it that parties being tried without a jury were not subjected to hurdles which they would not encounter if they were tried by jury at common law. (2) Abuse of "inquisitorial procedure" by ecclesiastical courts was also controlled by Prohibitions, though it was not entirely banned. To hand a man over to an ecclesiastical court was to expose him to involuntary interrogation in some cases. It is possible to object to *every* form of involuntary interrogation, even in a purely civil dispute. The common law jury system avoided it. Insofar as that system served as a norm, people may have regarded the inquisitorial system, even in its most neutral applications, as inherently unfair. Involuntary interrogation is much more objectionable when the effect is to force a man to betray himself to criminal liability. Ecclesiastical courts were not fully preventable from using it to that effect *quoad* purely ecclesiastical crimes. They were effectively prevented from exposing people to common law criminal liability by interrogating them in ecclesiastical causes. For our present purposes, therefore, there was little reason to fear that relegation to ecclesiastical justice meant relegation to fishing expeditions and secular self-incrimination. If a civil litigant was handed over to an ecclesiastical court lacking jurisdiction in principle, only because he failed to claim a Prohibition in proper form, he could almost certainly get a Prohibition later to stop interrogation tending to incriminate him at common law.

In the loose realm of attitudes, however, it is possible that ecclesiastical use of inquisitorial technique in criminal cases left a black mark on ecclesiastical courts and procedures generally. Almost all questions about the power to expose people to self-incrimination arose in connection with the High Commission -- an extraordinary court, and primarily a criminal court (exclusively one, with jurisdiction only over "high" eccle-

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siastical crimes, according to the prevailing common law view. If the High Commission had not existed, the reputation of the ordinary ecclesiastical courts might have been different. It was the High Commission, not the Star Chamber, that first got associated with what have come to be pejoratively called "Star Chamber methods." The strength of that association and the emotions connected with it are hard to gauge. I am inclined to think that the High Commission gained itself a generous measure of unpopularity on account of its procedures in legal and non-legal circles wider than the Puritan circles with self-interested grievances against the court. Such feeling may have reflected on ecclesiastical jurisdiction generally, and may have tended to focus the virtues which Englishmen were disposed to see in the common law. The presence of the controversial High Commission may have heightened the generalized contrast between the common law--where protection against self-incrimination was built into the system of fact finding-- and "inquisitorial procedure" with the Torquemadan associations it can have.

(c) One further special aspect of pro-common law feeling requires notice. In discussing the general prestige of the common law, I have not dwelt as specifically on the historico-prescriptive dimension of attitudes toward the law as its importance requires. The native legal tradition was not valued only because it was native; it was valued because it was reputedly immemorial. Coke's conception of the law's "copiousness" and of an "artificial reason" capable of exploiting the reserves in the cornucopia was a manifestation of a larger frame of mind. That frame of mind comprehended beliefs about the realities of history and about the legitimating power of time. The law was copious because it was the creation of "infinite ages." The product of boundless time was guaranteed to be a repository of such qualities of experience and reflection as could not possibly be accessible to any given generation of the living, however well-endowed with "natural reason." Objectively, the law itself was "artificial reason": a body of normative truth superior to that which any living individual or group could arrive at by inherent human powers of intuition, or by reflection on a limited fund of experience. To refer to the law -- to inquire after its solution of problems -- was to employ a superior substitute for reason, an "artifice," a man-made supplement to man's naked faculties. (The sense is perilously and ironically similar to what Hobbes was to mean by an "artificial animal": A sovereign state erected upon man's surrender of the right to judge for himself, whereby he breaks the dead-

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locks of "mere nature" and gains not only peace but civilization. It is no accident that Hobbes was implacably hostile to common lawyers. To enthrone one Leviathan it was necessary to depose another.) Subjectively, the "artificial reason" of trained lawyers was the one way living men could take advantage of the resources of wisdom history supplied and guaranteed.

These ideas depended on a mixture of positive historical awareness-- much of which was of course very inaccurate -- and legal concepts which exalted the value of usage in a distinctly ahistorical way. Knowledge of English antiquities, especially legal antiquities, had grown considerably by the early 17th century. The basis for actually seeing a continuous tradition of impressive extent, for noticing that features of English Law had in fact weathered long ages, was greatly expanded. Fortescue in the 15th century believed that English law had "always been there," was primordial and "constitutionally" implanted in the national identity. But he could not say how that was so except by positing a "social contract," "in the beginning," when Brutus first set foot upon this other-Latium. Coke had both the means and the need to say a great deal more. He was far from content with abstract generalities, to the effect that English law must be an old and continuous tradition because there was no sign of its having begun at any specifiable time. That is to say, Coke was truly interested in history -- not out of idle curiosity, but because his claims for the common law seemed to him to depend on actual demonstration of its remarkable age and continuity. He had no interest in "social contracts" (and no faith in Brutus.) He had great interest in making the case that the essential characteristics of English law were observable in Anglo-Saxon times, and even earlier, in combing Caesar's *Commentaries* for evidence of common law institutions (which of course he found.) Of course he convinced himself of a great deal of nonsense. Very real knowledge of medieval law was projected backwards into make-believe. But the impulse was historical -- no less for being uncritical and wishful. Coke believed that the common law was in fact what it ought to be. His positive history was not accurate, but that does not mean the "ought" simply drowned the "is." It does not mean that Coke failed to study the evidence available to him-- available to an extremely busy practitioner and judge who knew about some sources by accident and in the way of business and did not know about others, available also to the preconceptions with which the material was approached.

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The historical beliefs spread by Coke and others found acceptance. (Like "Cokeanism" generally, they found resistance too. The better-informed, more critical vein of legal history that runs from Spelman through Selden to Hale was destructive of Coke's certainties even when, as with Hale, it was ultimately affirmative of his jurisprudence.) The prestige of the common law was in part its reputation, sustained by positive historical beliefs, for antiquity, survival, and the chastening wisdom of gigantic ancestors. In point of pedigree, English law was the peer of civil law. (Its correspondence with the primal law of the Jews was one of Coke's themes. God gave His judgements, Moses, "the first reporter," wrote them down. So Lord Justices continued to pronounce and Inns-of-Court men to record. The Twelve Tables, of course, were a respectably ancient record of foreign law.) In England, foreign imports might have their limited place--strangers, guests, *peregrini*--entitled to hospitality, to tolerance in their place. But they could not be said to supply any deficiency in English law, to represent for any purpose a higher or more universal standard of right, to be anything but *latter*-day imports whose inevitable role was to occupy such space as the old and all-sufficient English system chose to make for them. To be judged by the common law was to be judged in the old English way. The natural prejudices of an innovation-fearing, traditionalistic society were supplied with confirmatory facts and fictions from history toward the end of the 16th century. Patterns perceived in history affected perceptions in everyday life-- manifestly in politics. They may also have borne upon the relative acceptability of common law and non-common law adjudication that concerns us here.

On one side, historical awareness was extended. If you like, it was extended just enough to go wrong, to furnish prejudice and myth with a servant. In part, it was extended -- and patterned as it was -- because of legal ideas which "sounded in history" but were in fact quite ahistorical. Usage legitimated in English law. That is a legal "fact" with specific applications -- viz., to the establishment of prescriptive rights. A prescriptive right is in essence an exception to the common law founded on usage -- local usage (i.e., obtaining throughout a recognized local unit, a county, parish, manor, or whatever) or private usage (as between the owners of Blackacre and the owners of Whiteacre). There were limits on the power of usage to carve out exceptions to the common law, most notably: (1) the rule that an exceptional custom must be "reasonable" in the eyes of the

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judges; (2) *Nullum tempus occurit regi* -- the most important practical effect of which was that usage could not make an exception to statutory law. Subject to such limits, usage could establish local rules and private rights at variance with the common law (some extreme forms of variance failing by the reasonableness test.) The only *kind* of legitimating usage contemplated by English law was immemorial usage. That is to say, usage extending over a specifiable period, however long, did not establish rights. It must be shown to have continued "from time whereof memory runneth not to the contrary." The negative meaning of that expression, however, was much more important than the positive. Evidence going to show that an exceptional practice obtained at some remote time was conducive to the conclusion that it was immemorial; evidence showing that a practice started at some specific time in the past, however remote, or that it did *not* obtain at some specifiable time, was fatal to the conclusion. Applying these ideas sometimes produced terrible legal knots, but such were the principles, Whether an alleged custom was in fact immemorial was a jury question. Elaborate historical research was hardly called for to convince a jury. A man trying to establish a prescription would want to gather some witnesses or documents testifying to condition a while back. If the other party produced no evidence of the fatal kind, there was little to prevent the jury from concluding that the custom was indeed immemorial. Judges exercised a degree of control over irresponsible juries, but it is doubtful that a skeptical judge could do very much in this context. The archaic conception of the jury -- "those who know," local men familiar with local facts -- was appropriate when the question was "What is the immemorial usage of this locality?"

These legal doctrines bear on our present concerns in two ways. (1) Custom as a technical category influenced the conceptualization of the common law itself. Immemorial usage legitimated exceptional local customs. What else so essentially gave the law of the realm its authority? The common law was routinely defined as "the common custom of the realm." I suspect that the phrase had accumulated rather more meaning by the beginning of the 17th century than it had earlier. A highly professionalized national legal system could not really be reduced to the model of customs technically so-called. There were difficulties, certainly, in the implication that a rule of the common law was the peer of some humble borough custom -- authoritative for the same reason, on a par because coeval -- save for the wider prevalence of the common law rule. Not the

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least difficulty was that the common law judges passed on the reasonableness of customs proved or admitted to be immemorial "facts," drawing to some extent on the common law itself (as opposed to mere common sense and fairness) for criteria of reasonableness. I suspect, however, that the difficulties tended to be suppressed and the model more insistently relied on as "Cokeanism" organized one side of the legal thinking of an increasingly sophisticated age. As "What is law?" came to worry people more, "Law is essentially custom" took on weight as one serious answer (disputed as a much too simple one by such as Lord Ellesmere.) As more historical information came in to suggest that the presumption of the law's immemorialness corresponded to fact, there was the more reason to dwell on the legitimating power of immemorialness. Conversely, looking into the past was stimulated by the need to verify what was presumed, and what was seen was profoundly colored by presumption.

To the extent that the common law was more sharply perceived as custom, and to the extent that immemorial usage was more credited with the power to make law valid and valuable, contrast between common law and non-common law jurisdictions was heightened in still another way. If a man's case stayed in common law hands, it would be decided by law that was intelligible and good because it amounted to custom; if the case escaped common law hands, it would be decided by rules whose title to be law was less clear. In this way, insofar as they penetrated ordinary people's consciousness, general ideas about the law's source of authority, as well as about its *de facto* antiquity, may have affected the acceptability of non-common law adjudication and prevailing notions of the public interest in jurisdictional lines.

(2) There is another more specific effect to consider. Many Prohibition cases actually involved prescriptive claims, customary tithe-commutations being the leading example. Speaking abstractly (we shall worry later about practical complications of this subject), there is no necessary reason why an ecclesiastical court could not adjudicate such a claim well enough. Ecclesiastical rules on prescription were different from common law rules (they avoided the common law concept of immemorialness), but they were not on paper less favorable to the establishment of prescriptive rights. In any case, if the ecclesiastical courts had been allowed to entertain prescriptive claims, they would probably not have been allowed to insist on their own substantive rules. In principle, a prescriptive claim can

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be tried without a jury, inconvenient though that may be for a man whose hopes rest heavily on a friendly jury. But in another way, there, perhaps, is the rub. A man claims a right based on the immemorial usage of his community. Can the truth of the claim *really* be judged by anyone but members of the community? In cold theory, the evidence can be evaluated by any "judge of fact." But is there not something missing without the actual testimony of the community that only a jury can supply? As it were, an outside judge can say what appears to be the custom, but a jury can say what it *is*. In short, non-jury trial may have been especially unacceptable in cases involving prescription, for more-than-partisan reasons. More generally: A man claims a right based on immemorial usage -- one little custom in the vast structure of customs that includes the common law itself, in a sense as good as any other, as sacrosanct, if usage above all else points to right. In cold theory, of course, anyone can judge the "fact" of the custom, and perhaps any reasonable man can judge its reasonableness. But can a court that is not essentially beholden to custom really handle a case of custom as well as a court that thinks custom and breathes custom, applies custom and protects it because the law to which it owes faith amounts to custom? In sum: The high incidence of prescriptive claims in cases raising jurisdictional problems may have created a greater bias in favor of common law adjudication that would otherwise have existed, for there are special reasons why non-common law determination of such claims would have been hard to accept.

In the preceding pages, we have asked whether a strong public interest in the strict maintenance of jurisdictional lines is likely to have been perceived. Did it *very* much matter if a case fell into the wrong court? Ought it to have mattered a great deal to the judges if they were to serve the expectations of the community that employed them? Was the perceived public interest sufficient to justify relatively loose procedural policies, with the effect of enforcing the lines of jurisdiction in favor of litigants who neglected to take the proper steps to enforce them for what they conceived to be their private benefit? I do not make the slightest pretense of having answered these questions. They do not admit of straightforward answers except by much deeper research and analysis at every point than I have carried out, or, to many intents, than anyone else has. Insofar as the questions go to the "public opinion" of a remote time, they cannot possibly be answered except by elaborately inferential means. Insofar as there are possibilities, such as I have to a degree adumbrated,

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for projecting from intellectual history to what considerable numbers of people may have thought and felt, they must always be tentative, not least because the intellectual history itself -- the process of working out what articulate thinkers "really meant" -- can never command consensus. The well-known gross facts of institutional and political history provide a kind of basis for getting at the experiences that were available to people and the features of their environment that were taken for granted, but even those kinds of history are still often too grossly known to permit the sort of projection that would be most valuable for the purposes intimated here. This study is about the "cases and resolutions of the law," to which we must now turn. The considerations above are meant to suggest the large, vague, complex worlds of reality and perception that *might conceivably* be reflected in innumerable grains of sand, in "actual cases and controversies" of the various types that arose on Prohibitions. The extent to which those large worlds can actually be seen in the grains of sand, and the extent to which studying the cases is a useful indirect approach to the general problems we have raised, are implicit questions in all that follows. For the rest, we shall be concerned with what the courts did in Prohibition cases and with the immediate implications of their decisions for legal doctrine.

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A synthesizing and speculative essay such as this Introduction owes a diffuse debt to many historical writings and historical sources. The best path to the jurisprudential climate in which the cases in this study were decided is to read a modest “canon” of original texts. (I use “jurisprudential” here to signify generalized thought about the law and of lawyers, expressed in something like literary form and capable of confluence with wider intellectual culture. That contrasts with the mere generalizable implications of the practice of law, one of the horizons of this entire study, elements of which figure in the present Introduction.) My interpretation of that climate is mainly the product of reflection on the texts. There is secondary comment on them, some of which I shall mention, but it does not approach substitutability for the sources. It could not, in the way that literary criticism cannot dispense from reading the literature it is about. That truism aside, it remains, in my opinion, manifest that the tradition of English jurisprudential writing has not accumulated around it a very significant body of criticism and intellectual history. The corpus of important sources is small and accessible; any reader whose interest or skepticism is provoked by this Introduction should think of going directly to it.

Sir John Fortescue (referred to on page 24) is seminal for the tradition of self-conscious affirmation of English law against its rivals, as well as for some ideas and attitudes within that tradition: *De Laudibus Legum Angliae* (modern edition and translation by S. B. Chrimes, Cambridge, 1942.) The text at page 24 notes how the work of Fortescue’s contemporary, Sir Thomas Littleton, *Tenures*, seemed in 17th century retrospect to be a landmark -- one might say half-seriously a monument of Phidian perfection showing that English law had attained its classical epoch. Littleton’s book has no express jurisprudential content, however; for that, Fortescue is the landmark.

The peaks of the tradition after Fortescue are Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone. The essence of my interpretation of Coke’s jurisprudence is conveyed in this Introduction. It is much more fully developed in my essay “Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke” (in Perez Zagorin, ed., *Culture and Politics from Puritanism to the Enlightenment*, Berkeley, 1980). The reader is referred to that essay for the primary sources beyond the central

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Calvin's Case. (Coke's general ideas are hopelessly scattered over his writings. The prefaces to his *Reports* are the best primary sources to go to after *Calvin*, then here and there in the four volumes of Coke's *Institutes*--regrettably here and there, amid a great deal of mere law.) I have said in the "General Introduction" that this study as a whole is meant to contribute to a fuller reconstruction of Coke's career than is yet possible. For secondary comment on Coke, my recommendations would be: (1) Stephen D. White, *Sir Edward Coke and "The Grievances of the Commonwealth, 1621-1628* (Chapel Hill, 1979) -- the only book-length example (and an excellent one) of serious monographic study of Coke; the thorough bibliography covers everything that has been written on Coke, the serious part of which is mostly in articles. (2) Samuel E. Thorne, *Sir Edward Coke, 1552-1634* (London, 1957) -- a brief synoptic treatment by a distinguished contributor to detailed Coke studies. (3) Holdsworth in Vol. V -- see below for Holdsworth's History.

For Hale, again, I have expressed in essay form how he seems to me to fit the tradition, especially in relation to Coke. (Introduction to Hale's *History of the Common Law*, reprint, Charles M. Gray ed., Chicago, 1971.) See bibliographical note thereto for the Hale sources beyond the History.

Blackstone's *Commentaries*, though well beyond the period of this study, is important for anyone who wants to see the study in perspective -- whether the jurisprudential tradition immediately in question or the substance of jurisdictional law (*sparsim* for the former, sections of Bk. III dealing with the non-common law courts for the latter). Blackstone's text can be studied in innumerable editions, ignoring the editors and commentators or using them as a valuable supplement. A reader who wants to avoid the complication of the glossators should use the most easily available edition -- University of Chicago Press reprint of Blackstone's first edition, ed. Stanley N. Katz *et al.*, Chicago, 1979. Nothing I know of in the extensive secondary literature on Blackstone deals with him adequately in the set of relations immediately relevant here. A still unpublished essay of my own, "Blackstone's History of English Law," is intended as a sequel to my pieces on Coke and Hale -- the final chapter of a further working-out of the lines adumbrated in this Introduction, which was written before the essays. With respect to jurisdictional law, reading Blackstone is the best first step -- and at present it would be hard to rec-

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commend further ones -- toward understanding that the relationship between the common law and the non-common law systems as conceived in the 1760s was very different from that relationship in practice and implication during the period of this study.)

The vital point about the tradition “affirming” English law is that the closer one looks at it the more aware one becomes -- as one moves from Fortescue to Coke to Hale to Blackstone -- that the way the history of the law is imagined and the meaning of the terms in which it is affirmed change dramatically. It is a story of successive writers adhering to a common set of basic values, in a sense “saying the same thing,” but in an equally important sense saying very different things. This Introduction catches only something of the first transition -- Fortescue to Coke. It explicitly argues that there is a counter-tradition -- more cosmopolitan, more in touch with natural law thinking, sometimes directly critical of “Cokeanism.” In the text I call attention to Lord Ellesmere’s opinion in *Calvin* as the sharpest example of engagement between the affirmers and the critics. I refer also to Francis Bacon. There is nothing in the large secondary literature on Bacon that seems to me to put his legal thought in all the right perspectives, though the best-known article on the legal aspect of his work is a good start toward an appreciation of it: Paul H. Kocher, “Francis Bacon on the Science of Jurisprudence” (*Journal of the History of Ideas*, 1957). I have not myself tried to analyze Bacon’s thought in detail, as I have that of other figures. The best place to start in Bacon’s writings is his essay “On Judicature.” His ideas can then be pursued in his into his expressly legal writings (collected in Vol. VII of the Spedding ed. of Bacon’s Works.) They must be pursued with caution there, for sometimes, as always with such material, the line between the lawyer doing his job and the thinker thinking his own thoughts is hard to draw. My suggestion on p. 38 ff. that major tracts of Bacon’s thought can be brought under the rubric “jurisdiction” amounts to a suggestion for reading *The Advancement of Learning*.

Bacon has never been so well written about as a political thinker -- in contexts that often make his political thought continuous with his legal -- as by S. R. Gardiner. This is an appropriate occasion to say that Gardiner’s great history is the place to go for a sense of how jurisdictional law fits and has been fitted into the received rendering of general political and constitutional history. (Samuel R. Gardiner, *History of England from the*

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Accession of James I to the Outbreak of the Civil War, 1603-1642, 10 Vols., London, 1883-4.) Chs. VIII, XII, and XXII are the most immediately relevant. Observations on Bacon come partly in these chapters; they are otherwise scattered over the first three volumes. Gardiner can be usefully supplemented by J. R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* (Cambridge, 1928), and some of the most basic documents touching the legal problems dealt with in this study are available in Tanner's *Constitutional Documents of James I* (Cambridge, 1930.) This body of older work is of excellent quality. It is my starting point. Political history has been advanced in many dimensions by more recent scholars, but not in the microscopic one that touches the law of jurisdiction. With respect to that, there is nothing wrong with the rendering of Gardiner et al., save for the missing Prince of Denmark those authors could not have supplied without ludicrous diversion from their larger tasks -- the close inspection of jurisdictional law in the courts which this study attempts to provide.

Between the peaks -- Fortescue, Coke, Hale, Blackstone -- and aside from the obvious competing eminence, Ellesmere-Bacon, are other books of the jurisprudential "canon." These are more obliquely related to the themes of this Introduction, but they are useful as indirect lights, and some of them are referred to in the text. Christopher St. German's *Doctor and Student* (referred to on p. 15 -- best modern ed.: Selden Society, T. F. T. Plucknett and J. L. Barton eds., London, 1974) is the most significant work of jurisprudence proper between Fortescue and Coke. Besides its main claim to landmark status -- as the first book to bring the Chancellor's court of equity into the open air of literature -- *Doctor and Student* is an invaluable source for the intellectual world of the English lawyer in the early 16th century. In the end, in my opinion, it documents the "affirmative" nativist tradition along with the tradition's clearly orthodox bearers, the more so for struggling to accommodate the common law to the "higher law" conventions of the age and the reality of an equitable corrective.

Thomas Starkey's *Dialogue between Reginald Pole and Thomas Lupset* (ed. Kathleen M. Burton, 1948) is the "canon's" witness to dissatisfaction with native English law arising out of 16th century humanism and to a kind of aspiration toward Romanization. Starkey gave the impulse to F. W. Maitland's well-known essay *English Law and the Renaissance*

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(Cambridge, 1901 -- often reprinted), which properly takes note of the humanist “aspiration toward Romanization,” explains why nothing came of it in the end, and in the process seems rather to exaggerate the real-life threat, in the Henrician period, of the common law’s being replaced through the agency of non-common law courts. As a cold sober theory about practical danger, the “Maitland thesis” was pretty well disposed of by Holdsworth (*History of English Law*, Vol. IV, 252 ff). For an up-to-date reexamination of the matter, see J. H. Baker, Introduction to *The Reports of Sir John Spelman* (2 vols., Selden Society, London 1977-78).

In passing: Readers of this book should keep Baker in mind, not for a great deal of direct help with the legal detail of the later period that concerns me, but for a picture of English law and the legal system at a slightly earlier time that meets an unprecedented standard of scholarship and clarity. There is no comparable picture for the late 16th to early 17th century period where my Prohibition cases fall. I could not provide a comprehensive one at anything approaching Baker’s level. I inevitably do speak, with various degrees of explicitness, about the system as a whole -- in this Introduction and the General Introduction among other places. I speak from the basic legal history and from impressions which I like to say jokingly I got, not from books, but from my practice -- not that of a practitioner of early modern jurisdictional law (who would know infinitely more), but of someone who most of the time, in preparing these volumes, is playing the role of a “re-stater,” or legal textbook writer, or law review article-ist, with respect to those dead and gone practitioners. On the proper occasion, I might be willing to defend that sort of role-player or costume-actor among the *personae* of the historian; when, in the Introductions and essays, I turn back into something more like a modern-dress historian, I am constantly drawing on the quainter character. For the reader who wants a sense of the system in many aspects -- the same system, only a little earlier -- at a level above the “basic legal history,” Baker is the place to go.

For just the “basic legal history,” which is enough for placing the Prohibition cases in context, the best books are: T. F. T. Plucknett, *A Concise History of the Common Law* (2nd ed., New York, 1932), J. H. Baker, *An Introduction to English Legal History* (London, 1979), and, in a unique class, W. S. Holdsworth’s monumental *History of English Law* (13 vols., 3rd ed., London, 1945). Vol. I of Holdsworth is the basic book

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on the English system of courts in its diversity (cf. General Introduction). For the parts of medieval history in which Maitland did his specialized work, Holdsworth was a transmitter; for the later middle ages and the early modern period, he was a pioneer. In writing an encyclopedic book, he was necessarily confined for the most part to the printed sources and, for close work on many of the innumerable sub-topics of legal history, to monographic studies by others here and there, none of them approaching the scope and quality of what Maitland had done on the high middle ages. The close texture of jurisdictional law, my subject, is one example of the many topics with respect to which Holdsworth could not go beyond what he could do with any single topic himself in the course of taking on everything. Nevertheless, the reader of Holdsworth from Vol. III on will have an enormous knowledge of early modern law and its immediate antecedents -- of the "hardcore" case law and statute law, of the lawyers and judges, of their literature, and of the surrounding constitutional history. Holdsworth has by now been improved on and supplemented, but not succeeded. With respect to lawyers' literature, in formulating a "canon" of basic jurisprudential texts here, I am saying by implication that little else in the corpus of legal writings contributes much to an understanding of lawyers' thought beyond the practical level. Others may dispute this judgment. Holdsworth provides comprehensive guidance to the corpus as a whole.

A modest "canonical" niche can be assigned to Sir Thomas Smith's mid-16th century *De Republica Anglorum*. Law figures only incidentally, but Smith provides a valuable contemporary "fix" on the English political order with the advantage of a partially outside perspective. (He was a practiced insider of English government, but a professional civilian with extensive foreign experience, who wrote in part to make English ways intelligible to an educated public that need not be English.)

Richard Hooker's *Laws of Ecclesiastical Polity* (most conveniently available in Everyman ed., 2 vols., London, 1907, and subsequent reprints) touches the concerns of this Introduction in interesting ways. It comes, of course, out of the clerical world, not the legal (including the Church-legal or civilian). It testifies to at least the following: The Church of England's search for a self-conception and ethos distinct from the other strains of Protestantism; a theory assertive of the particular community's right to choose its ecclesiastical forms as it chooses its secular

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law, against the Puritan conviction that there was a divinely prescribed, universal blueprint in the Scriptures (cf. p. 37 in the text); a version of classical natural law theory, reflecting Thomas Aquinas (from one angle discomforting to the Cokean will to keep argument from mere natural reason out of legal debate, but so generous toward man-made law and the self-determination of historic communities that the ultimate formula could be as easily “natural law on terms acceptable to a Cokean” as an antagonistic position); a “jurisdictional” mentality parallel to Bacon’s, for Hooker’s organizing theme is that we are under many laws at once, each in its sphere, and trouble comes when any of them overreaches its domain -- a theme to which Coke on his terms would have said “Amen,” and his terms were more clearly opposed to those of a politician and equity judge, such as Bacon, than to those of an ecclesiastic such as Hooker. Hooker was a loyal Church of England cleric, whose sympathy at the practical level would undoubtedly have been with the ecclesiastical courts and their protests against over-regulation by the common law; on the high ground of theory he made peculiarly his, he propounded ideas that do not necessarily serve only the interests he would have cherished. (John Locke’s celebrated reverence for this Elizabethan High Churchman may remind us of that.)

The view has long been in circulation that there was some natural affinity between “the lawyers” and Puritan critics of the ecclesiastical establishment, Hooker’s foes. I believe that material in this study will contribute to sustaining the opinion I hold: the view as stated is jejune. Lawyers like other people differed over current religious controversies. To the uncertain degree that they were held together by a professional ethos -- an ethos given conscious formulation primarily by Coke, and perhaps exaggerated by him beyond the demands of a mere professional ethos -- I do not think they had much in common with serious Puritan thought. (Mildly Puritanish sentiments are something else, for these were widespread in the ruling class and likely to turn up in a caste of conservative laymen apt to be at odds from time to time with high-flying clerics and their friends in the government.) It is easier to imagine Coke reading Hooker with fundamental approval -- particularly on the matters Hooker immediately addressed, though perhaps with moments of theoretical discomfort -- than to see lines of attraction between his mentality and that of ultra-Calvinist idealism.

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The last text in my “canon” is Thomas Hobbes’s *Dialogue between a Philosopher and a Student of the Common Laws of England* (modern ed. by Joseph Cropsey, Chicago, 1971), supported by the philosopher’s major works. Hobbes is the antithesis of the “affirmative” tradition. His relation to lawyers such as Ellesmere and Bacon is like his relation to Anglican divines: he propounded a version of their position so extreme that they would have been more shocked by it than by a Coke at his most exaggerated. (So his pressing Erastianism to its logical conclusion was more terrible to Anglican bishops than any spook the bluest of Presbyterians could conjure.) Hobbes analyzed common law ideology as a tissue of nonsense; “mere reason” or natural law he analyzed as the only possible source of adjudication besides sovereign mandate. He was father of the lawyer-Puritan linkage (principally in *Behemoth*). On his premises, there is no objecting to it -- *per* Hobbes, the two groups were victims of different kinds of nonsense, and also malicious propounders of different kinds, but the will to subvert legitimate authority and substitute one’s own is the same malignant will behind whatever ideological facade, and if the head’s muddledness can ever excuse the heart’s disloyalty, then lawyers and Puritans failed alike to grasp the intellectual grounds of political duty. (There is of course also no objection to linking Puritan religious opinion and various veins of legal opinion in the texture of straightforward political history, a texture of imperfect alliances. The shifting confluences of groups alienated from the government and of grounds for criticizing its policies are classically depicted in Gardiner’s *History* and its derivatives; they have been persuasively re-weighed in more recent political history, with the effect of correcting the impression that over several decades currents of opposition to the Stuarts were constantly accumulating, alliances always consolidating, towards the fatal moment of civil catastrophe.)

The aspect of Puritanism I speak of expressly in this Introduction -- its built-in opposition to the “carnal” mode of Christian discipline embodied in the Church courts -- has not had sufficient discussion. Christopher Hill in *Society and Puritanism in Pre-revolutionary England* (American ed., New York, 1964) made a valuable contribution by calling attention to it (Chs. 8-10). A common lawyer or judge could participate in that fundamental objection to ecclesiastical justice as the world had long known it. I can only say that virtually nothing in hundreds of Prohibition cases suggests any such attitude. Exceptions could probably be found, but it seems likely that nearly all of the legally minded believed what institutionally

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they must profess -- that the established form of ecclesiastical justice was a benign and necessary part of the legal order. The belief is compatible with great disagreement on the exact role assigned to the ecclesiastical system by the law. My point in the text is that radical disapproval of that system was at large in the community, to reinforce less radical forms of dissatisfaction with it.

For awareness of the tradition affirming the native English legal heritage, and of Coke's centrality in it, historians owe their primary debt to J. G. A. Pocock's *The Ancient Constitution and the Feudal Law* (Cambridge, 1957). Pocock has been catalytic for my own work on general jurisprudence (not so much for the study of Prohibitions as such, though even there, to the degree that it started from an interest in pursuing a fuller picture of Coke, Pocock's placing of the judge as a figure in wider intellectual history was an encouragement). I have come to take some kinds of exception to Pocock's picture of the "common law mind" (cf. p. 46), but I think the differences are more of perspective than of substance. The "common law mind" looks more complicated when seen from within the history of jurisprudence (with hardcore legal history over one's shoulder) than when Pocock sets it in the history of historical thought. Any reader whose interest is caught by what I say in this Introduction about the prestige of the common law and the perfections ascribed to it by its initiates should go to Pocock's representation of those phenomena.

The rest of what I say in this Introduction mostly so merges into a general reading of Tudor-Stuart history that it can hardly be tied to particular sources. Though its place in the vast literature is certainly modest, I have given a "general reading" in *Renaissance and Reformation England* (New York, 1973). That book was written at about the same time as the present volume of the study of Prohibitions. I cite it (with the bibliographical suggestions therein) for the benefit of any reader whose curiosity is engaged by the ways in which my emphases in depicting the background of cases on Prohibition procedure seem to imply a larger way of seeing the period in which the cases fall.

There are speculative observations in this Introduction on the reputation of ecclesiastical courts. Throughout the study, I by and large rely for my sense of what was going on in those courts -- on which any estimation of their reputation depends -- on the reflection of that activity in common

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law reports. I do not try to coordinate that with the growing body of direct knowledge of ecclesiastical courts based on their own records. This is a deliberate simplifying measure. There are two pictures: one is of how the doings of ecclesiastical courts looked to the common law courts in particular cases; the other is of how they really were -- typically, across the board, in many normal cases (as opposed to those in which an attempt was made to arrest ecclesiastical proceedings). I think it is better to let study of the common law and ecclesiastical sources converge than to "worry" the former with impressions from the latter. My largely skeptical suggestions in this Introduction seem to me compatible enough with our improved direct knowledge of the ecclesiastical system in action. Readers interested in whether they are might usefully start with Ralph A. Houlbrooke, *Church Courts and the People During the English Reformation 1520-1570* (Oxford, 1979), which contains a good bibliography of other work. Now, however -- just as the present volume goes to press -- another book is available, a more comprehensive work and one more directly related to my concerns: R. H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge, 1990). Helmholz is extending his distinguished earlier work in medieval ecclesiastical law into the early modern period. *Roman Canon Law* takes in all that has been done, by Helmholz himself and by others, and projects a balanced and persuasive wider picture of the post-Reformation ecclesiastical system -- a picture that is being and will be rounded out by study of the ecclesiastical court records in the kind of detail these volumes aspire to on the common law side. That is a larger task than mine, for the quantity of material is much greater. It is my hope that the present study will contribute a dimension to the "rounding out" by working the easier side of the street with some care.