Michael Lobban

Theory in history: positivism, natural law and conjectural history in seventeenth- and eighteenth-century English legal thought

Book section

Theory in History:

Positivism, Natural law and Conjectural History in Seventeenth- and Eighteenth-Century English Legal Thought

Michael Lobban

Contemporary jurisprudence can be very tribal. Rival schools compete with each other to show that they have the best answers to fundamental questions about the nature of law and legal reasoning. Their answers may appear incompatible, in part because they focus on different aspects of law. Positivists such as HLA Hart and his followers, who seek to identify what counts as law, find its systematic unity in the fact that it derives from an identifiable source which is distinct from morality. Hart's critics, notably Ronald Dworkin, focus on the question of how judges develop the law in the process of adjudication, arguing that the law develops not with the discretionary diktats of the judge acting as a kind of subordinate legislator but though a form of moral reasoning engaged in by the judiciary. While such theorists may not be particularly interested in seeking analytical systems in the law, other schools of thought – such as corrective justice theorists in private law – seek to find a logical unity within areas of legal doctrine, by using both conceptual analysis and moral philosophy. Few of these schools now make much use of history in their argumentation – in contrast to nineteenth century jurists such as Savigny, who both argued that law reflected the people's consciousness, or *Volksgeist*, and that it was jurists dealing with legal concepts who articulated that consciousness. Where history is drawn on, it is rather by sociological or instrumental theorists, who wish to challenge the assumption of those theorists who take an

'internal' view and consequently concentrate their analysis on the language of jurists.

In their academic disputes, the combatants often seem to suggest that the law student needs to be persuaded that only one view accurately describes the world he inhabits. Yet it may be suggested that no single theory has the monopoly of truth. Neither does it have a monopoly of usefulness. Indeed, it is hardly to be expected that it would, given that different theories focus on different aspects of law, and that few now would attempt to create a holistic theory encompassing both law in general and the substantive rules it enforces. To understand law in its totality, we may find each of these theoretical approaches to be useful, while not necessarily definitive.[1] We may also find that it is useful, perhaps necessary, to look to history to understand the shape of the law. To illustrate this, we will in what follows explore how theory was used in the century and a half after the English civil war when a number of jurists did try – for the first time since the composition of the *Bracton* treatise – to create a holistic theory of the common law. The writers we will explore were not abstract theorists – they were seeking to draw on theory for the very practical purpose of making sense of the law of their era. As shall be seen, they had great difficulty in making a single theory explain all that needed to be explained.

This was a novel enterprise. Although jurists before the civil war certainly thought deeply about the nature of legal reasoning and legal practice, they did not develop systematic theories of law and its content. For them, the common law was a system of special professional knowledge, or 'artificial reason', best manifested by legal argumentation in the courtroom.[2] As Sir John Dodderidge explained in 1629, the common law was 'not left in any

---

[1] See also Steve Hedley's arguments on corrective justice in this collection.

[2] For Coke, difficult cases could be solved by 'no one Man alone with all his true and uttermost labours, nor all the actors themselves by themselves out of a Court of Justice, nor in Court without solemn Argument'. S

other monument, than in the mind of man'. Its content was 'to be deduced by discourse of reason; *when occasion should be offered*, and not before.'[3] However, in the century following the civil war, a number of English lawyers sought to emulate their continental and Scottish counterparts in writing 'institutes' of national customary law on the model of Justinian's textbook.[4] Their task was significantly different from that of the Europeans, whose aim in writing such works was to give unity to a variety of formerly autonomous customary systems, or to assert the national system's autonomy from a dominant *ius commune*. A unitary national legal system had existed in England since the era of Henry II (1154-89), when the royal justice dispensed by the king's judges began to displace local jurisdictions. But if her system of judicature was much more unified than those of her continental neighbours, England had a much more fragmented substantive law. For the new generation of 'institutists', the aim was to show that English law as a whole could be put into as rational a framework as Roman law, to refute the commonly held view (as Thomas Wood put it in 1720) that 'there was no Way

Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (Indianapolis 2003) vol 1, 307 (preface to Part 9 of the *Reports*). See further, M Lobban, *A History of the Philosophy of Law in the Common Law World* (Springer 2007) ch 2.

[3] J Dodderidge, *The Lawyer's Light* (London, 1629), 90, emphasis added. Quoted in M Lobban, 'Common Law and Common Sense' (2008) 21 *Ratio Juris* 542. Dodderidge went on: 'therefore there is nothing of more force and effect touching the making and framing of a good Law, then the present occasion offered, sith thereby it brought to light, that which otherwise would not asmuch (many times) as be thought upon, and giveth occasion to dispute that which none would have thought ever should gave come in question. And therefore not without due consideration among the Romans, *Disputationes fori*, and with us *Demurrers* have ever beene allowed as originalls of Law.'

[4] See K Luig, 'The Institutes of National law in the Seventeenth and Eighteenth Centuries' (1972) *Juridical Review* 193-226 and JW Cairns, 'Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State' (1984) 4 *OJLS* 318-60.

to attain to the Knowledge of them, but by a Tedious Wandring about, or with the Greatest Application and Long Attendance on the Highest Courts of Justice'.[5]

In doing so, different jurists used different theories for different purposes. Although each of the jurists we will study saw himself as writing in a natural law tradition, this was an ambiguous heritage, for the law of nature could be seen either as the commands of a divine legislator, or as a set of principles of justice accessible to right reason.[6] It could be seen either as *lex* – a form of commanded rule – or as *ius*[7] – a sense of justice, generating a will to live honestly, not to harm others, and to give them their due.[8] As shall be seen, the first model was used particularly by those writers who sought to explain the nature of the state, and the rules of distributive justice which derived from that constitution. The pioneer in this field was Sir Matthew Hale, whose model was also followed by the first man to publish a complete set of *Commentaries on the Laws of England*, Sir William Blackstone. The second model was useful for those who were less interested in the state, and more interested in how to resolve the problems of corrective justice faced by judges. This view of law was more favoured by Sir Jeffrey Gilbert, who planned (but did not complete) a large-scale overview of the English

---

[5] T Wood, *An Institute of the Laws of England* (E Nutt and R Gosling, 1720), vol 1, Preface. For the educational impulses behind this, see D Lemmings, 'Blackstone and Law Reform by Education: Preparation for the Bar and Lawyerly Culture in Eighteenth-Century England' (1998) 16 *Law and History Review* 211-56.

[6] Cf *Digest* 1.1.9.

[7] The ambiguity can be seen in the phrasing of a passage at the start of Gratian's twelfth century *Tractatus de Legibus*: 'The *ius* of nature is what is contained in the *lex* and the Gospel. By it, each person is commanded to do to others what he wants done to himself and is prohibited from inflicting on others what he does not want done to himself.' Quoted in K Pennington, 'Lex Naturalis and Ius Naturale' in SE Young (ed), *Crossing Boundaries at Medieval Universities* (Brill 2010) 228.

[8] *Digest* 1.1.10.1.

law, in far greater detail than Blackstone's lectures. As shall be seen, each 'school' used the model which was most useful for answering the questions it regarded as most important. At the same time, as shall be seen, neither school found that abstract theory answered all the questions. Instead, theory needed to be supplemented by history.

I

William Blackstone's *Commentaries on the Laws of England* began with a chapter 'On the Nature of Laws in General'. His decision to commence his discussion of the legal system with an analysis of the concept of law was not dictated by the institutional model he was using. Three decades earlier, the civilian lawyer John Ayliffe began his *A New Pandect of the Roman Civil Law* not by discussing *law*, but by discussing the concept of *justice*, which was not only the parent of law, but set limits to it.[9] For Ayliffe, jurisprudence was the study 'of that which is just, and that which is unjust': justice was the constant and perpetual will of giving each his due, and was encapsulated in the precepts (taken from the beginning of both the *Digest* and the *Institutes*) to live honestly, not to hurt another and to give every one his due.[10] By contrast, Blackstone's initial focus was on law, which he defined in a particular way. '[T]he general signification of law,' he stated at the outset of his discussion, '[is] a rule of action dictated by some superior being'.[11] If natural law was God's will, municipal law

---

[9] J Ayliffe, *A New Pandect of Roman Civil Law* (Thomas Osborne, 1734) 1-5.

[10] Thomas Wood similarly began his *New Institute of the Imperial or Civil Law* (Richard Sare 1704) by stating that 'The Law is an *Art directing to the knowledge of Justice*,' the 'constant and perpetual desire of giving to every one his due'. Only after having discussed the nature of universal and particular justice, and the distinction between commutative and distributive justice did define law as '*the precept of the supreme power*, (or power derive from it) *obliging the Subject to act or not act under a Penalty.*'

[11] W Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765-9), i: 39. Law, he added (i: 43)

was 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong'.[12]

The notion that law was to be seen in terms of the will of a superior was hardly new, having been discussed extensively in the seventeenth century by a number of writers who had influenced Blackstone, including Thomas Hobbes, John Selden, Samuel Pufendorf, and Sir Matthew Hale. Hale had himself planned to write an institutional overview of the laws of England, an outline of which was published posthumously in 1713 as *The Analysis of the Law*.[13] He did not complete this work, but he did leave behind an unpublished treatise on the nature of the law of nature, in which he discussed law in terms of commands and rules. In Hale's view, law was 'a Rule of Morall Actions, given to a being endued with understanding and will; by him that hath power or authority to give the same, and to exact obedience thereunto *per modum imperii*, commanding or forbidding such actions under some penalty expressed or implicitly contained in such law.'[14] Consequently, in any legal system, obligations arose 'from the Party to whom the Law is given unto the Party by whom it is given to observe and perform it.'[15] Elsewhere, he explained that 'A Law or Rule is not in it self effective or active, neither can it subsist or exist without an Agent that either gave it, or

---

'always supposes some superior who is to make it'. Blackstone's theorisation was influenced by JJ Burlamaqui, *Principles of Natural Law* (J Nourse 1748), 77-8.

[12] Blackstone, *Commentaries* (n 11) i: 39, 44.

[13] M Hale, *The History and Analysis of the Common Law of England* (J Nutt and J Walthoe 1713).

[14] M Hale, *Of the Law of Nature* (ed D S Sytsma, CLP Academic 2015), 6. See also Lobban, *History* (n 2) ch. 3.

[15] Hale, *Law of Nature* (n 14) 15. Indeed, the subject of the law was under two distinct obligations: '1. An antecedent obligation; whereby the Subject is bound to obey such Law's as are Justly made. 2. An Obligation secundary or subsequent, whereby the Subject in case of disobedience is obliged to the penalty or sanction of the Law', ibid. 29.

works by or according to it. The Laws of a State are the Rules of its Government, but this Law must be given by some Power, and some Power there must be that must act according to it, otherwise a Law is a stupid, dead, unactive, and unconceivable thing.'[16]

Hale's elaboration of this theory might not have been well known in the eighteenth century, but many other writers did define law in similarly positivist terms. The idea that the law of nature was imposed by God's will – an idea elaborated by Selden and Hale as well as numerous other natural lawyers – was repeated by several eighteenth century English writers, including Blackstone.[17] They also saw human law in such positivist terms. One of Blackstone's successors in the Vinerian chair, Richard Wooddeson, argued that laws 'cannot be abstracted from the authority of a lawgiver'.[18] In his view, '[t]he giving of laws to a people

---

[16] M Hale, *The Primitive Origination of Mankind, considered and examined according to the Light of Nature* (William Godbid, 1677) 344. Elsewhere, he wrote that 'Without a power to exact obedience and to inflict punishments for breach, the Law were ridiculous and vain', M Hale, *A Discourse of the Knowledge of God and of our selves* (William Shrowsbury 1688) 23, quoted Hale, *Law of Nature* (n 14), 6n. Following his mentor, John Selden, he wrote that the law of nature itself derived from God's commands. Hale, *Discourse* 23.

[17] Blackstone wrote that the state of man's dependence on God obliged 'the inferior to take the will of him, on whom he depends, as the rule of his conduct ... [t]he will of his maker is called the law of nature'. Blackstone, *Commentaries* (n 11) i: 39. John Taylor noted that if 'legal necessity must come from a superior and directing hand ... Then I can gather, that a Being of infinite Wisdom, who contrived that Fitness, should be willing to demand the Execution.' Taylor, *Elements of the Civil Law* (Cambridge University Press 1755) 126. By contrast, Richard Wooddeson wrote that Selden's 'very learned work' in tracing natural law to the Praecepta Noachidarum that 'is not in equal estimation with the writings of those who have paid more attention in their researches to the pure dictates of reason': *Elements of Jurisprudence* (J Moore 1792) 4. At the same time, he wrote that God, '[t]he sovereign legislator hath ... exercised his consummate authority. He hath ordained certain measures of human conduct' (10).

[18] Wooddeson, *Elements of Jurisprudence* (n 17) 10.

forms the most exalted degree of human sovereignty; and is perhaps in effect, or in strict propriety of speech, the only truly supreme power of the state'.[19] Similarly, in his *Considerations on Criminal Law* of 1772, Henry Dagge gave this definition: 'Law is that faculty whereby some lawful superior prescribes rules of action, which those in subjection are obliged to perform, under certain penalties, express or implied.'[20] Dagge added that every subject was bound to observe every law made by lawful authority, whatever he thought of it, 'for he has given up his right of judgment to the legislature'. Furthermore, anticipating an argument which was to be particularly associated with John Austin, he wrote that 'the supreme magistrate is not himself bound by the laws of the land: For as he acknowledges no superior, no one can command him; since such a power would induce the absurdity of *Imperium in Imperio*.'[21]

These writers' concept of law was closely tied to the concept of a sovereign body acting within a state. Civil law was the product of a civil society. Human legislators had been created by men who had been driven into society as a means of self-preservation,[22] or out of a '*sense* of their weakness and imperfection'.[23] In Blackstone's view, once society was formed, 'government results of course, as necessary to preserve and to keep that society in order'. Any society therefore needed a superior whose commands all were bound to obey – 'a

---

[19] Ibid 71.

[20] [Henry Dagge], *Considerations on Criminal Law* (T Cadell 1772) 2-3.

[21] Ibid 5.

[22] Hale, *Law of Nature* (n 14) 77.

[23] Blackstone, *Commentaries* (n 11) i: 47. By contrast, Wooddeson, *Elements of Jurisprudence* (n 17) 44, quoting Coke (*The King* v. *Marsh* (1615) 3 Bulst 27) stated that 'magistracy is by the law of nature, reason assuring men that they cannot well subsist without civil society, nor civil society without government'. He also argued (at 73) that the existence of political power was God's will.

supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside' – as well as a judge who could 'define their several rights and redress their several wrongs'.[24] There could be no provision in law for resistance to the established authorities, even if there might be times when resistance was required.[25] Wooddeson also argued for an illimitable legislative sovereign, which had been created by the consent of the people. Echoing views which could be found in Hooker and Hale, Wooddeson added that this consent was not revocable by the people alone 'for that would be making a part of the community equal in power to the whole originally, and superior to the rulers thereof after their establishment.'[26] He also drew a distinction between moral fitness and political authority: 'We cannot expect that all acts of legislators will, or can be entirely good, ethically perfect; but if their proceedings are to be decided upon by their subjects, government and subordination cease.'[27]

In the view of these writers, legislators were needed to flesh out, give shape to and enforce natural law. As Hale explained, human laws were necessary, not only to regulate matters which were indifferent,[28] but also because the detail of some obligatory laws of

---

[24] Blackstone, *Commentaries* (n 11) i: 48-9; cf i: 91.

[25] Cf [Dagge], *Considerations on Criminal Law* (n 20) 10: 'it is not for an ignorant and factious multitude, misguided perhaps by a few needy and interested leaders, to determine what is, or is not, a violation of the laws, in either prince or people. The common and statute law can only determine in cases where subjects resist the supreme magistrate; and the united voice of the whole people can only decide upon the crisis when resistance may be justifiable'.

[26] Wooddeson, *Elements of Jurisprudence* (n 17) 36.

[27] Ibid 81.

[28] Hale qualified this, however, saying that it might be difficult to find any particular action 'in the concrete' which was purely indifferent; 'yet we are not presently thereupon to conclude that all these are under the precise Command or prohibition of the Law of Nature. Hale, *Law of Nature* (n 14) 192.

nature needed to be determined by positive authority,[29] given the 'great variety and the great diversity that ariseth by the Exygencies and Conveniencys of several people'.[30] Blackstone – who argued that the law of nature was binding of itself, but that positive law was needed to regulate indifferent matters – added that 'the main strength and force' of *any* law – whether regulating natural or indifferent matters – 'consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.'[31] Wooddeson also argued that human laws were needed to give form to the law of nature. Although individuals could 'comprehend whatever may possibly be known to be the duty of all men by necessary consequence, deduced out of clear and manifest principles', they 'must not descend to conjectural probabilities, as to what is convenient, for that is a field of arbitrary determination, and the province of positive law.'[32] In making the point that a human legislator was needed to work out the specific details of what natural law required, Wooddeson drew on the distinction (made by Pufendorf) between the 'absolute' and 'hypothetical' (or primary and secondary) law of nature, the first of which regulated man is a state of nature, and the second of which dealt with the necessities created once men were organised into civil societies, the most important of which was property. Furthermore, he noted that although cases had to be

---

[29] Hale pointed out that the laws of nature 'cannot be certainly and definitively enumerated in their uttermost extent' because of 'the great variety of Circumstances which Accompany moral actions which strangly diversify the application of the Generall Laws which we may suppose naturall whereby those that perchance subscribe to the same universall Laws of Nature, yet are contradictory in their Conclusions touching particular Moral Actions'. Hale, *Law of Nature* (n 14) 46.

[30] Ibid 196.

[31] Blackstone, *Commentaries* (n 11) i: 57.

[32] Wooddeson, *Elements of Jurisprudence* (n 17) 21-2, following Hooker. On Hooker and probabilities, see Lobban, *History* (n 2) 66.

decided on the principles of natural law where positive law was silent, '[t]he necessity of recurring to primary principles of right and wrong is avoided, where the municipal institutions are express: it is then, in general, concluded, that they are founded on the law of nature, or contain nothing repugnant to it.'[33]

Writers from Hale to Wooddeson praised the apparently complex English law for the detail of its provisions. As Hale explained,

> The Common Laws of England are more particular than other Laws, and this, though it render them more numerous, less methodical, and takes up longer time for their study, yet ... it prevents arbitrariness on the Judge, and makes the Law more certain and better applicable to the business that comes to be judged by it ... It hath therefore always been the wisdome and happiness of the *English* Government, not to rest in Generals, but to prevent arbitrariness and uncertainty by particular Laws, fitted almost to all particular occasions.[34]

Over a century later, Wooddeson agreed:

> a man of the most penetrating understanding would rarely be able to solve an intricate legal question, unless a general acquaintance with the whole law capacitated him to judge of the various relations and dependencies of the case stated for discussion, and of the consequences which his determination might involve, by shaking and

---

[33] Wooddeson, *Elements of Jurisprudence* (n 17) 134.

[34] Preface to Henry Rolle, *Un Abridgment des Plusieurs Cases et Resolutions del Common Ley* (London, A Crooke et al 1668).

deranging the juridical system. It must be remembered, how great a part of municipal law consists of positive institutions, having little or no original connexion with the principles of natural law and abstract justice; established at first arbitrarily, because it was necessary they should be in some way settled, and adhered to afterwards for the sake of uniformity of decision, which the welfare of the community demands. As in civil life rules of property must be instituted, they also must be permanent and stable[35]

Why did these writers build their institutes around this 'positivist' model? Two reasons may be suggested. The first was practical. These writers were seeking to describe the body of the common law as a systematic set of rules which could be identified and described, and to explain their pedigree within the system. Just as political societies needed to have rulers, so they needed to be held together by rules. As Hale put it, 'what a Confusion would there be in the World, if the particular Laws and rules of property were not settled and governed by some established Laws or rules, if all punishments should be equal or none at all, if there were no compuls[ion] for the inforcing of every Man to performe his promise, or make retribution in damages.'[36] These rules could be neatly parcelled out in the institutional division of persons, things and actions. The law of persons – which in Hale's system dealt with 'the Relation of Persons, and the Rights arising thereby', including political, economical and civil relations – provided a ready category to describe the rules of constitutional law. The law of things allowed for the discussion of rules of property ownership, while the law of actions allowed jurists to set out the rules of criminal law. In each of these areas, English law could be described in terms of rules whose origin and pedigree could be identified. The second reason

---

[35] Wooddeson, *Elements of Jurisprudence* (n 17) 172-3.

[36] Hale, *Law of Nature* (n 14) 196.

was more political: in the aftermath of the attempts of the seventeenth century Stuart monarchy to exercise extensive prerogative powers, anti-absolutist jurists sought to describe a constitution which clearly demarcated where legislative power lay in the state. By defining law as the product of the will of a sovereign, and by identifying where sovereignty lay, jurists were able to show which institutions and individuals did not have authority to make law. For this reason, writers from Hale to Blackstone to Wooddeson aimed to set out what powers the crown had, and how constitutional power was allocated to different bodies acting under the law. The jurisprudence they developed consequently served a particular purpose. These 'positivists' were not concerned with making an argument that law had no foundation in morality. Nor were they simply seeking to clarify concepts, so that it would be easier to distinguish the realm of the legal from the non-legal. Instead, they more concerned in identifying who had the authority to pronounce what that law was, and who did not.

II

If a positivist theory of law explained that there had to be a single sovereign power in any state, and showed that the law made by that power was binding, how was it to explain the authority of that sovereign, and the obligation of the people to obey it? How could it explain why the particular constitutional arrangements were authoritative? This was a central question for seventeenth and eighteenth century writers to address, writing in the aftermath of half a century of constitutional crisis.

In the seventeenth century, Thomas Hobbes had solved this problem by resting the authority of his sovereign on a legalistic social contract theory. His was a normative theory which explained the subject's duty to obey whatever laws the sovereign passed: for each subject was said to have authorised the sovereign by an act of his will when making the social

contract.[37] However, since this in effect preached obedience to whatever authority was established, and argued that sovereign power was by nature illimitable, it did not account for how sovereign powers might be limited by law, or how a constitution might change. The Hobbesian route was therefore not one our seventeenth and eighteenth-century jurists wanted to take; for while they agreed with him in wanting to base the constitution on legal foundations, they wanted foundations which might define and limit the powers of constitutional actors, and to allow for constitutional modifications over time.

Nor did they take the approach developed by subsequent generations of English positivists, who did not seek a normative grounding for their theory of law, but instead located the ultimate basis of the sovereign's authority in social facts, either a habit of obedience (in the case of Bentham and Austin) or a 'rule of recognition' (in Hart's case). For such approaches could not show how and why the English constitution had obtained legal authority. In Bentham's theory, it was for each individual to make his own present calculation of the benefits and burdens of obeying the sovereign: and if enough people calculated that there was more utility in obeying than disobeying, the sovereign remained in power. The people's disposition to obey could constrain the sovereign, but (in Bentham's early formulations, followed by Austin) it was not a legal constraint.[38] Hart sought to solve

_____

[37] See further M Lobban, 'Thomas Hobbes and the Common Law' in D Dyzenhaus and T Poole (eds) *Thomas Hobbes and the Law* (Cambridge University Press 2012) 39-67.

[38] Austin did not have access to Bentham's unpublished manuscripts, but did read Bentham's *Fragment on Government*, where he wrote 'That to say there is any act they [supreme legislatures] *cannot* do, to speak of any thing as their's as being *illegal*, - as being *void*; - so speak of their exceeding their *authority* (whatever be the phrase) - their *power*, their *right*, - is, however common, an abuse of language'. J Bentham *A Comment on the Commentaries and a Fragment on Government* (Athlone Press 1977) 485-6. Bentham's unpublished work (and his later constitutional writings) showed that Bentham did envisage sovereigns being limited by constitutional

the problem that the Benthamic vision did not appear to allow for legally limited government through his theory of the rule of recognition, which was a power-conferring rule which might limit the powers conferred. However, Hart's rule of recognition – a customary rule of the officials of a system, who in effect made the rule by their customary practices – did not explain where the officials got their power from or how they were themselves constrained, nor did it explain the rules of change of the system itself, rather than the rules within it.

These were the problems which our thinkers needed to provide for, and they found their solutions in history. For them, the original power-conferring rule which gave powers to the constitutional actors had to be in some way a legalistic one: and for that reason, they were often tempted to follow Hobbes to a notion of a social contract. At the same time, in the absence of historical evidence of such a contract, they were often forced to invoke immemorial custom as evidence of an historical consent, which had acquired the status of law. An historical foundational moment was presumed, which in turn created a presumption of the legitimacy of institutions and the legal customs they enforced, which included the rules which determined how the constitution itself could be modified. Like the common law itself, these customs were legal customs *in foro*, in contrast to the general custom of the community, or customs *in pays.*

The notion that there was an ancient constitution, rooted in communal consent, consequently underpinned the constitutional theory of several of these writers. As Hale explained,

---

laws *in principem*. For a discussion of the relationship between Bentham and Austin's ideas on this, see M Lobban, 'John Austin and Bentham's *Of the Limits of the Penal Branch of Jurisprudence'* in G Tusseau (ed) *The Legal Philosophy and Influence of Jeremy Bentham: Essays on Of the Limits of the Penal Branch of Jurisprudence* (Routledge 2014) 149-69.

if the original of government appears not, then we must have recourse to the common custom and usage of the kingdom ... For custom and usage hath not only a kind of declarative evidence what the original pact was in case there were any, but if it be constant and immemorial, it hath a kind of introductive or institutive power.[39]

Hale traced this history from legal sources. As he explained, in tracing the constitution, one needed to examine 'such customs as have been allowed by the known laws of the kingdom'. These 'legal' customs were to be found not in the community, but 'in the traditions and muniments of the municipal laws, law-books, records of judgments and resolutions of judges, treaties and resolutions and capitulations of regular and orderly conventions, authentical histories, concessions of privileges and liberties'.[40] Looking at such sources – rather than to the 'notions and fancies' of those who might wish to make new models of governments – showed that 'it is the settled constitution and custom of the kingdom, that fixeth and defineth, where the legislative power is lodged.'[41]

---

[39] DEC Yale (ed), *Sir Matthew Hale's The Prerogatives of the King* (Selden Society, 1976) 7. In Hale's view, if one could show an original contract, one could establish the duty of subjects to obey, which was rooted in the divine command to keep one's promises. The citizen was bound to keep his faith 'not only by an Obligation between me and the Party, to whom it is given, for then if I could avoid his coertion I may loosen myself again. But I am obliged hereunto by a more soveraigne and uncontroleable Law, the Law of Almighty God who hath given this Law, to me and to all mankind, that *fides est servanda*.' Hale, *Law of Nature* (n 14) 16-17. Cf J Selden, *De Iure Naturali et Gentium Iuxta Disciplinam Ebraeorum* (Richard Bishop 1640) 106-7.

[40] *Hale's Prerogatives of the King* (n 39) 7.

[41] M Hale, *The Jurisdiction of the Lords House or Parliament* (ed F Hargrave, London 1796) 11. At p 4, he said the king's power was 'qualified at least in some points of government, as in making of laws and imposing of taxes or altering properties.'

Blackstone also took a historical view of the constitution. He was more sceptical about the notion of an original contract by which men emerged from the state of nature into a political society, considering the theory 'too wild to be seriously admitted'. However, he argued that since men's weakness and imperfection kept them in society, an original contract 'in nature and reason must always be understood and implied, in the very act of associating together'.[42] Indeed, the notion that there was a contract 'necessarily implied by the fundamental constitution of government, to which every man is a contracting party' ran through the *Commentaries*.[43] At the same time, it was supplemented by Blackstone's historical vision 'of the Rise, Progress and gradual Improvements of the Laws of England' (the title of his last chapter). This chapter mapped out the gradual progress of 'our laws and liberties', showing the constitution to be a product of time: 'the fundamental maxims and rules of the law ... have been and are every day improving, and are now fraught with the accumulated wisdom of ages'. For Blackstone, its very authority seemed to come from its history: 'Of a constitution, so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely it's due'.[44]

Writers like Hale and Blackstone were keen to show a continuity in English constitutional history, unbroken by any conquest which might give absolute power to a conqueror. Hale therefore argued that William I had conquered not England, but only the usurper Harold, and consequently had only ever obtained the powers which earlier kings had under 'our ancient government, laws, and rights.'[45] Indeed, William 'did not pretend, not

---

[42] Blackstone, *Commentaries* (n 11) i: 47-8.

[43] Blackstone, *Commentaries* (n 11) iii: 158.

[44] Ibid iv: 435-6.

[45] Hale, *History and Analysis* (n 13) 90, *Hale's Prerogatives of the King*, (n 39) 10.

indeed could he pretend, notwithstanding this Nominal Conquest, to alter the Laws of this Kingdom without common Consent in *Communi Concilio Regni*, or in Parliament.'[46] This was to argue that the central institutions which made up the sovereign in the state had derived from some foundational moment, whose authority had been confirmed by a continuing history. Although Blackstone did not share Hale's assumption of the foundational moment, he did take much of his history from Hale, to construct an argument that while the origins of parliament were hidden 'in the dark ages of antiquity', they could be traced both in Saxon and Norman eras. In his view, the constitution was 'coeval with the kingdom itself,' and had been reaffirmed in several constitutional landmarks, including Magna Carta and the abolition of feudal tenures on the restoration of Charles II, which saw 'our ancient constitution' restored together with 'the complete restitution of English liberty.[47]

Wooddeson similarly sought to trace the roots of the English constitution to Anglo-Saxon times. Drawing on seventeenth century historians, he argued that the Anglo-Saxon *witan* had been composed of representatives of the people, as well as the crown and nobility. If the Commons had been temporarily eclipsed after the conquest, the ancient constitution was revived in the age of Simon of Montford. His historical survey concluded that 'the English constitution has immemorially been in substance much the same, or has at least born a strong resemblance to the present system, although its influence was impeded, and its lustre obscured, for near two centuries by the obvious effects of the Norman invasion and tyranny.'[48] Like Blackstone, he felt that the constitution had been restored to its ancient

---

[46] Hale, *History and Analysis* (n 13) 105, 108.

[47] Blackstone, *Commentaries* (n 11), i: 143-5, iv: 431. Cf his views of the origins of the common law of the kingdom at iv: 405.

[48] R Wooddeson, *A Systematical View of the Laws of England,* 3 vols (Thomas Payne 1792) i: 28.

purity in later times. For these writers, the turn to history was not merely rhetorical or decorative: rather, an historical understanding of the constitution was essential to explain its authority, and so performed an important theoretical function.

It was not only the constitution which was to be understood by tracing the evolution of rules through particular historical moments. History was also used to explain the rules which made up the common law, which were seen as the product of positive imposition at specific times.[49] If these rules obtained their authority from moments of imposition, the coherence of their content could only be explained by tracing their history. The history employed by writers like Hale or his followers was not a contextual, or sociological one, but rather involved tracing particular rules to their origins either in legislation or in specific case law. It was, in other words, lawyers' history. Lawyers' history was employed, for instance, to explain the law of property, which was agreed by these writers to derive from positive imposition. As Blackstone explained, 'it is impracticable to comprehend many rules of the modern law, in a scholarlike scientific manner, without having recourse to the ancient.'[50] As in their constitutional writings, these jurists drew on a particularly legalistic view of history when discussing property rights: they held that the foundational principles of English land law had been introduced by constitutional consent at a specific moment in time. Blackstone accepted Sir Martin Wright's view that although the principles of the English system of tenures were derived from a pan-European feudal law,[51] the system itself had only been introduced into England by consent after the Norman Conquest, at a precise moment in 1085,

---

[49] As Hale put it, many of these rules doubtless 'had their Original by Parliamentary Acts', which had then been developed by judges by building on ancient foundations, as cases came for decision. Hale, *History and Analysis* (n 13) 3. See also Lobban, *History* (n 2) 88.

[50] Blackstone, *Commentaries* (n 11) ii: 44.

[51] M Wright, *An Introduction to the Law of Tenures* (E & R Nutt, 1729) 80-1.

when the council of the nation consented to its introduction by William.[52] The English were misled, Blackstone told his auditors, and 'Norman interpreters, skilled in all the niceties of the feodal constitutions' were able to introduce very 'rigorous doctrines' which it would take centuries to prune. It was still necessary to understand the ancient system, he argued, for although 'the oppressive or military part of the feodal constitution' was abolished root and branch, the constitution itself was not laid aside, and it needed to be understood 'to explain any seeming, or real, difficulties, that may arise in our present mode of tenure'.[53]

A similar approach was used to explain criminal law. Although it was acknowledged that many offences were violations of the law of nature - and might not need the signal of legislation to tell people that they were offences – it was generally agreed that positive law was needed to determine sanctions.[54] Hale noted that while many offences were prohibited by the laws of God and nature, all states had varied their punishments from the Biblical ones: 'Penalties therefore regularly seem to be *juris positivi, & non naturalis*, as to their degrees and applications, and therefore in different ages and states have been set higher or lower according to the exigence of the state and wisdom of the law-giver.'[55] In Blackstone's explanation, '[a] crime or a misdemeanor, is an act committed, or omitted, in violation of a

---

[52] Blackstone, *Commentaries* (n 11) ii: 49, following Wright, *Tenures* (n 51) 66.

[53] Blackstone, *Commentaries* (n 11) ii: 78. Wooddeson also drew on Wright's historical discussion of the rise of feudal tenures. Like his predecessor, he argued that the importation of feudal tenures had been assented to be a legislator, which was misled by the use of 'feudal expressions' which were then used 'to aggrandize each feudal superior, and in particular to advance the prerogatives of the crown.' Wooddeson, *Elements of Jurisprudence* (n 17) 142.

[54] As Hale explained, while many offences were prohibited by the laws of God and nature, punishments were determined by positive law. M Hale, *Historia Placitorum Coronae* (E & R Nutt and R. Gosling 1736) 1.

[55] Ibid 13.

public law, either forbidding or commanding it.'[56] Wooddeson argued that the exercise of capital punishment was the greatest exercise of the 'legislative power', and said that it was for the legislature to judge of the necessity of imposing this penalty.[57] Much of criminal law could therefore be discussed in terms of the development of legislation, tracing which offences had been punished in which way over time.

The positivist/historical model developed by the theorists we have discussed suited their purposes, for it answered the questions which they sought to resolve. It allowed them to set out the parameters of the constitution, and the rules of property law and criminal law. Using this method, Vinerian professors like Blackstone and Wooddeson, teaching English law to a non-professional audience, could set out briefly and clearly the rules which subjects and citizens most needed to know. However, this model of law did not explain everything a lawyer needed to know. In particular, it was unable to explain how judges should resolve disputes where the rules were unsettled, particularly in the law of obligations. Indeed, writers like Blackstone did not devote much time to exploring the nature of contract or tort. In part, this may have been because they the law of obligations as essentially ancillary – a law of wrongs (or actions) responding to breaches of rights. For some writers, it was possible to explain the law of torts or contracts in terms of the remedies created by positive institution. As the author of an early eighteenth century *Treatise concerning Trespasses* explained, it was only 'thanks to our laws, and not the good nature of my neighbour' that anyone was protected

---

[56] Blackstone, *Commentaries* (n 11) iv: 5. He went on to explain (at 8) that while in the state of nature, all had a power to punish, in civil society this power was transferred to the sovereign. The sovereign also had power to punish for *mala prohibita*, 'upon this principle, that the law by which they suffer was made by their own consent; it is a part of the original contract into which they entered, when first they engaged in society; it was calculated for, and has long contributed to, their own security'.

[57] Wooddeson, *Systematical View* (n 48) ii: 489.

in their persons and interests: '[i]f a man commit a trespass maliciously, I can pardon him and pity him as a Christian; but I ought not to spare punishing him as I am a Member of a Politick Society, when he continues obstinate and perseveres in his Malice; but this punishment must be by Law.'[58]

However, this kind of analysis said little about the principles underpinning the law of contract or tort (or unjust enrichment); nor could it show judges how to develop these areas of law. Indeed, it was evident that there were also many areas outside the law of obligations – such as the law relating to criminal capacity – where lawyers developed the law through legal reasoning which went far beyond the application of the rules of positive law. Discussing this issue, Hale explained that humans were liable to punishment by virtue of the fact that they had understanding and will, and consequently had a capacity to obey: 'where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offences'. Since such a general view might offer too great an opportunity for people to escape punishment, he added, it had 'been always the wisdom of states and law-givers to prescribe limits and bounds to these general notions' and to define who could claim exemption from incapacity. Yet it was clear that this had not always been done by *legislation*: in the era of Edward III, he explained, the law relating to incapacity of age 'received a greater perfection, not by the change of the Common law, as some have thought, for that could not be but by act of parliament: but men grew to greater learning, judgment and experience, and rectified the mistakes of former ages and judgments.'[59] When it came to explaining how judges were to develop these kinds of principles, the positivist model proved incomplete, and those whose main interest was in

---

[58] Anon, *A Treatise concerning Trespasses vi et armis* (J Walthoe 1704) Preface.

[59] Hale, *Historia Placitorum Coronae* (n 54) 14-15, 24-5.

exploring how to develop the law of obligations took a different theoretical route.

<div align="center">

III

</div>

An alternative model of law to the positivist one was invoked by those who were less interested in exploring the nature of the state, and more interested in explaining those areas of law – such as contract and tort – whose principles which could not be readily explained by tracing moments of positive institution. This approach was taken by Sir Jeffrey Gilbert, who (like Hale) planned to write a comprehensive work on the laws of England and left behind a large number of manuscripts, many on aspects of law (such as contract) which had not hitherto been given systematic treatment by English jurists. A large number of these manuscripts were published as separate treatises after Gilbert's death, though the works which most clearly revealed his theoretical premises remained unpublished.[60] In common with civilian writers such as Ayliffe, Gilbert was more interested in exploring the nature of law as *ius* rather than as *lex*, considering that the notion of justice preceded the notion of command. Gilbert's treatise of the law of nature began with the following definition:

1. Laws are the rules of justice and injustice made known by supreme power.

2. Justice is the giving every one his right and to do the contrary we call injustice or wrong.

3. Right is what a man hath power to exclude others from the use and command of by

---

[60] A volume of Gilbert's writings on the Law of Nature, and on Property and Contract is currently being prepared for publication by the Selden Society.

the rules of law.[61]

Elsewhere, Gilbert began his discussion of the nature of law with the following phrase: 'Justice is [the] constant and perpetual inclination to give every man his own, and that which can be called a man's own, is what he possesses either by the laws of nature or by the laws of civil society.'[62] For Gilbert, the rules of justice concerning rights to property and contract could be figured out from reasoning on natural law: they did not need a state to impose them.

Gilbert was not the only early eighteenth century writer interested in exploring the nature of justice without invoking the state. However, other writers devoted less attention to the theoretical groundwork. In his institute of English law, Thomas Wood omitted the command-based definition of law included in his civilian work, and stated simply 'As *Law* in General is an Art directing to the knowledge of Justice, and to the well ordering of Civil Society, so the Law of *England* in particular, is an Art to know what is Justice in *England*, and to preserve Order in that Kingdom.'[63] To know what was justice in England, he turned to English writers predating Hale: Christopher St German and Edward Coke. From the former, he took the six grounds on which English law was built – the law of nature (or reason); revelation; general customs; certain principles and maxims; particular customs and statutes. From the latter, he took a series of maxims, such as that the common law was 'the Absolute Perfection of Reason', or that 'The Law provides a Remedy for every Wrong'. This was to echo an early seventeenth-century view of law as a system of artificial reasoning to reach just

---

[61] J Gilbert, *Treatise on the Law of Nature*, Lincoln's Inn, MS Hargrave 13, f 1.

[62] J Gilbert, *Treatise of Property and Contract*, Arthur W. Diamond Law Library, Columbia Law School, MS Singleton 31, chapter 7.

[63] Wood, *Institute of the Laws of England* (n 5) i: 6.

outcomes, rather than developing a new theory of his own.

The author of *A Treatise of Equity* – sometimes attributed to Henry Ballow – similarly began with the statement, 'It is plain that Law is a moral science, since the end of all law is justice'. This writer's focus on notions of abstract justice is perhaps not surprising in a work on equity, whose function was to correct positive law when it was defective: 'we do not intend to confine our Discourse to the municipal Laws only, but to have chiefly in View that natural Justice and Equity, which ought to be the Ground-work and Foundation of all Laws, and which corrects and controls them when they do amiss'.[64] Since the rules of municipal law were finite, cases often occurred for which there was no rule, for which there had to be a recourse to natural principles. In common with many of the civilians, Ballow used Aristotelian language in setting out the subject matter of his treatise, distinguishing between distributive justice ('of Things to be divided amongst those who are united in civil Society') and commutative justice ('that which governs Contracts'). Ballow's main interest was in the latter, not the former, though he did not devote much attention to its theoretical foundations of commutative justice. These foundations were described in broad contractual terms:

> as an Action or Suit, which is the Remedy the Law hath provided for the Obtaining Justice, is but a legal Demand of some Right, and all civil Rights must arise from Obligations, and these Obligations are founded on Compacts, it follows of Necessity, that the proper subject of Law is Contracts, and that Justice the chief End of Law, which teaches the Performance of them. The voluntary are, Buying and Selling, Letting and hiring, Deposits, the Interest of Money and the like. The involuntary are,

---

[64] [H Ballow], *A Treatise of Equity* (London, E. & R. Nutt and R. Gosling, 1737) 2.

Theft; Murder, Rapine, and all other heinous Offences, whether secret or violent.[65]

Ballow borrowed the distinction between 'voluntary' and 'involuntary' contracts, and the accompanying examples, from Book V of Aristotle's *Nicomachean Ethics*, and he borrowed the notion that every right was correlative to an obligation from Pufendorf's *On the Law of Nature and Nations*.[66] However, he omitted to mention Pufendorf's wider explanation of the distinction between voluntary and involuntary transactions, which showed that the latter were not really 'contractual'. Rather, where a party was made to pay damages for a wrong, the obligation rested 'upon that necessity of Restitution, which upon a Settlement of Property, evidently flows from the Laws of Nature'.[67] The flaws in Ballow's exposition were perhaps not particularly important, insofar as he explained that his interest did not lie in analysing the 'involuntary' transactions, but in explaining 'those particular Contracts, which are limited to the Benefit of certain Persons, and presuppose Property and Price';[68] but it was to assume rather than demonstrate a natural law system which underpinned the rules he was to elaborate.

By contrast, Gilbert attempted a more philosophical discussion of the nature of natural law. Like Hale, he considered the law of nature to be the law commanded by God. However, where Hale had seen natural law in terms of the commands given by God to the sons of

---

[65] Ibid 2.

[66] S Pufendorf, *On the Law of Nature and Nations* trans B. Kennett, 2nd ed (L Lichfield 1710) 620-1 (VIII.iii.5).

[67] As Pufendorf explained, Aristotle had called the obligation to make satisfaction an involuntary contract, because the wrongdoer's obligation to pay damages did not depend on the victim's consent.

[68] [Ballow], *Treatise of Equity* (n 64) 3. Equally, although Ballow also noted that it was by 'universal Pacts' that 'the Propriety and Dominion of Things was at first established', he was not interested in exploring this area of civil obligation.

Noah, at the centre of which stood the command to keep one's promises, Gilbert conceived of natural law as a dictate of reason instructing man in the requirements of justice. The commands and prohibitions of God were very simple, and could be deduced once one recognised the existence of God and his creation of mankind: God commanded whatever led to the preservation of mankind, and prohibited what led to its destruction. In brief, 'all the laws of nature are reduced to this single head, to maintain an universal love to all mankind, and procure as much as in us lies the good of all men'.[69] As Gilbert explained, 'he that acts towards the preservation of the species, answers the primitive design of God Almighty, but he that acts any thing that tends to the destruction of the species disobeys the laws of nature.'[70] Since 'the preservation of every individual being' could be shown to be the will of God, it had 'the obligation or binding force of a law'. Furthermore, God had implanted in man not only a power of reasoning, but also 'a natural pity to the innocent, and an aversion to those actions, which if the table were turned would be very uneasy, and grievous to ourselves.'[71] A sense of good and evil thus pre-dated civil laws, which did not themselves generate criteria of right and wrong, but were judged by them. If men disagreed about right and wrong, and fell into discord, it was because they had been given free will, and were prone to be ruled by those appetites which were necessary for their self-preservation, with the result that the appetites might prove too powerful for their reason. But this did not mean that the jurist could not figure out what the law of nature required.

Gilbert used the kind of reasoning which Thomas Hobbes had used in *De Cive*, but to

---

[69] Gilbert, *Treatise of Property and Contract* (n 62), chapter 7. Gilbert's formulation was probably influenced by his reading of Richard Cumberland's *A Treatise of the Law of Nature,* trans J Maxwell (1727), ed J Parkin (Liberty Fund 2005) 300 (chapter 1, § IX).

[70] Ibid.

[71] Ibid.

very different effect.[72] Where Hobbes's theory required a sovereign to be the arbiter of citizens' disputes in a civil society – since men in the natural state could never agree on right and wrong – Gilbert suggested that judges could themselves figure out what natural law required through analytical reasoning, commencing from the principle of self-preservation. Since war led to the destruction of mankind (which was against God's will), men had to seek peace with each other. This meant in turn that 'no man ought to take away the life of an other without just cause', and that anyone who did so would commit 'the crime of murder'.[73] The foundations of property were also explained by similar reasoning: since man had a right to preserve himself, and a right to the means of self-preservation, he had a right to cultivate the earth and to keep the fruits generated by his labour. Property arose from occupancy of the means of self-preservation, which was made up of both an act of the mind and an act of the body: no one could have property 'without some act of his own, for nothing can tend to the preservation of any man without some application and relation to him'; and nothing 'can have any relation to him or the means of his preservation without his own judgment and consent'.[74] Once property was occupied with the appropriate intention, a man obtained a right which he could defend. He had a consequent right to defend the property from invasion (or to compensation for harm done to it), and he had a right to transfer it to others. Just as he had obtained property through an act of the will, so he could transfer it through acts of the will, found in contracts or testaments. In this way, Gilbert developed a natural law theory of property, contract and testament, which did not require the existence of a civil society: its

---

[72] For the relationship between Hobbes's approach and Gilbert's see further Lobban, 'Thomas Hobbes' (n 37).

[73] Gilbert, *Treatise on the Law of Nature* (n 61). Other forms of conduct which violated the principle of human preservation included 'the sin of lying', arrogance, ambition, and evil-speaking.

[74] Ibid.

rules were rather natural.

Gilbert's writings on contract remained largely unpublished in the eighteenth century, as did his philosophical writings. Nonetheless, the notion that the principles of contract could be figured out through natural reason, without resort to the commands of a legislator, was one shared by other writers, who published the first English works on contract law. Ballow began his exposition of contracts in the *Treatise of Equity* with the notion that, in order for property to be transferred, 'there must be an Union of Minds and Affections'. A contract required mutual agreement and consent, which was 'an Act of Reason, and accompanied with Deliberation'. As a corollary, it meant that 'Creatures void of Reason and Understanding are incapable of giving a serious and firm Assent'.[75] Ballow then explained that in order to protect them, children were regarded as being incapable of contracting (other than for necessaries), and then added that ignorance and error were other impediments to assent. Similarly, in his late eighteenth-century *Essay upon the Law of Contracts*, John Joseph Powell wrote that contracts 'must uniformly be determined by the principles of natural or civil equity'.[76] Noting that '[a]ll reasoning must be founded on first principles,' he argued that

> The science of the Law derives its principles either from that artificial system which was incidental to the introduction of feuds, or from the science of morals. And, without a knowledge of these principles, we can no more establish a conclusion in law, than we can see with our eyes shut, measure without a standard or count without

---

[75] [Ballow], *Treatise of Equity* (n 64) 6.

[76] *Essay upon the Law of Contracts* (2 vols, J Johnson 1790) preface.

arithmetic.[77]

Like Gilbert, Powell presumed that property could be acquired and transferred in the state of nature, and he was concerned with teasing out the rules relating to the transfer of property, which did not depend on any rules created by a legislator, but which could be worked out analytically from the nature of the subject. '[T]he regular effect of all contracts being on one side to acquire, and on the other to part with or alien some property, or to abridge and restrain natural liberty by binding the parties, or one of them, to do, or restraining them, or one of them, from doing, something which before he might have done, or omitted doing, at his pleasure,' he wrote, 'it is necessary that the party to be bound, shall have given his free assent to what is imposed upon him'.[78]

IV

Those eighteenth-century writers who set themselves the task of explaining the structure of the law of obligations sought to develop abstract models, which did not depend on positive legislation or on precedent, but on correct moral reasoning. This new methodology was summed up in the preface to Sir William Jones's *Essay on the Law of Bailments*, where he stated that he had sought to explain the subject analytically (tracing 'every part of it up to the first principles of natural reason' or 'the plain elements of natural law'), historically (to show how those principles were recognised by other nations) and synthetically (setting out clear rules).[79] Such writers were often influenced by models taken from civilian texts; and for

---

[77] Ibid, v-vi.

[78] Ibid, vii-viii.

[79] W Jones, *An Essay on the Law of Bailments* (J Nichols 1781) 4, 11.

many civilian writers, reason was always to trump precedent. As the early eighteenth-century civilian John Ayliffe noted, 'In the Business of Deciding Causes by Precedents ... every Judge is a Law-giver, by drawing the Law *de Similibus ad Similia*, as he fancies: But this is a dangerous Way of proceeding, and only serves to confound he Law, and not to do Right and Justice oftentimes.' The fact that one sentence conformed with another 'argues nothing as to Right or Equity, but only concludes a Concurrency in Opinion, both of which may be erroneous and mistaken'.[80] For Ayliffe, the judge should therefore use reason rather than precedent: for 'in Cases which depend upon fundamental Principles, from which Demonstrations may be drawn, Millions of Precedents are to no Purpose.' This was quite a different view from that subsequently taken by Blackstone, who argued that 'it is an established rule to abide by former precedents, where the same points come again in litigation ... because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule.'[81] For jurists like Ayliffe, the route to justice was through right reasoning, rather than decisions of authority.

However, if the law of contract or tort might be explained by abstract reasoning, there remained many areas of law which could not be so explained. To begin with, as Gilbert explained in his posthumously published treatise on *Devises,* while the basic principles of the acquisition and transmission of property by contract and will could be figured out by reason in the state of nature, they could not explain the rules relating to English real property: for 'however reasonable this NATURAL notion may seem of transferring property by *testament*, it was *not* admitted into the *feudal* law; the reasons whereof will appear, if we examine into the

---

[80] Ayliffe, *New Pandect* (n 9) 8-9.

[81] Blackstone, *Commentaries* (n 11) i: 69.

nature of the old *feuds* and *tenures*.'[82] To explain these areas, jurists like Gilbert turned to history, just as Wright and Blackstone were to do. Consequently, where Gilbert's projected treatise on personal property and contract began with theoretical conjectures on the state of nature, his projected work on real property began with a 'History of the Feud'. However, Gilbert's brand of history was a rather different one from Blackstone's Whiggish legal history, which served to give historical underpinning to his unitary sovereign state. Gilbert's was a conjectural sociological history, which looked back to the seventeenth century histories of feudalism written by Sir Henry Spelman and forward to the four-stage theory of the Scottish Enlightenment.[83] For Gilbert, a resort to history did not serve the function of tracing the validity of particular property regimes, or of explaining the authority of the sovereign as the source of all valid laws, as it did for the 'positivist' jurists discussed earlier. One needed an historical understanding, not to grasp why particular rules were valid, but to comprehend the nature and purpose of different kinds of property. This required the jurist to do more than lawyers' history.

Thus, in material published in his posthumous *Treatise of Tenures*, Gilbert traced allodial and feudal property to different sources. Allodial property was 'the old Patrimonial Property revived by the Christian Clergy among the Barbarous Nations'. It derived originally from the first notion of 'regular property' which had developed among the Jews and Egyptians: 'The *Jews* were taught from Heaven, and the *Egyptians* by the Inundations of *Nile*, to settle in regular Neighbourhood; and from the *Egyptians* the Notions of Property

---

[82] J Gilbert, *An Historical Account of the Original and Nature as well as the Law of Devises and Revocations* (E & R Nutt 1739) 4.

[83] For a recent reassessment of the importance of his historical writings, see J Rudolph, *Common Law and Enlightenment in England 1689-1750* (Boydell 2013) 232-4, 258-62. On Gilbert's broader project, see M Macnair, 'Sir Jeffrey Gilbert and his Treatises' (1994) 15 *Journal of Legal History* 252-68.

came to the *Greeks* and *Romans*.[84] In this text, Gilbert described the various rules of inheritance found in Biblical sources and in Roman law, describing (for instance) how the Roman *paterfamilias* could disinherit his children by express words in his will and how the Roman rules allocated property in case the father died without making any disposition.[85] Feudal property had a different source. Where allodial property had spread from the Nile to the Greeks and Romans, feudal property was to be traced to the Scythians, the ancestors of the northern Gothic nations, which included the barbarians who had conquered the Roman empire – Ostrogoths and Visigoths – as well as the Saxons. These nations lived in clans in which possessions were not heritable but temporary or transitory.[86] Feudal property came to be heritable over a period of time, for reasons to be explained more by conjectural history or sociology than philosophy. The military lords who had granted lands 'to such Persons as behaved themselves well in the War, for their Lives only,' sometimes married their daughters to such vassals. When they did this, they limited the lands not only to the feudiary, but to the issue of the marriage. In this way, the northern nations developed a notion of succession which was distinct from the Roman one, and one whose detailed rules were to be explained by reference to its original nature. For Gilbert, understanding the nature of English real property law required the jurist to engage in an exercise in historical sociology. Rather than being a framework of rules introduced at a particular moment by the consent of the nation – as Wright and Blackstone suggested – it was a system reflecting the social and military structure of the Gothic nations.

---

[84] J Gilbert, *Treatise on Tenures* (2nd ed, E & R Nutt and R. Gosling, 1738) 2.

[85] Gilbert explained that these Roman rules relating to intestate succession were subsequently introduced in England: ibid 7.

[86] These views are set out most fully in the 'History of the Feud' in British Library, Hargrave MS 194.

In a similar way, Gilbert also explained the evolution of different political systems in more sociological terms. Rather than seeing the origins of political society in a Lockean social contract dating from one notional past moment, Gilbert saw political society emerging as primitive societies became richer and more refined; and suggested that the structure of the polity which emerged – whether monarchy, aristocracy or democracy – would depend on socio-economic factors, primarily where the greatest concentration of land lay. When he turned to discussing English medieval history, the kind of history he wrote was also less 'constitutionalist' than writers such as Blackstone. In Gilbert's history, two major changes had followed the conquest. The first was that William had converted all allodial holdings into feudal tenures, so that all land was held of the king. The second was the creation of a new system of royal courts which took power away from more communal bodies. The king created a 'constant Court in his own Hall, made up of the Officers of his own Palace', which supplanted the popular Saxon witenagemot, which (Gilbert argued) had also heard appeals.[87] He also granted commissions to sheriffs by writs of justicies, in 'the *Norman* form, by which all power of judicature was immediately derived from the Prince', which gave the sheriff the power to judge cases 'independent of the suitors of the county court.'[88] If these changes had increased the power of the king, the balance was soon redressed. For Gilbert explained that although for some reigns after the time of the Conquest, the barons were kept in subjection by the king - since 'the *Norman* and *English* Barons were a balance one for the other, the *Normans* being dependants upon the crown who had new planted them in the Kingdom –

---

[87] 'Introduction' to *The History and Practice of the Court of Common Pleas* (E & R Nutt 1737), ix (also printed as *Of the Division of the Courts* in *Cases in Law and Equity with Two Treatise, the One on the Action of Debt, the Other on the Constitution of England* (Catherine Linton 1760) 449-68.

[88] 'Forum Romanum' in *The History and Practice of the high Court of Chancery* (2 vols, Richard Watts 1758) i: 2.

after some time, the Normans became more Anglicised, and became fond of the liberties they had enjoyed in Saxon times.[89] In the baronial wars of the thirteenth century, they turned against the king, which led to a 'new policy in the kingdom': not only the conformation of Magna Carta, but the development of a parliament with two houses. For Gilbert, England's balanced, mixed constitution was the product of social forces over a period of time. It was not only the product of Norman barons seeking greater liberties in the thirteenth century, but also the product of the commons growing in power in the sixteenth, thanks both to Tudor attempts to weaken the nobility, and economic changes strengthening the gentry.

V

Each of the writers we have discussed were engaged in the very practical business of attempting to put the law of England into a coherent and systematic order. To assist them in this project, they turned to legal theory, seeking answers both about the nature of law and of legal reasoning. Jurists drew on a wide variety of theories and approaches, including positivism, natural law and 'internal' as well as 'external' legal history. Different theories were better placed to address different questions. As writers such as Hale and Blackstone found, constitutional law, the law of real property and criminal law were easiest to put into a 'positivist' frame, which derived all law from moments of positive institution, which could be traced through legal landmarks – even ones which (like the original contract) were conjectural. By contrast, the principles of the law of contract or tort were much harder to fit into this model, especially in an age with very sparse legislation on these topics, and a relative paucity of reported case law. Those scholars more interested in discovering the principles which lay behind these areas, such as Gilbert, developed natural law theories

---

[89] Ibid 6.

35

which did not rest on human legislation, but which could be worked out analytically. Yet their models could not explain the areas that the rival school's theory could – and so, to explain the law of real property or the constitution, they turned to a different model of history.

For each of these theorists, both theory and history operated as tools which could be used to get a better understanding of the law. The tools were far from perfect, and did not suit all the tasks they set themselves. Nor were the theories themselves always convincing. However, they were tools which helped these jurists rethink the law and its organisation in productive ways. If they did not have the last word, it was because there was no last word to be had. Theory turned out to be ever provisional – a useful starting point to organise the law, and a useful model to explain parts of it, even if it proved incapable of explaining the totality.

By the nineteenth century, the ambition to put all of the law of England into a systematic form had fallen out of fashion: in this era, jurists made use of the analytical jurisprudence popularised by John Austin to write coherent treatises on different aspects of law. Nor did the jurists who reinvigorated English jurisprudence after the Second World War seek to revive the grand project of putting all of the law of England into a systematic structure grounded on theory. Such an ambition would have been regarded as utopian, since few would have agreed that there was an inherent unity to be found. Yet despite this scepticism about an innate substantive coherence in law, many post war jurists remained confident that their theories were uniquely able to answer questions such as 'what is law' and 'what is legal reasoning'? The history we have been engaged with in this essay might suggest that the aim to find one theoretical answer to such questions is equally utopian. Legal theory offers a box of tools, and different tools may be taken from the toolbox for different jobs.