The judicial persona in historical context: the case of Matthew Hale

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The work of law does not reduce to the work of the judicial arm of law. Yet, the persona of the jurist has a particularly rich normative history, not least in stories of the judge as God or God as the judge. In the human forum, however, the office of judge presumes a jurisdiction, a delimited ambit of adjudication, a definite historical scene or territorial setting. In the particular scene of early modern European confessional conflict and state building, temporal jurisdictions emerged as boundaries were drawn between state and church, between civil laws and canon laws, in order to fix the locus of a power of final determination. Legal officers – jurists as well as judges – found themselves at the epicentre of profound disputes over where to draw the boundaries. This was a matter of expediency, as territorial states sought to separate themselves from trans-territorial powers of church and empire, and attempts at peaceful coexistence were made in the face of a volatile religious diversity. Given national variations in religious, political and legal conditions, there was no one right answer. Any consideration of the judicial persona within this early modern setting therefore dictates an approach that is comparative, relativising and jurisdictionally specific.

The judicial attribute of neutrality in the face of subjective preference has its prime historical locus in relations between law and the clashing religious impulsions of the early modern scene. This paper will begin by establishing the persona of a particular
judge, Sir Matthew Hale (1609-76), viewed in the particular context of an emerging Anglican settlement. With Hale as an example of common-law judicial personality, some contrasts will be suggested with contemporary French and German settings. Though extremely brief, these contrasts then allow a return to the English scene and Hale’s *Reflections on Mr Hobbes his Dialogue of the Lawe*, considered in light of my theme: the judicial persona fashioned in the habitus of the common law.

Into the fifteenth century, for Sir John Fortescue, English lawyers were associated with the figure of the priest. A century later, a different figure of comparison had emerged, no doubt thanks to humanistic modes of thought: the Roman *iuris prudente* or *iuris consulti*. By the mid-1600s, and the time of Hale, the persona of the lawyer had thus acquired a distinctively secular model.¹ Indeed, Hale had exercised himself in translating Cornelius Nepos’s life of Pomponius Atticus, the Roman stoic renowned for his “political neutrality by living through the Roman revolution on terms of friendship with all the major antagonists.”² It is not too difficult to see a concern with achieving impartiality in adjudication, in times of civil conflict.

And these were still dangerous times. The 1660s “proved an incomplete restoration of the unity of church and crowd, and therefore did not remove the possibility of renewed civil wars, which would also be wars of religion.”³ In this unsettled landscape, the common-law judiciary conducted legal business in respect of church matters. Their conduct, it is suggested, was “very moderate”: “One or two of the judges may have been more liberal than most of their contemporaries, or perhaps in the heat of the moment they were simply more impartial.”⁴ More often than not, their decision went no further than to “bind those accused of not using the Prayer Book by a surety to appear
and prosecute their traverse at the next assizes, a neutral course and one that could be accommodated to any decisions made by Parliament in the meanwhile.\textsuperscript{5} For the most part, accused clergy did not suffer ejection from their livings, imprisonment or even fines. Indeed, they were not “as far as is known constrained to read the Book of Common Prayer in their ministrations.”\textsuperscript{6}

Before turning to the particular case of Hale, it is worth recapitulating the present aim: to explore the relation between issues of church, politics and law under early modern conditions of religious war and state building and, on the other hand, issues of judicial persona, legal habitus and the cultivation of a capacity for neutrality in adjudication. But judicial neutrality is not an unconditional, free-floating capacity. What the judge is neutral towards depends on something other than the law — and something other than his individual ‘self’. In early modern England, judgments were made on blasphemy and witchcraft. These judgments were symptomatic of a law that operated within a political state characterised by an established national church. It is such conditions — peculiar to the contingencies of one political history — that orient and delimit the exercise of an intellectual-ethical capacity, neutrality, attaching to the judicial persona and office. The present task, then, is to retrace the interactions of this persona with the conditions in which it emerged and was more regularly occupied.

Having served on the Common Bench under Cromwell, Sir Matthew Hale returned to office under Charles II as Chief Baron of the Court of Exchequer (1660-71) and as Chief Justice of the King’s Bench (1671-6). In an important sense, Hale had to emerge from a dream: “[t]he dream that the saints could subdue the world and reshape nature was the excess and perversion of Puritanism. In more or less controlled forms, that
disease had troubled Hale’s times.” As to the matter of religion, Hale stood on the side of Puritan piety coloured by a conviction of post-lapsarian humanity’s limited capacities. It was a conviction material to the cultivation of a specific persona. He thus shared the “awareness that only so much is possible within the structures provided by a working Christian’s place and opportunity; that nature is only impresible, never transformable by grace.”

To view worldly life from this theological perspective was to clear a space for legal action. Indeed, Hale found coercive laws all the more necessary in regulating public expression of religious impulsions in circumstances where “the concerns of religion and the civil state are so twisted one with another that confusion and disorder and anarchy in the former must of necessity introduce confusion and dissolution of the latter.” At risk from spiritual enthusiasts was civil peace: “he that today pretends an inspiration or a divine impulse to disturb a minister in his sermon tomorrow may pretend another inspiration to take away his goods or his life.” In sum, Hale was eminently clear on the public dangers of religion as on the civil benefits of law.

Caught in the sectarian crossfire of his times, Hale took certain steps to guarantee some balance in his judicial work. To this end, he imposed on himself a code of conduct that included the following written resolution: that “in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked”. The concern is that the judge should not deviate from an ideal of dispassionate adjudication. Another resolution recognises the difficulty of impartial judging when religion was at issue: that “I be not too rigid in matters conscientious, where all harm is diversity of judgement.” It was a professional regimen for a judicial persona ideally capable of impersonal
detachment and impartial judgement. Hence the further rules: that “I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard” and that “in business capital, though my nature prompts me to pity, yet to consider that there is also pity due the country.”¹² In the circumstances, these resolutions are far from being unremarkable. At their heart is an incipient ethical separation: a neutral adjudication as is “due the country” must be something other than the pious faith that the believer owes to God.

To mark out the space of this separation was compatible with the Protestant doctrine that fallen man’s imperfect capacities rendered spurious any human claim to know God’s will and to cite the same as a matter of law. In this space, Hale thus draws a line against granting supremacy in civil matters to inner conscience, since this would “utterly enervate all the power of [the] magistrate, for [conscience] sets up in every particular subject a tribunal superior to that of the magistrate.”¹³ The danger is double: not only would civil peace be threatened by those who claim to act in the name of an authority higher than the law of the civil sovereign; but also — as indicated by Hale’s statement that “all harm is the diversity of judgement” — civil conflict is rendered the more likely because in circumstances of religious division no consensus is possible as to what the reasons and demands of the higher authority actually are.

On church ceremonies as dangerously divergent expressions of the religious impulsion, Hale’s disposition was latitudinarian:

It is pitiful to see men make these mistakes; … one holding a great part of religion in pulling off the hat, and bowing at the name of Jesus; another judging a man an idolater for it; and a third placing his religion in putting
off his hat to no one; and so like a company of boys that blow bubbles out
of a walnut shell shall every one run after his bubble and call it religion.\textsuperscript{14}

Did this cool view of the conduct of the hyper-religious carry over into Hale’s
adjudication of “offences” against the religious codes of an established national church?
Were acts of heresy, blasphemy and witchcraft properly justiciable in the secular courts
of law in circumstances where — because the church was integral to the sovereign
government — heresy, blasphemy and witchcraft would count as civil seditions and
matters of law? This was a jurisdictional issue that Hale — as Chief Justice in the court
of King’s Bench — could scarcely avoid, for instance when the spirit had moved a man
to tell the world that “Christ is a whoremaster, and religion is a cheat and [Protestant]
profession a cloak, and all cheats, all are mine, and I am a King’s son and fear neither
God, devil nor man.”\textsuperscript{15} Hale had no hesitation. This blasphemy — with its almost
textbook terminology — was beyond question a matter for the civil laws of England:

[S]uch Kind of wicked blasphemous words were not only an Offence to
God and Religion, but a Crime against the Laws, State and Government,
and therefore punishable in this Court. For us to say, religion is a Cheat, is
to dissolve all those Obligations whereby Civil Societies are preserved,
and that Christianity is Parcel of the Laws of England; and therefore to
reproach the Christian Religion is to speak in Subversion of the Law.\textsuperscript{16}

Such remained the discourse of law in a confessional state.

Fourteen years earlier, in 1662, Hale had conducted the trial for witchcraft of two
East Anglian women at Bury St Edmunds.\textsuperscript{17} For bewitching girls whom they were found
to have caused to vomit more than forty “crooked pins and one time a two-penny nail
with a very broad head,” he sentenced the women to death by hanging. The secular law, by its action, furnished the sanction for a religious offence. In a devotional essay composed on the eve of the execution, Hale satisfied his conscience that the penalty for proven witchcraft was just, since “the instrument, without which [the devil] cannot ordinarily work, is within the reach of human justice and government.” This is in keeping with his advice to the 1662 jury that the existence of witchcraft and laws against it were affirmed in Scripture, in the laws of other nations and in the laws of England “as appears by that Act of Parliament which hath provided punishments proportionable to the quality of the offence.”

But was the matter quite so cut and dried? The remarkable thing is this: in his great treatise on the criminal law, Historia placitorum coronae, Hale adds a quite different dimension to the issue. Here he records that the common law viewed witchcraft — along with “fascination” or enchantment — as among those “secret things [that] belong to God”:

If a man either by working upon the fancy of another, or possibly by harsh or unkind usage put another into such passion of grief or fear, that the party either die suddenly, or contract some disease, whereof he dies, tho as the circumstances of the case may, this may be murder or manslaughter in the sight of God, yet in foro humano it cannot come under the judgment of felony, because no external act of violence was offered, whereof the common law can take notice, and secret things belong to God.

Older certainties were in the balance, rendering the present legal status of witchcraft and other “irreligious” actions uncertain. As Hale’s ambivalence suggests, at this time the
demarcation between public crimes and private beliefs was not drawn in a recognisably modern manner. As a matter of private belief, witchcraft would not be the concern of secular legality, though known to God, the foro divino and inner conscience.

Witchcraft and heresy had stood in the same historical series: “Witchcraft, Sortilegium was by the antient laws of England of ecclesiastical cognizance, and upon conviction thereof without abjuration, or relapse after abjuration, was punishable with death by writ de haeretico comburendo.”22 In presenting the history, Hale’s jurisdictional concern and confessional sensitivity are evident:

[The Papal canonists] have by ample and general terms extended heresy so far, and left so much in the discretion of the ordinary to determine it, that there is scarce any the smallest deviation from them, but it may be reduced to heresy, according to the general generality, latitude, and extent of their definitions and descriptions.23

The story is being told so as to disinculpate the common law from a charge of complicity with religious persecution. Hale thus ends the chapter on religion in Historia placitorum coronae by recording that now, under Charles II, the writ of de haeretico and “all capital punishments in pursuance of ecclesiastical censures are utterly abolished and taken away, so that heresy is now punishable only by excommunication, … the civil effects of which are, that the party is disabled from making a will, or from suing for any debt or legacy.”24

That Hale conducted himself as he did in the 1662 witchcraft trial and the 1676 blasphemy case cannot be separated from the cultural circumstances. Confessional movements were throwing up religious phenomena such as the “witch craze,” in England as in Germany. In part such phenomena endangered civil peace by firing popular fears
and rousing communal resentments. Magic and enchantment persisted. They could almost be relied on. More importantly, though, if an existing statute against witchcraft was now enforced in the court of King’s Bench, this was because in England legal action against witchcraft — linked, along with sorcery, to heresy and thus to *lèse-majesté* against both God and King — was a phenomenon that continued on into the confessional state.

If no clear line was drawn between religious belief and legal action, this was less a function of an individual English judge’s subjective superstition or proof of the common law’s inadequate rules of evidence. Rather, it was part and parcel of a still confessional law and politics. With its emerging national church, the English state allowed religious breaches to be legal crimes. Yet, it is not a question of a state simply imposing a confessional regime upon a would-be autonomous judiciary. Civil trial and sanctioning of religious breaches was in part the work of canonist and civilian lawyers prior to the establishment of Protestant states. If the law was now becoming neutral towards matters deemed religious, this was something other than law’s separating from the confessional politics of the state. It was also a significant alteration internal to the legal sphere itself, not least with regard to the judicial persona.

With some sense of Hale’s circumstances and persona, let me suggest some brief contrasts between the English, French and German settings as these might have borne on the fashioning of judicial personae within these different jurisdictions. Raoul van Caenegem, the Belgian legal historian, has characterised the three jurisdictions in terms of their protagonists and structures of prestige: respectively, judges, legislators and professors. This is memorable enough, but it does not specifically address the English,
French and German settings of the judicial persona in their political and legal circumstances or their religious settlements. This remains to be done, but the similarities and differences are multiple. If England and France were nations outside an Empire, a territorial state such as Brandenburg was fashioned within and against the terms of the German Empire.\textsuperscript{26} If France and Germany were civilian law regimes, England was notoriously insular and insulated within its common-law history. If England remained a confessional state with an established church, France became one (under Louis XIV) and Brandenburg determined not to be one, preferring a sharp separation of state from church. If seventeenth-century England became a state of mixed constitution, France and Brandenburg went along the absolutist path — though religious peace in France was achieved at the price of an enforced Gallican conformity, whereas the Brandenburg state made itself agnostic or indifferent towards the rival truth-claims of at least the three confessions recognised in the Westphalian treaties as legitimate public bodies. Nearly enough said, then, to establish that there was no common setting for judicial personae … and to leave further elaborations on these themes to Professors Hunter and von Friedeburg.

A couple of words on the circumstances of French and German judges, though, will serve as a foil to sharpen Matthew Hale’s common-law setting. Though the German Peace of Augsburg (1555) is conventionally regarded as ending the first of the European “wars of religion,” Nancy Roelker terms sixteenth-century France the “crucible of Europe”.\textsuperscript{27} In this crucible, unprecedented political and legal solutions were devised in response to conflicts generated by Christian disunion. For thirty-six years from 1562 France was engulfed by confessional conflict. By these times, the Reformed religion had
some two million adherents in France. The Catholic Massacre of Protestants — the Huguenots — on St Bartholomew’s Eve took place in 1572. Each of the eight wars of religion was concluded by an edict of pacification, the peace being brokered by the Crown (that is, by Charles IX and Henri III, Catherine de Medicis and Michel de L’Hospital, Chancellor of France from 1560 to 1568). In 1562, during the first war of religion, Chancellor L’Hospital had put the Crown’s case to the peace “colloquium” at St-Germain-en-Laye:

> It is not a question of establishing the faith, but of regulating the state. It is possible to be a citizen without being a Christian. You do not cease to be a subject of the King when you separate from the Church. We can live in peace with those who do not observe the same ceremonies.28

This was, precisely, a “one-state” solution to religious discord that had split the realm of France in two. State action — raison d’État — was now laying claim to sovereign authority, displacing confessional faith from a determining role in “regulating the state,” that is, in sanctioning civil conduct. Only if the sovereignty of the state were absolute could Protestants and Catholics have identical status as citizens, equal before the law. Protestant would then not mean foreign. Pluralising the personae of man and citizen, L’Hospital put the point famously to the judges of the Parlement in 1562: “même l’excommunié ne laisse pas d’être citoyen.” Political change here creates the possibility for a neutral civil law housed in an administrative order independent of confessional norms.

To underscore the consequences of his policy, the following year L’Hospital confronted the parlementaires of Rouen on the occasion of the formal majority of
Charles IX with a stark political fact concerning the limits of their judicial office. Matters of state, he said, did not fall within their jurisdiction. L’Hospital took a political view of law. The parlementaires were, he reminded them, judges “of the meadow and the field,” that is, of private property disputes, “but not of life and customs and not of religion.”

Under political orders, the judges were to pursue no further civil prosecutions for religion.

L’Hospital’s decisive turn to politics — resolving confessional conflict by a political regulation of civil life — gained theoretical justification in Jean Bodin’s *De la république*. Appearing in 1576, four years after the St Bartholomew, Bodin’s treatise conceptualised sovereignty as absolute and indivisible in a manner that aligned him with the Chancellor’s peace-broking politics. Given such a politics, a plurality of faiths need not be catastrophic if the unified sovereign will was law. That good citizens need not be “Christians” was an exemplary *politique* axiom. Yet it proved unacceptable to the majority of Paris judges. There was thus no easy unity between the traditional judicial order as represented by the majority *parlementaires* and, on the other hand, the new *politique* conceptions of the steps necessary for civil peace.

Martin Heckel has given us the remarkable legal history of a “non-confessional order of co-existence” and its achievement in the German Empire. Robert von Friedeburg underscores this achievement: by the mid-1600s, “assessment of licit government had been separated from scripture and relocated in an entirely legal realm of thought, based on a historical assessment of the German constitution.” Yet, as regards a judiciary independent of the sovereign power, Brandenburg was one state that had little or no place for any such institution. In comparison with the quasi-autonomous regime of
the English common-law judiciary, in Brandenburg there was no separation of political sovereign and judiciary, no division of powers insulating judge from legislator. Before we commoners protest, we must recognise that the Brandenburg establishment of absolute sovereignty proved one way of rendering religious differences politically — and juridically — irrelevant (or, at least, less relevant), thereby serving the cause of peaceful coexistence. What is more, the common law — in such a persona as the Tudor jurist, Christopher St German — was perfectly complicit with state absolutism insofar as this denied legitimacy to its rivals, papal and canonist jurisdictions, even as the political break with Rome freed up space for a quasi-autonomous native English law.

Whether or not the quasi-autonomy of the native common lawyers was — and is — a good thing has long been a matter of dispute. In the eyes of Thomas Hobbes, that Frenchified English philosopher of civil science with a Gallic distrust of government by judiciary, there was no doubt: an independent judiciary was an impediment to legislative sovereignty and thus part of the problem of civil conflict, not its solution. As for the common lawyers more generally, they were the “fascinators” and the provokers of disobedience. “The private priests of (legal) reason must be checked as the private priests of revelation needed to be checked” — such is the burden of Hobbes’s *Dialogue between a Philosopher and a Student of the Common Laws of England*. Faced with the Philosopher’s charge that any man can “pretend within a Month, or two to make [himself] able to perform the Office of a Judge”, Hobbes’s Lawyer says that such a man will make “an ill Pleader”, a response that generates a pointed attack:

Philosopher: A Pleader commonly thinks he ought to say all he can for the Benefit of his Client, and therefore has need of a faculty to wrest the sense
of words from their true meaning; and the faculty of Rhetorick to seduce the Jury, and sometimes the Judge also.36

The narrow craft of the common-law professionals in the sovereign courts in London was a familiar target for early modern legal scholars in the civil-law culture of Oxford and Cambridge. In fact Hobbes here echoes the discourse of a “university man” such as Abraham Fraunce, reformist advocate of a legal training on Erasmian and Ramist lines, objecting to the commoners’ mixing of logic and rhetoric when they obscured the structure of the argument by would-be persuasive cascades of cases cited. Hence his dismissive depiction of “little grand mootmen, who cast case upon case, as Carters do billets, and for every collateral trifle, run over all the 633 titles of Brookes abridgement.”37

Matthew Hale was the judicial interlocutor that the “Philosopher” could have had, if only Hobbes had not made the exchange between his general science of political reason and a historical justification of the common law so complete a whitewash for the former. In the pages of Hale’s “Reflections on Mr Hobbes his Dialogue of the Lawe,” the judge provides a real response to what he will term the “wild propositions” of the Philosopher.38 Taken together, the Dialogue and the “Reflections” constitute a case study in the differentiation of contemporary personae. To this exchange, the Hale persona brings a characteristic common-law disposition fashioned from recourse to England’s ancient laws and constitution, an anti-philosophical perspective in keeping not only with a London Inns of Court formation but also with a Protestant restraint grounded in the conviction of fallen man’s limited capacities. Small wonder, then, that for Hale the Hobbesian persona is one of intellectual excess and abstraction, belonging with
they that please themselves with a persuasion that they can with as much evidence and Congruitie make out an unerring systeme of Lawes and Politiques equally applicable to all States and Occasions, as Euclide demonstrates his Conclusions, deceive themselves with Notions which prove ineffectual, when they come to particular application.  

If such “unerring systems” in fact err, this is because of “the greate difference in most of the States and Kingdomes in ye world in their Laws administrations and measures of right and wrong, when they come to particulars.” We can imagine a Hale who says: “this law works in practice”, only to have a Hobbes reply: “But does it work in theory?”  

In fact Hale is unmoved by the confidence of Hobbes’s Philosopher that natural reason plus a month’s reading in the law can make anyone a judge when it comes to deciding the particulars:  

[Y]ett for the most part those men that have greate reason and Learneing which they gather up of Casuists, Schoolmen, Morall Philosophers, and Treatises touching Moralls in the Theory, that So are in high Speculacions and abstract Notions touching Justice and Right, and as they differ Extreamely among themselves when they come to particular applications, So are most Commonly the worst Judges that can be, because they are transported from the Ordinary Measure of right and wrong by their over fine Speculacons Theoryes and distinctions above the Common Staple of humane Conversations.

As the structure of Hale’s response becomes clear, we see it is not simply a matter of preferring the pragmatic to the theoretical. More interesting is the corresponding contrast
between a defence of the historical “common staple” or normal against the philosophical extreme or exceptional:

[I]t is a reason for me to preferre a Law by which a Kingdome hath been happily governed four or five hundred years then to adventure the happiness and Peace of a Kingdome upon Some new Theorye of my owne tho’ I am better acquainted with the reasonableness of my owne theory then with that Law.42

To turn to “reason” as law — no less than turning to private conscience — is therefore to risk the “Inconvenience of an Arbitrary.” This, writes Hale, “is intollerable, and therefore a certaine Lawe, though accompanied by some mischiefe, is preferrable before it.” But, he adds, “it is not possible for any humane thing to be wholly perfect.”43

The English common law is such a law. It has emerged not from some great theoretical elevation to a higher-order reason but as a “Production of long and Iterated Experience”:

[I]t appears that men are not borne Common Lawyers, neither can the bare Exercise of the Faculty of Reason give a man a Sufficient Knowledge of it, but it must be gained by the habituateing and accustoming and Exercising that Faculty by readeing, Study and observation to give a man a compleate Knowledge thereof.44

Thanks to this in situ “habituateing” of the judicial persona, the historical kingdom has achieved the “Conservation of Laws within their boundes and Limitts.”45 In this way, peace and civil order have been preserved as best they could.
No less than Hobbes, Hale was preoccupied with peace. Like Hobbes, Hale recognised the fact of sovereign unity. Yet, reading the words of Hobbes’s Philosopher, the judge is moved to write that “Such a man that teacheth Such a doctrine as this as much weakens the Soveraigne Power as is imaginable and betrays it with a Kisse.” How could this be? It was in part an empirical matter, “as by miserable Experience we have learned”:

That there is no Law Soe Strictly and prudently Penned for the Secureing of his subjects Liberties and Properties, but that they intrinsically have this Condicion implyed, tho’ not Expressed. That when [the Sovereign] Judgeth itt fitt he may Suspend or abrogate them.

It was Hobbes’s endorsement of such absolutist powers that Hale found to be “wild propositions … [d]estructive to the Common good and safety of the Government.” Hale’s positive account of what sovereignty actually is within the terms of an English jurisdiction — namely, the array of attributes that have become attached to the historical office of the king and that now define a royal prerogative bounded by certain “qualifications” — differs sharply from Hobbes’s normative account of what all sovereignty ought to be.

In Hobbes’s Dialogue, then, Hale recognised the Philosopher as speaking with the voice of the Theorist. Worse, Hobbes himself was one of those certaine Speculators that take upon them to Correct all the Governments in the World and to govern them by Certaine Notions and Fancies of their owne, and are transported with soe great Confidence and opinion of
them[selves] that they thinke all States and Kingdomes and Governments
must presently be Conforme to them.48

Rather than overweening confidence, it is diffidence that marks the Hale persona, a
diffidence that finds expression in a capacity to operate within the circumstances and not
beyond the “Common and Ordinary State of thinges.” Confronted by Hobbes’s
Philosopher’s assertion that a prince who has to bargain with a parliament — or a
judiciary — could never guarantee the “Common Safety,” Hale remains robust:

I answer … that as Lawes So the Method and Modelling of Governments
are to be fitted to what is the Common and Ordinary State of thinges ad
Plurimum, because mankind have most Ordinarily to do with Such
Circumstances or affaires as most usually happen.49

Prescription in Hobbesian style might suit the state of exception occasioned by foreign
invasion or civil war, but by casting everything within the grid of the exception, Hobbes
risks disrupting the hard won normality of law-based living in the name of an abstract
political science. Hence a final word from Hale:

[I]t is a Madness to thinke that the Modell of Lawes or Government is to
be formed according to Such Circumstances as very rarely occurre. Tis as
if a Man should make Agarike and Rhubarb his Ordinary Dyett, because it
is of use when he is sicke which may be once in 7 years.50

I could end, fashionably, on this useful dietary note. But let me move back from
the legal margins to a more mainstream issue and a last word on contextualisation. A
generation ago, the Yale historian Jack Hexter polemically made of Hale’s responding to
Hobbes a clash of epistemic titans. At issue were “all ways of knowing modo historico”
which do not “let themselves be pushed into defining their claims with the boundaries set by the rhetoric of the natural sciences”:

[Hale] may have been the first to espouse consciously an historical mode of knowing *over against* a mode that was consciously rooted in the new natural sciences and that used them as its universal model in method. Indeed, Hale could have had few precursors, since Hobbes was the first to universalise the scientific mode, and most of Hobbes’ early opponents were too busy being shocked by his conclusions to pay much heed to his method.51

This is epic imagery … and so has problems. Hexter’s exemplary opposition — between a lawyerly and historically minded Hale and a toweringly scientific and philosophically minded Hobbes — is so perfect that we risk losing sight of the circumstances of their exchange. Without going too far down the counter-factual path, we can speculate a little: if an absolutist monarchy French-style had taken hold in England, a Hobbes would have enjoyed the status of a Bodin as the hard-headed theorist of the sovereign state. Conversely, a Hale would have suffered the same marginalisation as a Hotmann, left aside defending an ancient constitution and some customary indigenous laws. In other words, it is the contingent facts of English political history and not the actual content of his political philosophy that turn Hobbes into the abstract theorist.52

It is better, therefore, to conclude by anticipating an alternative depiction, one that recasts Hale and Hobbes in terms of two different historical personae, each a contemporary ordering of life but in a different habitus and each with its specific purposes and distributed techniques. In this way, the historical relations of the judicial
and the philosophical, the legal and the critical, recover something more of their tactical intelligence and contextual depth.

1 This shift in personae is only one aspect of the complex phenomenon of legal secularisation. In countries lacking their own institutions of legal formation, jurists travelled abroad to train in the canon law. See K. Hørby, *Church and State in Medieval and Early Modern Denmark, in Legislation and Justice* 197-209 (Anthony Padoa-Schioppa ed., 1997). The princes of such countries could secularise such law by declaring themselves to be its source.


5 Id.

6 Id.

7 Gray, *supra* note 2, at xvi.

8 Id.

Matthew Hale, in EDMUND HEWARD, MATTHEW HALE 67 (1972). Like Hale’s devotional writings, these statements of judicial self-resolve were for his own private reflection, not for publication. They establish personal guidelines for what might be termed an exercise of spirit for juridical purposes.

Matthew Hale, Lambeth MS 3507, 32, in CROMARTIE, supra note 9, at 181.

Matthew Hale, in HEWARD, supra note 11, at 127.


Taylor’s Case, 1 Ventris 293 (1676), 86 E.R. 189. The defendant was fined “1000 mark, imprisonment until seurities for good behaviour for life, and pillory at Gilford [Guildford] where the words were spoken, and at Westminster, Cheapside and Exchange, with a paper for horrid blasphemy, tending to subvert all government.” 84 E.R. 914.

See A trial of witches, in COBBETT’S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANOURS, VI, 687-702 (1809). [hereinafter STATE TRIALS].

Gilbert Geis, Lord Hale, Witches and Rape, BRITISH J. OF L. AND SOCIETY 26-44 (1978), treats the 1662 trial and verdict in psycho-historical terms of a “misogynistic bias” on the part of Hale and the common law regarding witchcraft and rape. The relation of law and religion in the times of confessional conflict is not
mentioned. To discuss witchcraft without referring to religion is like discussing rape without referring to men.

19 Matthew Hale, *Lambeth MS 3506, fo.114*, in CROMARTIE, supra note 9, at 238. Remarkably – at least from our incredulous perspective on these things – the bewitched children “within less than half an hour after the witches were convicted, they were all of them restored”. STATE TRIALS, VI, at 702.

20 STATE TRIALS, VI, at 700-01.

21 MATTHEW HALE, HISTORIA PLACITORUM CORONAE [THE HISTORY OF THE PLEAS OF THE CROWN], VOL. 1, 429 (Sollom Emlyn ed., 1736). In a comparative note, Hale then adds that “before the statute of I Jac. cap. 12 witchcraft or fascination was not felony because it wanted [i.e., lacked] a trial, tho some constitutions of the civil law make it penal.” In the HISTORIA – perhaps curiously, perhaps not – Hale makes no reference to the 1662 trial.

22 Id., at 383.

23 Id, at 383-4.

24 Id., at 410.

25 “It is generally known that the English common law is a creation of the royal judges and that the role of professors of law and of theoretical study – ‘legal science’ – has in the course of the centuries been marginal. No contrast could be greater than between this English development and its continental counterpart, for there the impact of ‘professors’ law’ has been of the greatest importance. In fact, it is not too much to say that there are large and important fields of law which were created by continental jurists
just as the English common law was the judges’ handiwork.” RAOUl C. Van Caenegem, Judges, Legislators and Professors. Chapters in European Legal History 53 (1987).

26 See D. Willoweit, The Holy Roman Empire as a Legal System, in Legislation and Justice, supra note 1, 123-30.

27 Nancy L. Roelker, One King, One Faith. The Parlement of Paris and the Religious Reformation of the Sixteenth Century 228 (1996). J. M. H. Salmon, Society in Crisis. France in the Sixteenth Century 13 (1975) had previously adopted the same metaphor to characterise the French religious wars as “the crucible in which some of the competing forces from an earlier age were consumed in the fire and others blended and transmuted into new compounds.” On the French wars and fundamental law, see Martyn P. Thompson, The History of Fundamental Law in Political Thought from the French Wars of Religion to the American Revolution, American Historical Rev. 1103 (1986).

28 Michel de l’Hospital, Oeuvres Complètes de Michel de L’Hospital, Vol. 1, 452 (P. J. S. Dufey ed., 1824-5).

29 Translations can render L’Hospital’s 1563 address in rather plainer terms, but the point remains the same: “You are civil judges, not [judges] of life, morals or religion.” Sarah Hanley, The Lit de Justice of the Kings of France: Constitutional Ideology in Legend, Ritual, and Discourse 168 (1983). Another rendering of L’Hospital’s admonition is equally plain: “Take care not to bring enmity, favour or prejudice to your judgments. I see many judges who seek to
judge in the cases of their friends or enemies. Daily, I see men who are involved as enemies or friends of persons, sects or factions, judging for or against without considering the equity of the case. You are judges of acts, not of lives, morals or religion. You think it good enough to award the case to the one you think the worthy man, the better Christian, as though it were a question between parties of which was the better poet, orator, painter, worker – in the end a master of art, doctrine, valour or whatever other quality – not of the matter that has caused the case.” THE FRENCH WARS OF RELIGION. SELECTED DOCUMENTS 88 (David Potter ed. and trans., 1997), (emphasis added).

30 In the 1560s, Bodin was an avocat pleading cases at the bar of the Parlement of Paris.

31 Christopher Bettinson, The Politiques and the Politique Party: a Reappraisal, in FROM VALOIS TO BOURBON. DYNASTY, STATE AND SOCIETY IN EARLY MODERN FRANCE 35 (Keith Cameron ed., 1989) warns against reifying a diverse set of ideas, a variety of initiatives and some political episodes into a unified politque ideology with something like an epochal transformative power. As he reminds us, “politique” was the preferred term of censure deployed by Catholic Leaguers to besmirch all those who would abandon religious truth and seek accommodation with known heretics and proven schismatics.

32 Martin Heckel, Das Säkularisierungsproblem in der Entwicklung des deutschen Staatskirchenrecht, in CHRISTENTUM UND MODERNES RECHT: BEITRÄGE ZUM PROBLEM DER SÄKULARISATION 35, 50 (Gerhard Dilcher & Ilse Staff eds., 1984).

“Much of Hobbes’s philosophical development took place on foreign soil: in a period of just over twenty-two years, from October 1629 to December 1651, Hobbes spent only eight years in his native land. By the time he finally settled again in England, he must have struck his fellow countrymen as a positively Frenchified figure; Lodewijk Huygens, who visited him in London in February 1652, noted that ‘He was still dressed in the French manner, however, in trousers with points and boots with white buttons and fashionable tops.’” NOEL MALCOLM, ASPECTS OF HOBBES, 458 (2002).

Joseph Cropsey, Introduction, in THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 26 (1971). Cropsey sets the composition of Hobbes’s Dialogue between 1662 and 1675. These are almost exactly the years between Hale’s 1662 “witchcraft” judgment and his 1676 retirement from the court of King’s Bench. James R. Stoner speculates that “[i]f Leviathan was directed to commoners and intended for use in the reformed universities, perhaps the Dialogue was written for lawyers who skipped university to study directly at the Inns of Court.” JAMES R. STONER, COMMON LAW AND LIBERAL THEORY. COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 116 (1992).

HOBSES, supra note 35, at 56.

Hobbes’s *Dialogue* was first published in 1681, two years after its author’s death and six years after the death of Matthew Hale. The *Dialogue* thus circulated in manuscript for some time before 1675, including among the common-law judiciary. It is not known if any other judge responded to Hobbes’s work as fully as did Hale. The latter’s *Reflections* were not published until 1945. See infra, note 39.


Id., at 502-03.

Id., at 503.

Id.

Id., at 504.

Id. As one now expects, the claim is immediately qualified by the additional comment that even such a man “cannot p’tend to Infallibilitie in his Judgement or to a full attainment of all that is attainable toucheing the Laws of England.” Despite this modesty, echoes of Coke are clear.

Id., at 506. This theme of the conceptual yield of the common law habitus is more fully developed in Hale’s celebrated *History of the Common Law of England*, where he foregrounds the role of the “courts at Westminster, whereby there is kept a great Order and Uniformity of Proceedings in the whole Kingdom, to prevent the Multiplicity of Laws and Forms”: “F]or those Men employed as Justices, who as they have had a
Common education in the Study of the Law, so they daily in Term-time converse and consult with one another; acquaint one another with their Judgments, sit near one another in Westminster Hall, whereby their Judgments and Decisions are necessarily communicated to one another, either immediately or by relations of others, and by this Means their Judgments and their Administrations of Common Justice carry a Consonancy, Congruity and Uniformity one to another, whereby both the Laws and the Administrations thereof are preserved from that Confusion and Disparity that would unavoidably ensue, if the Administration was by several incommunicating hands, or by provincial Establishments.” HALE, supra note 2, at 161-2.

46 Hale, supra note 39, at 511.

47 Id.

48 Id., at 509.

49 Id., at 512.

50 Id.


52 However, the circumstances allow a different reading, in which Hobbes imports into England an anachronistic and therefore dangerous French political theory – absolutist sovereignty – whereas it was the seventeenth-century English jurists who, as political realists, faced the facts of the situation and understood what was needed for religious peace. See Martin Kriele, Notes on the Controversy between Hobbes and the