Michigan Law Review

Volume 92 | Issue 6

1994

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Recommended Citation

Allen D. Boyer, *Light, Shadow, Science, and Law*, 92 MICH. L. REV. 1622 (1994).

Available at: <https://repository.law.umich.edu/mlr/vol92/iss6/15>

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LIGHT, SHADOW, SCIENCE, AND LAW

Allen D. Boyer*

FRANCIS BACON. By *Daniel R. Coquillette*. Stanford: Stanford University Press. 1992. Pp. x, 358. \$39.50.

Francis Bacon, Lord Chancellor of England — the man who pioneered the scientific method, dreamed of the research university, set forth a prophetic agenda for law reform, and wrote so gracefully that he has been accused of writing Shakespeare's plays — fell from office when proof emerged that he had taken bribes. The story is old; it remains important.

With *Francis Bacon*,¹ Daniel Coquillette² provides a valuable study of Bacon's legal career and jurisprudential impact. Coquillette makes the most of an exasperating subject, because writing on Bacon means constantly deciding what to leave out. It means choosing between analyzing character and analyzing achievement, as well as sorting out Bacon's jurisprudence and *belles lettres* from his scientific and philosophical work. As Coquillette notes,

Bacon must have been consigned to a very special purgatory to have been seriously credited with writing Shakespeare's plays and to have invented modern science, while being denied credit for the thing he really did achieve — the first sustained, analytical, secular, and inductive approach to jurisprudence.

... Being "scrupulously fair" to Bacon is extraordinarily difficult. It is hard to penetrate past the continuing controversies about so many aspects of his life and character, his political ideology, his homosexuality, his art, his actual ability as a scientist, and his integrity. Even the place of his burial is shrouded in mystery. But if we focus fairly on the written record of Bacon's work as a lawyer and a jurist, and particularly on his legal thought, the picture emerges of a creative, profound and innovative man, dedicated to his profession and to making genuine progress in the way we think about the law. [p. viii; footnote omitted]

Writing on Bacon means giving explanations. It may also mean resisting the temptation to give apologies. Few thinkers have ever projected as many intellectual structures, and for every one of these structures, so to speak, there is a matching shadow.

Coquillette's focus is close and methodical. He moves steadily

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1. *Francis Bacon* is the most recent entry in the *Profiles in Legal Theory* series, for which William Twining and Neil MacCormick serve as general editors.

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through the canon of Bacon's legal works, framing his discussions with biography, until a masterful final chapter pulls Bacon's achievement into full perspective. The approach is one Bacon would have both understood and praised.

* * *

In April 1603, James VI of Scotland traveled south to claim the crown of England. At Newark, in Nottinghamshire, his entourage discovered a pickpocket in their midst.

In this town, and in the Court, was taken a cutpurse, doing the deed; and being a base pilfering thief, yet was all Gentleman-like on the outside. This fellow had [a] good store of coin found about him: and, upon his examination, confessed that he had, from Berwick to that place, played the cutpurse in the Court. His fellow was ill missed, for no doubt he had a walking mate. They drew together like coach horses, and it is pity they did not go hang together. For His Majesty, hearing of this nimbling gallant, directed a Warrant presently to the Recorder of Newark, to have him hanged: which was accordingly executed.³

English institutions and attitudes were malleable; hence arose the crisis that the common law would face under the Stuarts. The author of *The Trew Law of Free Monarchies*⁴ was eager to take a personal hand in ruling. The men who worked the nation's justice system were willing to listen to royal suggestions. The population also approved. The people of Newark took it for granted that a king could hang a pickpocket, just as their cousins in London would take it for granted that a Danish prince could order the death of two courtiers.

During the era James's accession ushered in, Bacon's ambition and intellectual arrogance would both make and damage his reputation. He would be remembered as a clever and eloquent man, capable of using changing times to put forward new ideas, but, at the same time, as someone who was too much the supple tool of power, who would scheme and toady and seek to replace the common law with civil law. In the demonology of Whig historians, Bacon became the opposite of his great rival Edward Coke — the common lawyer, common law judge, and resolute and selfless proponent of judicial independence, parliamentary government, and English liberties.

There is some truth to this caricature. Bacon's *Essays* explored Cunning, Ambition, Negotiating, Great Place, and Fame, as well as Judicature, Truth, and Love.⁵ His views on judicial politics reveal the compromise he was willing to strike with royal absolutism: "[I]t is a

3. THOMAS MILLINGTON, *THE TRUE NARRATION OF THE ENTERTAINMENT OF HIS MAJESTY* (1603), reprinted in *STUART TRACTS 1603-1693*, at 11, 35 (Thomas Seecombe ed., 1903) (alteration in original).

4. For James's work in theoretical political science, see JAMES I, *THE TREW LAW OF FREE MONARCHIES* (1598), reprinted in *THE POLITICAL WORKS OF JAMES I*, at 53 (Charles H. McIlwain ed., Harvard Univ. Press 1918) (1616).

5. FRANCIS BACON, *ESSAYS OR COUNSELS, CIVILL AND MORALL* (1625) [hereinafter *Es-*

happy thing in a state when kings and states do often consult with judges; and again when judges do often consult with the king and state . . . when there is some consideration of state intervenient in matter of law."⁶ In order to further his own intellectual agenda, Bacon was willing to embrace his monarch's political agenda. But what he sought to achieve through such compromises was original and often foresighted:

Much of Bacon's work on legal method, including theories of statutory interpretation, evidentiary process, legal drafting and legal information systems, seems strangely familiar. Like his aphorisms and essays, we have the sense we have heard it before. The true impact of Bacon's originality comes when we look at his juristic predecessors and contemporaries. Then we realise that we *have* heard it before, many times, but that Bacon usually said it first. [p. 277]

Perceptively, Coquillette points out that Bacon made a career for himself within the common law context. He sat in every Parliament between 1581 and 1618, leaving the House of Commons only when King James raised him to the Lords. He called himself a "professor of the Common Law,"⁷ someone who understood and believed in the common law. In 1600, when he lectured on the Statute of Uses, he spoke as a lawyer who had helped argue the winning side of *Chudleigh's Case*.⁸

Although Bacon never achieved the success that attended Coke, he took a prominent role in many of the great cases of his day — first as a lawyer, then as James's Solicitor General (1607-1613) and Attorney General (1613-1617).⁹ Coquillette's third chapter, "The Theorist as Advocate," samples the spectrum of litigation in which Bacon was involved (pp. 127-89). *Slade's Case* opened the door to modern contract law by upholding the availability of assumpsit to contract plaintiffs.¹⁰ *The Case of Impeachment of Waste* involved a classic dispute between a life tenant and her remainderman.¹¹ *The Jurisdiction of the Council*

SAYS], reprinted in 6 THE WORKS OF FRANCIS BACON 365 (James Spedding et al. eds., Frommann-Holzboog 1963) (1861).

6. FRANCIS BACON, *Of Judicature*, in ESSAYS, *supra* note 5, at 506, 509.

7. P. 103 (quoting Letter from Francis Bacon to George Villiers, later Duke of Buckingham (circa 1616) (second version), in 13 THE WORKS OF FRANCIS BACON, *supra* note 5, at 27, 39).

8. *Chudleigh's Case*, 1 Co. Rep. 113b, 76 Eng. Rep. 261 (K.B. 1594) (clarifying the Statute of Uses), reported *sub nom.* Dillon v. Frain, 1 Anderson's Rep. 309, and reported *sub nom.* Dillon v. Fraine, Popham's Rep. 70.

9. Under Elizabeth, Bacon was made Queen's Counsel, a rank awarded as a consolation prize when Coke was named Attorney General. For nine years he held the signal honor of serving as treasurer of Gray's Inn. See p. 20 n.41.

10. *Slade's Case*, 4 Co. Rep. 92b, 76 Eng. Rep. 1074 (K.B. 1602). Bacon argued for the defendant against the use of assumpsit; Coke represented the plaintiff. In reporting the case, Coke suppressed Bacon's arguments. See J.H. Baker, *New Light on Slade's Case* (pt. 1), 29 CAMBRIDGE L.J. 51, 53 (1971).

11. *Lewis Bowles's Case*, 11 Co. Rep. 79b, 77 Eng. Rep. 1252 (K.B. 1618) (*The Case of*

of the *Marches* dealt with the jurisdiction of prerogative courts.¹² *Calvin's Case*, in which Bacon argued for the Crown, was the greatest political decision of its day — the test case that settled whether Scots had Englishmen's rights in England, now that a Stuart king ruled both kingdoms.¹³

In all of these cases Bacon demonstrated three traits. The first, often overlooked by his critics, was his dedication to the advocacy process, his love of the give-and-take of rational discourse and legal argument. This love of "testing" propositions and theories was directly linked to his second great trait, his systematic and scientific approach to legal advocacy. . . . Finally, Bacon's later arguments revealed his growing interest in a legal science that was directly instructed by natural philosophy and the study of linguistics. [p. 175]

Bacon's role as a member of Parliament led to his earliest surviving legal works: reports on reformatories, crown prerogatives and ownership rights, and advowsons.¹⁴ His first essay in jurisprudence, *A Collection of Some Principal Rules and Maxims of the Common Lawes*,¹⁵ known briefly as the *Maxims*, also fell within the common law tradition. A large number of common lawyers had sought to extract principles from the mass of precedents in the Year Books. The *Maxims*, however, transcended the black-letter mentality. The work brought together twenty-five maxims, aphorisms which Bacon interchangeably called *regulae*, from Latin, and *maximes*, from Law French. For each maxim, Bacon pursued the same approach:

First, he set out the maxim in Latin, without translation. Next, there [was] a general discussion. This frequently restated the maxim, occasionally provided a direct translation, and always analysed the important elements of the *regula*. In addition, there were frequently policy justifications. Then Bacon listed specific examples illustrating the operation of the maxim. These often came from actual yearbook cases. . . . Finally, Bacon concluded each discussion by setting out the exceptions to the maxims [in a] final step of "negation" or "definition by exception" [that] was to become an important part of Bacon's philosophical method. [p. 41]

Impeachment of Waste), reported *sub nom.* Bowles v. Berrie, 1 Rolle's Rep. 177 (K.B. 1613). For a discussion of the history of this case, see p. 182 n.103.

Bacon's arguments are presented in his collected works. FRANCIS BACON, *THE ARGUMENTS OF LAW* (1730) [hereinafter *THE ARGUMENTS*], reprinted in 7 *THE WORKS OF FRANCIS BACON*, *supra* note 5, at 517. See pp. 127-75 and accompanying notes. A new edition of Bacon's works is currently being prepared for Oxford University by Professor Julian Martin.

12. *Fareley's Case*, 2 Croke's Rep. 36 (K.B. 1604) (*The Jurisdiction of the Council of the Marches*); see also Francis Bacon, *The Arguments on the Jurisdiction of the Council of the Marches* (1604), in *THE ARGUMENTS*, *supra* note 11, at 567.

13. *Calvin's Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (K.B. 1608) (*The Case of the Post-Nati*).

14. See pp. 25-28.

15. FRANCIS BACON, *A COLLECTION OF SOME PRINCIPAL RULES AND MAXIMS OF THE COMMON LAWES* (1630) [hereinafter *THE MAXIMS*], reprinted in 7 *THE WORKS OF FRANCIS BACON*, *supra* note 5, at 307.

In Bacon's hands, Justinian's dictum on the rights established by bloodlines, *jura sanguinis nullo jure civili dirimi possunt*, became the focus of Regula XI's discussion of conviction and pardon. Regula III, *verba fortius accipiuntur contra proferentem*, Bacon translated as "[a] man's deeds and words shall be taken strongest against himself" (p. 41); he used it as the basis of a discussion that wound through the construction of deeds, judicial decisions as to what was admitted or denied by pleadings, and, finally, issues of statutory construction. Sir William Holdsworth, in his monumental *A History of English Law*, recognized the importance of this work:

Bacon's little book on the Maxims of the Law shows that if he had had the leisure to accomplish [his] scheme of reform, he, and he alone, was the man for the task. Many another lawyer could have stated legal propositions accurately. He alone had the philosophical capacity, the historical knowledge, and the literary taste needed to select the subject matter and to shape the form of the books in which English law was to be restated. And, if his scheme had been accomplished, there is no doubt that he was right in thinking that there would be many who would question whether, as a lawyer, he was not Coke's superior.¹⁶

While his contemporaries explained law in terms of antiquity and usage,¹⁷ Bacon worked from the basis of policy and principle. Because of his fondness for crystallizing legal points in aphorisms, it is easy to think of him as devoted to abstraction and perhaps as a forerunner of the formalist school.¹⁸ Instead, Coquillette's discussion points out how Bacon insisted on linking his generalizations to actual decisions.¹⁹ Moreover, he refused to reduce the law to a mere outline. He wrote:

[W]hereas I could have digested these rules into a certain method or order, which, I know, would have been more admired . . . yet I have avoided to do so, because this delivering of knowledge in distinct and disjointed aphorisms doth leave the wit of man more free to turn and toss, and to make use of that which is so delivered to more several purposes and applications.²⁰

The desire to inspire independent thought places Bacon in the modern age. His purpose was not to hoard knowledge or to dictate rules.²¹

Two decades later, at the height of his career, Bacon returned to

16. 5 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 489 (2d ed. 1937).

17. See generally GLENN BURGESS, *THE POLITICS OF THE ANCIENT CONSTITUTION* 19-78 (1992); J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1957).

18. On formalism, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 593 (1973); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 41-67 (1977).

19. P. 40. Bacon did not name the Year Book cases from which he drew his examples, but he followed their facts so closely that later editors of the *Maximes* have been able to supply citations. *Id.*

20. P. 38 (quoting *THE MAXIMES*, *supra* note 15, at 321) (alteration in original).

21. This outlook has called Bacon to the attention of contemporary proponents of reader-centered criticism. See, e.g., Stanley Fish, *Georgics of the Mind: The Experience of Bacon's Essays*, 13 *CRITICAL Q.* 45 (1971).

the epigrammatic form. Sometime between 1614 and 1622, he produced two grandly titled works on jurisprudence: *Example of a Treatise on Universal Justice or the Fountains of Equity, by Aphorisms*,²² and *Aphorismi de Jure Gentium Maiore, Sive de Fontibus Justitiae et Juris* (*Aphorisms on the Greater Law of Nations, or of the Fountains of Justice and Law*).²³ The *Treatise* contained ninety-seven maxims. The *Aphorismi*, which have survived in a manuscript, identified as Bacon's work only in 1980, contained twenty more.

Bacon's understanding at this point had been deepened by experience. The *Maximes* considered only the first level of law, that is, rules of decision to use in deciding cases. The *Aphorismi* went beyond this level to look at first principles: the origins of law, how and why law grew over time, and what *authority* meant and how it legitimated law. Certain of the aphorisms Bacon set down are clearly the work of a man who had read Machiavelli and who would serve as the mentor of young Thomas Hobbes.

In human society either law or force prevails.

....

The ground and basis of law is this. He who commits an injury takes either pleasure or profit from the act, but danger from the precedent. Others for the most part share little in the profit or pleasure, but partake of the danger. Wherefore they readily unite in law, and protect themselves for the future.

....

... [I]t is better to live where nothing is allowed than where force does what it will. For anarchy is more malicious than tyranny, since the lusts of a single person have a limited scope, but those of the multitude extend everywhere.²⁴

22. FRANCIS BACON, *EXAMPLE OF A TREATISE ON UNIVERSAL JUSTICE OR THE FOUNTAINS OF EQUITY, BY APHORISMS* (1623) [hereinafter *THE TREATISE*], reprinted in 5 *THE WORKS OF FRANCIS BACON*, *supra* note 5, at 88 (Francis Headlam trans.).

23. Francis Bacon, *Aphorismi de Jure Gentium Maiore, Sive de Fontibus Justitiae et Juris* (c. 1614) [hereinafter *The Aphorismi*], in Mark S. Neustadt, *The Making of the Instauration: Science, Politics and Law in the Career of Francis Bacon* 247 (1987) (unpublished Ph.D. dissertation, Johns Hopkins University).

24. Pp. 239-40 (quoting *The Aphorismi*, *supra* note 23, at 274, 275, 280 (Aphorisms 1, 2, & 10)). The translation is by Mark Neustadt, whose dissertation brought the manuscript to scholarly attention. See generally Neustadt, *supra* note 23, quoted and discussed at pp. 237-38.

Coquillette observes: "[E]ven though the *Aphorismi* were never published, they may still have had great importance, for the effective 'Keeper' of the collection in which they were originally found was none other than Bacon's former amanuensis, Thomas Hobbes." P. 237. John Aubrey recorded:

The Lord Chancellor Bacon loved to converse with [Hobbes]. He assisted his Lordship in translating several of his essays into Latin . . . His lordship was a very contemplative person, and was wont to contemplate in his delicious walks at Gorhambury, and dictate to Mr. Thomas Bushell, or some other of his gentlemen, that attended him with ink and paper ready to set down presently . . . his thoughts. His lordship would often say that he better liked Mr. Hobbes's taking his thoughts, than any of the others, because he understood what he wrote, which the others not understanding, my lord would many times have a hard task to make sense of what they wrote.

JOHN AUBREY, *BRIEF LIVES* 151 (Richard Barber ed., 1972).

The *Treatise* focused on the need for increasing certainty in law. It anticipated Jeremy Bentham by two centuries in its argument that legal rules should be judged by their utility: "The end and scope which laws should have in view, and to which they should direct their decrees and sanctions, is no other than the happiness of the citizens."²⁵

In pursuit of certainty, Bacon sought to regularize English law. He sought a kind of codification, a "New Digest of the Law," which would print statutes and case law in separate sections (pp. 251-52). Moreover, he argued for inquiries every three or five years by parliamentary law commissions to weed out statutes that had fallen into desuetude (p. 251). He also called for the establishment of a reporting system.

Let this be the method of taking down judgments and committing them to writing. Record the cases precisely, the judgments themselves word for word; add the reasons which the judges allege for their judgments; do not mix up the authority of cases brought forward as examples with the principal case; and omit the perorations of counsel, unless they contain something very remarkable.

Let the reporters be taken from the most learned counsel, and receive a liberal salary from the state. But let not the judges themselves meddle with the reports; lest from being too fond of their own opinions, and relying on their own authority, they exceed the province of a reporter.²⁶

These calls for reform were glimmers of enlightenment in Bacon's call for increasing certainty. Overall, the *Treatise* had a darker cast. Bacon argued for the creation of "censorian courts" that would not only fill gaps in the law by punishing new offenses — that is, offenses not covered by existing criminal law — but also "increase the punishments appointed by law for old [existing] ones, where the cases are heinous . . . provided they are not capital."²⁷

We would understand Bacon's works better if he had taken the trouble to finish more of them. The *Maxims* dealt with only twenty maxims; Bacon claimed to have identified more than three hundred. The *Aphorismi* he left incomplete — an unfinished, unpublished, uncirculated fragment. In the *Treatise*, Bacon's stated intention was to deal with the goals law should serve — that is, how England's law might be made more "certain in meaning, just in precept, convenient

25. P. 243 (quoting THE TREATISE, *supra* note 22, at 89 (Aphorism 5)); see also JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11-13, 38-40 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789), quoted in SPENCER L. KIMBALL, HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM 361-63 (1966).

26. P. 253 (quoting THE TREATISE, *supra* note 22, at 104 (Aphorisms 74 & 75)). See also Bacon's comment that *Coke's Reports* contained "too much 'de proprio.'" 5 HOLDSWORTH, *supra* note 16, at 464.

27. P. 247 (quoting THE TREATISE, *supra* note 22, at 95 (Aphorism 34)). In Bacon's defense, it must be remembered that such censorian action was close to the Star Chamber practice of his day. Moreover, it took nearly two centuries for judges to yield their power to define new common law crimes. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 9-16 (1977).

in execution, agreeable to the form of government, and productive of virtue in those that live under it."²⁸ The aphorisms which Bacon completed, however, dealt only with the first of these goals. Had he discussed the rest, his prescriptions for censorian courts would have been less prominent. Usually, Bacon's penchant for leaving important work unfinished resulted in nothing more than obfuscation and frustration. In this instance, the result was damning.

As Coquillette rightly stresses, Bacon treated jurisprudence as a subset of the natural sciences. The *Treatise* formed part of Bacon's *De Augmentis Scientiarum*,²⁹ arguably the most successful of his attempts to analyze existing knowledge and call for its expansion through inductive reasoning and experimentation. What Bacon worked through in grasping an understanding of law influenced his understanding of general science.³⁰ At the same time, Bacon applied to issues of law reform a methodology that reflected its author's scientific outlook.³¹ His argument in *Chudleigh's Case*, in the spring of 1594, sounded themes that would be fully developed only in 1620 in the *Novum Organum*.³²

Bacon's view of *Chudleigh's Case* required a modern theory of how to construe statutes. That was what the *Reading Upon Uses* set out to provide. To those familiar with Bacon's later works on natural philosophy, what was so striking about Bacon's theory of statutory interpretation was how closely it followed the procedure of the *Novum Organum* and anticipated the "scientific" approach to the study of the law developed by Christopher Columbus Langdell. To Bacon, the Statute of Uses was like a specimen or artifact on the laboratory examining table. First you learned what you could about its historical and natural environment, then you dissected each part systematically, examining each artery and vein of meaning.³³

To resolve *Chudleigh's Case*, Bacon believed, one first had to review the history of uses — how they functioned before Henry VIII's statute

28. P. 244 (quoting THE TREATISE, *supra* note 22, at 88-90 (Aphorism 7)).

29. FRANCIS BACON, DE AUGMENTIS SCIENTIARUM (1623), reprinted in 4-5 THE WORKS OF FRANCIS BACON, *supra* note 5 (Francis Headlam & James Spedding trans.).

30. "Bacon was in fact a 'reverse' positivist," wrote Harvey Wheeler in 1983, "who derived the basic principles of experimental science from positive law processes." Harvey Wheeler, *The Invention of Modern Empiricism: Juridical Foundations of Francis Bacon's Philosophy of Science*, 76 LAW LIBR. J. 78, 80 (1983); see also Roger T. Simonds, *Bacon's Legal Learning: Its Influence on His Philosophical Ideas*, in ACTA CONVENTUS NEO-LATINI SANCTANDREANI 493 (I.D. McFarlane ed., 1986).

31. Coquillette notes: "I would only add that it was a two-way street: Bacon's philosophy informed his jurisprudence, and his jurisprudence informed his philosophy." P. 268 n.83. See also Paul H. Kocher, *Francis Bacon on the Science of Jurisprudence*, 18 J. HIST. IDEAS 3 (1957).

32. FRANCIS BACON, NOVUM ORGANUM (1620), reprinted in 4 THE WORKS OF FRANCIS BACON, *supra* note 5, at 37 (James Spedding trans.).

33. Pp. 53-54. The *Novum Organum* developed Bacon's criticism of human understanding — the limits he saw imposed by defects of individual character, language, and culture — proposing that inductive reasoning, based on close observation of the natural world, could overcome these defects. Pp. 223-34.

declared that they were executed — that is, turned from equitable into legal interests. One then had to determine what authority legitimated uses, and whether they were creatures of statute or of common law. In determining what reading to give the text of the statute, finally, one had to consider what problems Parliament had intended to remedy.

But if Bacon's scientific vision shared the highlights of his legal vision, it was darkened by similar shadows. The royal counsel who used torture as an adjunct to criminal proceedings was also a philosopher-reformer who projected visions of scientific war. There were macabre, painful connections between the scientific method that Bacon professed to follow and the inquisitorial sessions he attended in the Tower of London.

Bacon's active participation in interrogations of suspects under torture was, to him, less heinous than undiscovered evidence, and, thus, unjust judgment. He doubtless sought not just confessions, which were unreliable, but independently verifiable facts. This was exactly the procedure outlined for the interrogation of nature in the *Novum Organum*. Bacon's visionary conception of the future was singularly lacking in regard for the primacy of human dignity and individual freedom. . . . Bacon's belief in the need for state security and his "scientific" methods for obtaining evidence could be linked, sometimes in methods which allowed for great cruelty.³⁴

Bacon's last work, *The New Atlantis*,³⁵ presented a sort of scientist's paradise, a fictitious Pacific island called Bensalem. The people of Bensalem — who could speak Latin, Hebrew, classical Greek, and Spanish, and who lived an extraordinarily utopian existence — owed much of their comfort to the discoveries of a vast research facility called the College of the Six Days Work, or Salomon's House. Salomon's House investigated all the physical sciences, boring tunnels to study geology and seismology and breeding animals to further eugenics. It sent agents throughout the world to gather technological information from workshops and scour publications for reports of new discoveries.

There were, however, darker elements to this idyll. Salomon's House was controlled by a group called the Order, the Society, or the Fathers, an elite brotherhood bound by an oath of secrecy. Life was defined by rituals and ceremonies. Visitors were quarantined and watched. As to the discoveries made in Salomon's House, one of the Fathers disclosed, "some of those we do reveal sometimes to the state, and some not."³⁶

34. P. 279 (footnote omitted). See also Kenneth W. Cardwell, *Inquisitio Rerum Ipsarum: Francis Bacon and the Interrogation of Nature* (1986) (unpublished Ph.D. dissertation, University of California, Berkeley), discussed at p. 299.

35. FRANCIS BACON, *THE NEW ATLANTIS* (1627) [hereinafter *ATLANTIS*], reprinted in 3 *THE WORKS OF FRANCIS BACON*, *supra* note 5, at 119.

36. P. 259 (quoting *ATLANTIS*, *supra* note 35, at 165).

Like Leonardo da Vinci sketching futuristic war machines, Bacon outlined some of those discoveries:

We have also engine-houses, where are prepared engines and instruments for all sorts of motions. There we imitate and practise to make swifter motions than any you have, either out of your muskets or any engine that you have; and to make them and multiply them . . . and to make them stronger, and more violent than yours are; exceeding your greatest cannons and basilisks. We represent also ordnance and instruments of war, and engines of all kinds: and likewise new mixtures and compositions of gun-powder, wildfires burning in water, and unquenchable. Also fire-works of all variety both for pleasure and use. We imitate also flights of birds; we have some degrees of flying in the air; we have ships and boats for going under water, and brooking of seas³⁷

If Salomon's House looked forward to the modern research university, it also prefigured Los Alamos.

Yet it is not right to leave Bacon there, somewhere on the left-hand, left-brain side of human thought. The man had an open mind and a pointed sense of humor. He argued for wider education and against blind obedience.³⁸ Haphazard morality would bring him down, but the other side of this negligence was spontaneity. When he was not being studied and polished, he could forget himself in a new fascination. He is the only Lord Chancellor ever to die after attempting an impromptu experiment in refrigeration.

[A]s he was taking the air in a coach . . . snow lay on the ground, and it came into my lord's thoughts, why flesh might not be preserved in snow, as in salt. They were resolved they would try the experiment at once. They alighted out of the coach, and went into a poor woman's house at the bottom of Highgate Hill, and bought a hen, and made the woman gut it, and then stuffed the body with snow, and my lord did help to do it himself. The snow so chilled him, that he immediately fell so extremely ill, that he could not return to his lodging . . . but went to the Earl of Arundel's house at Highgate, where they put him into a good bed warmed with a pan, but it was a damp bed that had not been lain-in in about a year before, which gave him such a cold that in two or three days . . . he died of suffocation.³⁹

If Bacon had a courtier's guile, he also had a courtly eloquence. His *Essays* are characterized by brilliant openings: "Suspensions amongst thoughts are like bats amongst birds" ⁴⁰ "Men fear Death, as children fear to go in the dark" ⁴¹ "Revenge is a kind of wild

37. P. 259 (quoting ATLANTIS, *supra* note 35, at 163). A "basilisk," named for the fabulous reptile, is a large-bore brass cannon.

38. Pp. 77-90. See, e.g., FRANCIS BACON, THE ADVANCEMENT OF LEARNING (1605), reprinted in 3 THE WORKS OF FRANCIS BACON, *supra* note 5, at 253.

39. AUBREY, *supra* note 24, at 29.

40. FRANCIS BACON, *Of Suspicion*, in ESSAYS, *supra* note 5, at 454, 454.

41. FRANCIS BACON, *Of Death*, in ESSAYS, *supra* note 5, at 379, 379.

justice"⁴² "Virtue is like a rich stone, best plain set"⁴³ "Riches are for spending, and spending for honour and good actions."⁴⁴ "God Almighty first planted a Garden."⁴⁵ There is a talent here that transcends ambition and the desire to attract attention — something detached from self-interest, something that cannot be tarnished by it.

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Coquillette's text focuses on Bacon's works, both the texts he authored as a jurist and the arguments he made as a lawyer. The footnotes and appendices locate these works in the texture of Bacon's life.⁴⁶ It is in the footnotes that one finds the links between Bacon's jurisprudential writings and his experiments in pure philosophy, the ventures he made in his *Essays*, perhaps modeled on those of his brother's friend Montaigne, and the skirmishes and pitched battles he fought with Coke.

An anecdote in the opening pages helps to connect the writings with the man. At Christmastide of 1594, the students of Gray's Court staged their annual revels, *Gesta Grayorum*.⁴⁷ Among those attending the Inn's Christmas play were members of Elizabeth's Privy Council. As the play progressed, Privy Counselors on stage directed to the Privy Counselors in the audience lines that Bacon had written:

Then look into the state of your laws and justice of your land; purge out multiplicity of laws, clear the incertainty of them, repeal those that are snaring, and press the execution of them that are wholesome and necessary; define the jurisdiction of your courts, repress all suits and vexations, all causeless delays and fraudulent shifts and devices, and reform all such abuses of right and justice; assist the ministries thereof, punish

42. FRANCIS BACON, *Of Revenge*, in *ESSAYS*, *supra* note 5, at 384, 384.

43. FRANCIS BACON, *Of Beauty*, in *ESSAYS*, *supra* note 5, at 478, 478.

44. FRANCIS BACON, *Of Expense*, in *ESSAYS*, *supra* note 5, at 443, 443.

45. FRANCIS BACON, *Of Gardens*, in *ESSAYS*, *supra* note 5, at 485, 485.

46. Throughout the book, the footnotes' size and importance compete with that of the text itself. Nine pages of notes follow chapter 1. More than 14 pages follow chapter 3. After the conclusion come twelve more pages of notes, three chronologies of biography and compositions, and an outline of Bacon's projected *Instauratio Magna*. A book about Bacon, inevitably, is also a book about Baconiana. There is a final Select Bibliography, "a most arbitrary selection of the many thousands of books on Bacon," which itself opens by listing five further bibliographies. Pp. 337-48.

47. In 1592, serving as ghostwriter for the Earl of Essex, Bacon wrote a Queen's Day masque to be presented to Elizabeth. In 1595, again for Essex, he produced another Queen's Day masque. Essex appeared before Elizabeth as Erophilus, her faithful lover, while players representing a hermit-philosopher, a soldier, and a statesman (all messengers from Philautia, the goddess of self-love) pestered Essex with speeches that failed to interrupt his devotion to Her Majesty. Pp. 31-35. As late as 1613, Bacon staged a masque costing more than £2000 to honor the wedding of the new royal favorite, the Duke of Somerset. DAPHNE DU MAURIER, *THE WINDING STAIR: SIR FRANCIS BACON, HIS RISE AND FALL* 88 (1976). Recent scholarship has emphasized the way in which masques could be used as political propaganda. See KEVIN SHARPE, *THE PERSONAL RULE OF CHARLES I*, at 227-33 (1992). This does not substantially alter the conclusion that Bacon misapplied his medium.

severely all extortions and exactions of officers, all corruptions in trials and sentences of judgment.⁴⁸

These promptings were sensible. They anticipated the program Bacon would advocate, as well as the flaw that would bring him down. But these were lines uttered in a bit of theatrical fluff, on the ninth day of twelve days of holiday revelry. Did Bacon *really* expect that his listeners would take them to heart — that a masque was the right place to argue for law reform?

To be reminded that Bacon belonged to the age of masques is to remember that he belonged to the era of favorites and Court intrigues and self-interest. Bacon was not a protototalitarian; he was a Renaissance courtier.⁴⁹ He was not a man of the future, although he looked forward so often that we usually remember him that way.

Ironically, for most of his public life, Bacon was not a successful courtier. He entered Parliament as one of the compliant poor relations with whom Queen Elizabeth's ministers packed the House of Commons.⁵⁰ All too often, his calls for reform were gambits with which he tried to catch the attention of the monarch or the current favorite.⁵¹ That he curried favor with the Earl of Essex — writing masques for him, offering political advice — places him among what Hugh Trevor-Roper has called "the idiot-fringe of the indebted gentry,"⁵² gentlemen whose estates were so heavily mortgaged that they had nothing to lose by foolhardy action. It may say something that, of the two women who ever had to choose directly between Bacon and

48. P. 34 (quoting Francis Bacon, *Gesta Grayorum* (1594), in 8 THE WORKS OF FRANCIS BACON, *supra* note 5, at 329, 339).

49. Witness the report of his wedding, described in a letter of Dudley Carleton's: "Sir Francis Bacon was married yesterday to his young wench [Alice Barnham, age 14] in Marylebone Chapel. He was clad from top to toe in purple, and hath made himself and his wife such store of fine raiments of cloth of silver and gold that it draws deep into her portion." P. 90 (quoting Letter from Dudley Carleton to John Chamberlain (May 5, 1606)).

50. His most notable moment in the Commons was a gaffe that permanently cost him the Queen's trust. P. 30. Elizabeth wanted taxes raised promptly; Bacon, without consulting the Queen or his uncle, the Lord Treasurer, spoke up in Commons to volunteer a compromise. Elizabeth did not like compromises. Thereafter, the Crown used Bacon without relying upon him. Perhaps recognizing this, the Commons never quite regarded him as a leader. See JONATHAN MARWIL, *THE TRIALS OF COUNSEL: FRANCIS BACON IN 1621*, at 97, 135 (1976) (noting the reluctance of Commons to follow advice given by Bacon).

51. In 1616, Bacon sent a long series of proposals for law reform to George, Viscount Villiers, whose relationship with James eventually made him Duke of Buckingham and de facto ruler. Likewise, in 1621, after his fall from power, Bacon offered to buy his way back into royal favor by preparing a digest of English law. See pp. 102-03; see also MARWIL, *supra* note 50, at 149-200 (describing Bacon's *History of the Reign of King Henry VII* as a peace offering to James).

52. HUGH R. TREVOR-ROPER, *The Jesuit Mission in England and the Gunpowder Plot, in MEN AND EVENTS: HISTORICAL ESSAYS* 108, 109 (1957). After Essex's abortive coup d'état, Bacon turned against him, testifying for the Crown at his trial.

In 1604, Bacon had debts totaling £5000, set against a yearly income of about £300. In that same year, other impecunious gallants of Essex's old crew began to organize the Gunpowder Plot.

Coke — Queen Elizabeth, choosing an attorney general, and Lady Elizabeth Hatton, choosing a husband — both chose Coke.

James's accession brought a change in Bacon's fortunes. Success brought responsibilities, which he seemed to shoulder well. During his years on the woolsack, from 1618 to 1621, he proved himself a vigorous and progressive Lord Chancellor.⁵³ He worked to heal the animosity between the Chancery and the common law courts, a rift which Coke and the late Lord Chancellor Ellesmere had widened through their personal resentments. Bacon's *Ordinances in Chancery*,⁵⁴ which he promulgated in 1618, governed Chancery proceedings until the nineteenth century. Although the surviving records do not preserve the actual language of his decisions, the roll of judgments shows the decrees he entered. Among these, Coquillette points to areas of particular concern: perpetuities, the rights of debtors and women, and cases involving conflicts of interest (pp. 206-11).

These halcyon days ended in 1621. In that year, the House of Commons, increasingly resentful of James's favorites and the monopolies they controlled, scented corruption in the Chancery. In a devastatingly brief time, witnesses were produced who proved that Bacon had taken money from people who had litigation pending in his court. Rather than face impeachment, he resigned, even as the investigators continued to uncover new evidence. Coquillette recounts this crisis in one page of text, possibly because the evidence was so compellingly repetitious:

In Sir Thomas Monk's case [Bacon] had received 100 pounds, as Sir Thomas's lawyer, Sir Henry Helms, had deposed. In the cause of Mr. Dunch he had received 200 pounds, delivered to his seal-bearer William Hatcher. The go-between had been Bevis Thelwall, a relative of Eubule Thelwall, a master in Chancery. In the case of Sir Henry Ruswell, Bacon's own servant John Hunt had deposed that he had received "a purse." Bacon specified that it contained 300 or 400 pounds, adding that he had framed the decree with the help of two other judges. In Robert Barker's case, both Barker and Edward Shereburne, one of seven gentlemen of Bacon's "chamber" and "much used in his most confidential business," had deposed that he had received 700 pounds. Bacon confirmed their depositions.⁵⁵

A corrupt Chancellor had tolerated a corrupt Chancery. Three of Bacon's servants kept coaches, and others kept racehorses.⁵⁶

53. Bacon was appointed Lord Keeper of the Seal on March 3, 1617. He was elevated to the peerage, as Baron Verulam, and appointed Lord Chancellor the following year. See pp. 318-19.

54. FRANCIS BACON, *ORDINANCES IN CHANCERY* (1617-1620), reprinted in 7 *THE WORKS OF FRANCIS BACON*, *supra* note 5, at 755.

55. JOHN T. NOONAN, JR., *BIBES: THE INTELLECTUAL HISTORY OF A MORAL IDEA* 355 (1984) (citing 7 *THE LETTERS AND THE LIFE OF FRANCIS BACON* 253-259 (James Spedding ed., London, Longmans, Green, Reader & Dyer 1874); and 6 *THE LETTERS AND THE LIFE OF FRANCIS BACON*, *supra*, at 326, 336-37).

56. AUBREY, *supra* note 24, at 28. Hunt was "a notably thrifty man" and the only member

With Bacon the fault seems not to have been conscious dishonesty but an almost criminal carelessness where money was concerned. . . . Bacon's money lay about in drawers, unlocked. A gentleman calling on him at Gorhambury was left alone for an hour in the Chancellor's study. In came a member of Bacon's retinue, opened a chest of drawers, took money by handfuls, stuffed it in his pockets and went out without a word. He was followed by a second man who repeated the performance.⁵⁷

To double the irony, Bacon appears to have been a careful and competent judge, even an honest one, when actually deciding cases. Sir William Holdsworth concluded, "[I]t is probable, on the whole, that the presents which he took did not prevent him from deciding as he would otherwise have decided. At least we do not hear that any large number of his cases were reversed by his successor."⁵⁸

What betrayed Bacon was hubris, compounded of a philosopher's unworldliness and a courtier's hauteur. He believed himself pure — he protested that he had never sold justice and had certainly never sold judgment against the Crown. He was incapable of believing that charges could besmirch his character and utterly unprepared to believe that he would be impeached.⁵⁹ Even the phrases of his resignation show his pathological self-esteem: "I was the justest judge that was in England these fifty years: But it was the justest censure in Parliament that was these two hundred years."⁶⁰ Abasement was called for, but he could not resist that penultimate boast.

* * *

In both his legal and philosophical works, Bacon used the negative to explain the positive. In *Chudleigh's Case*, he argued that his interpretation of the Statute of Uses should be accepted because precedent did not forbid it. In the *Novum Organum*, he suggested truth might be

of Bacon's staff who consistently declined to sign as a surety for his debt-ridden master. Ultimately, he "left an estate of £1,000 per annum in Somerset." *Id.* at 26.

57. CATHERINE D. BOWEN, *THE LION AND THE THRONE* 429 (1957). John Aubrey commented of Bacon: "He was a homosexual. His Ganymedes and favourites took bribes; but his lordship always gave judgement according to justice and honesty." AUBREY, *supra* note 24, at 28. There is also a hint of alcoholism: "His lordship would often drink a good draught of strong beer (March beer) at bedtime, to lay his working fancy asleep: which otherwise would keep him from sleeping a great part of the night." *Id.*

58. 5 HOLDSWORTH, *supra* note 16, at 254. As Coquillette observes, power politics lay behind Bacon's fall.

He took large gifts designed to be bribes. So did every major officer in James's court, including the King. . . . Bacon was not impeached by Parliament because he took these "gifts." He was impeached because the Parliament of 1621 was seeking leverage on the King, and certain complaints against Bacon conveniently came to hand.

P. 222.

59. Self-doubt and false modesty had never plagued Bacon. In 1593, when he lobbied to have himself named Attorney General, he had never tried a case.

60. P. 222 (quoting CATHERINE D. BOWEN, FRANCIS BACON: THE TEMPER OF A MAN 209 (1963)).

recognized by screening out different sorts of falsehood. Now, as his judicial career came to a close, life seemed to follow theory. In his time as Chancellor, Bacon was an active, effective judge. In his ouster, the charges against him showed the evil ways into which a judge might fall.

Bacon's career is so much of one piece that it resists being discussed in parts. For this reason, the best chapter of this book is the last. Preceding chapters investigate their carefully defined topics, measuring out Bacon's career by the books that mark its course. If these earlier discussions seem piecemeal, if the text focuses on only a handful of the cases Bacon argued or decided, here all the themes can be brought together: How Bacon's rivalry with Coke revolved around legal fictions and technical distinctions, which Coke condoned and Bacon scorned (pp. 141-42). How continental and Roman legal philosophies were elements that Bacon sought to fit into an English context, a "middle" way to be reached by "transplanting and grafting."⁶¹ How Bacon's search for "laws of laws" — a formulation that anticipates Lon Fuller's idea of jurisprudence as "rules for making rules"⁶² — was not solely an attempt to formulate theory but also a call for making rules based on political authority and judicial experience.

Bacon emphasised the importance of the legal *process*, not simply as something separate and distinct from substantive doctrine, but as *part* of it. Bacon understood the futility of the process/substance distinction in law. It was fine to discuss a "rule" in the abstract, but the important issue was how it *worked* in the concrete. When Bacon said that the function of juristic restatement was "not to take the law from the rule, but to take the rule from the existing law" this was part of what he had in mind. In addition, Bacon was not just concerned with "process" in the sense of the application of substantive legal doctrines in practice, but also the larger "process" by which these legal doctrines developed and came to exist. [p. 277; footnote omitted]

In Bacon's case, it is well to remember the lack of real difference between substance and process. Some jurists are important because of the substantive laws they record: Coke, Blackstone, Justinian, Hammurabi. Bacon gave law definition in a different way. He did not lay down many rules of law, but he taught a great deal about how to study it. No less than these others, he deserves a place in legal history.

61. P. 288 (quoting FRANCIS BACON, AN OFFER TO THE KING OF A DIGEST OF THE LAWS (1629), reprinted in 14 THE WORKS OF FRANCIS BACON, *supra* note 5, at 357, 362).

62. See LON L. FULLER, THE MORALITY OF LAW 48-49 (1964).