Chapter VI
FRANCIS BACON

Incomparabilis Verulamius
Leibniz

Bacon's leading ideas are few in number, but they dominate his legal speculation as well as his philosophy. He was able to dismiss all earlier jurisprudence with two criticisms. "All those which have written of laws," he states,¹ "have written either as philosophers or as lawyers, and none as statesmen. As for the philosophers, they make imaginary laws for imaginary commonwealths: and their discourses are as the stars, which give little light because they are so high. For the lawyers, they write according to the states where they live, what is received law, and not what ought to be law." Knowledge, in Bacon's conception, must have a practical aim; it is his basic idea, and he dismisses all other objects of knowledge as "inferior and degenerate."² He insists also upon the unity of science. "The distributions and partitions of knowledge are not like several lines that meet in one angle, and so touch but in a point; but are like branches of a tree that meet in a stem, which hath a dimension and quantity of entirety and continuance, before it comes to discontinue and break itself into


¹ 6 Works 389. Bacon made the same point elsewhere in much the same words. "All who have written concerning laws have written either as philosophers or lawyers. The philosophers lay down many precepts fair in argument, but not applicable to use: the lawyers, being subject and addicted to the positive rules either of the laws of their own country or else of the Roman or Pontifical, have no freedom of opinion, but as it were talk in bonds. But surely the consideration of this properly belongs to statesmen, who best understand the condition of civil society, welfare of the people, natural equity, customs of nations, and different forms of government; and who may therefore determine laws by the rules and principles both of natural equity and policy." 9 Works 311.
² 8 Works 113; 6 Works 34.
arms and boughs.” Law itself has its appropriate place in the divisions of knowledge, and although it exhibits many aspects it too is a unity within its own sphere. “For there are in nature certain fountains of justice, whence all civil laws vary according to the regions and governments where they are planted, though they proceed from the same fountain.” Finally, since the mental capacities of our predecessors were the equal of our own, we cannot hope to attain a greater insight into nature than they did, unless we devise a new method of inquiry. The rationalists, who depend upon reason and neglect observation are like the spiders who spin webs out of their own bodies; the empiricists, who construct their theories from a few experiments, are like the ants which merely collect their store of materials and feed upon them. True science is like the bee which gathers its materials from the flowers and then, through its own activities, elaborates and transforms them into honey. Bacon’s purpose was to combine the methods of rationalism and empiricism, and this in the end, he believed, would lead to certainty, an ideal which he never tired of insisting upon. Certainty was the great objective which he hoped to realize through his legal speculation.

It must not be supposed that Bacon’s repudiation of the legal theories propounded by the philosophers involves a complete lapse on his part into a philosophy of the practical. Undeniably it was his position that scientific speculation and research should issue in an increase of man’s power over nature; but he singled out for special criticism those who were unduly hasty in seeking for practical results. He knew that a full understanding of nature belonged to the distant future and that he himself would scarcely reach the threshold. If there were men who desired to apply the fragments of his work to practical ends they were welcome to do so; those fragments might serve as interest until the principal was forthcoming. For himself he condemned as unseasonable and premature all attempts

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3 Legal Philosophy from Plato to Hegel

46 Works 207. Cf. 9 Works 14. 5 7 Works 137.

4 6 Works 389. 6 8 Works 60.
at such applications. Those who stop for the production of works are like the runners diverted from the race by Atalanta's golden balls. Bacon refuses to run off like a child after golden apples, but will stake everything on the victory of art over nature in the race; nor does he make haste to mow down the moss or the corn in blade, but will wait for the harvest in its due season. His objection to the juridical theories of the philosophers is the protest of the practicing lawyer and judge. Their legal precepts may be unassailable ethically but try as it may the legal profession can never squeeze any guidance from them for the decision of actual cases.

If the legal speculation of the philosophers errs by proceeding too far in one direction, that of the lawyers errs by moving too far in the other. They fail to see law as a whole, and perceive only that particular part of it which is under their noses. They are like the alchemists who work in the narrowness and darkness of a limited field. It is true that the alchemists have made a good many discoveries, and have presented men with useful inventions; but in the entirety their record is one of failure. Nature must be studied as a whole if it is ever to be understood. General scientific research must be carried on and applied to the particular sciences, and particular sciences be carried back again to general scientific theory. For want of this the particular sciences altogether lack profundness, and merely glide along the surface and variety of things. That is so because after the particular sciences have been once distributed and established they are no more nourished by general scientific ideas, which might have drawn out of the true contemplation of their subject matters the means of imparting to them fresh strength and growth. Therefore, it is not strange if the sciences do not grow, seeing they are parted from their roots.

With this set of ideas Bacon began the construction of a legal philosophy. He possessed a special competence in the

7 8 Works 149. 8 8 Works 119. 8 8 Works 93. 10 8 Works 112.
field because of his training as a lawyer. Of all the great, or near great, philosophers who have ventured into the domain of legal speculation Bacon and Leibniz stand alone in the fact that they were experienced lawyers. Financial circumstances compelled Bacon to take up the study of law, but he did so with reluctance. It was never his only, and was far from being his favorite, study. He had the great stimulus of rivalry with Coke to spur him to hard efforts, and he worked faithfully at the law though always with distaste; from the beginning he had resolved, however, that English laws should be the better by his industry, than that he should be the better by the knowledge of them. At the end he could say he was in good hope that when Coke’s Reports and his own Rules and Decisions should come to posterity there would be, whatever the opinion of his contemporaries, some question as to who was the greater lawyer. There can be now no impugning of his capacities as a lawyer. His little tract on The Maxims of the Law, his Reading on the Statute of Uses, his Ordinances in Chancery, his Arguments of Law leave no doubt as to his technical competence. His great advantage over most of his competitors at the bar lay in the organizing power which his philosophy enabled him to exercise over his legal knowledge. His philosophy gave him a point of view from which to arrange the materials of English law in a systematic and critical form. His knowledge of Roman law permitted him to escape from the insularity of the precepts of his native legal system. Altogether, his practical experience as a common law lawyer and chancellor imparted to his legal philosophy the concreteness and applicability for use which is its chief characteristic.

His own estimate of himself is as near the mark as any estimate is likely to be. At the age of thirty-one he had told his uncle Lord Burghley that he had taken all knowledge to be his province and so far as the demands of an exceedingly full life permitted he never lost sight of that ideal. He believed

11 I Spedding 231; 2 ibid. 1. 13 6 Spedding 70.
12 14 Works 179. 14 1 Spedding 109.
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himself fitted for nothing so well as the pursuit of knowledge. He found his mind nimble and versatile enough to catch the resemblances of things (which he thought was the chief point), and at the same time steady enough to fix and distinguish their subtler differences; a mind gifted by nature with desire to seek, patience to doubt, fondness to meditate, slowness to assent, readiness to reconsider, carefulness to dispose and set in order; that neither affects what is new nor admires what is old, and that hates every kind of imposture; a mind therefore especially framed for the study and pursuit of truth.\textsuperscript{15}

**General Theory**

On Bacon's agenda of unfinished works at the time of his death was a treatise on a system of jurisprudence, or, as he termed it, an exposition of that branch of knowledge which was concerned with the "laws of laws."\textsuperscript{16} His object was to go to the fountains of justice and public expediency, and endeavor with reference to the several provinces of law to exhibit the character and idea of justice in general by comparison with which the laws of particular states might be tested and amended.\textsuperscript{17} This project was not carried out, but he provided a specimen of what he had in mind in the form of ninety-seven aphorisms. Those aphorisms touch on nearly all the points which he enumerated as being the proper subject matter of jurisprudence. Thus we appear to have in a crystallized form the main positions which he had reached in a lifetime of reflection on legal theory.

Jurisprudence in Bacon's view must not be content with the construction of a platform of justice; it must also occupy itself with its application. In that latter task jurisprudence must consider by what means laws may be made certain, and what are the causes and remedies of the doubtfulness and uncertainty of law; by what means laws may be made apt and easy to be

\textsuperscript{15} 3 Spedding 85; 6 Works 435.
\textsuperscript{16} 9 Works 318; 6 Works 390.
\textsuperscript{17} 9 Works 311.
executed, and what are the impediments and remedies in the execution of laws; what influence laws have which touch private right of meum and tuum, and how they may be made apt and agreeable; how laws are to be penned and delivered, whether in texts or in acts, brief or large, with preambles or without; how they are to be pruned and reformed from time to time; and what is the best means to keep them from being too vast in volumes or too full of multiplicity and entanglement; how they are to be expounded, when upon causes emergent and judicially discussed, and when upon responses and conferences touching general points or questions; how they are to be pressed, vigorously or tenderly; how they are to be mitigated by equity and good conscience; whether discretion and strict law are to be mingled in the same courts or kept apart in several courts; and how the practice, profession, and erudition of law is to be censored and governed. He also proposed to consider many other points touching the administration and what he termed animation of laws.\(^\text{15}\)

In the outline of these objectives for jurisprudence, we are plainly in the presence of a man who has broken sharply with the traditional approach of philosophy to law. It might even be asserted that Bacon here was thinking more as a lawyer than as a philosopher. It is true that some of the great seventeenth century legal problems, such as the delimitation of the fields of law and equity, and the control and education of barristers and attorneys, were present to his mind. But that is a small part of the matter. At the outset he is careful to dismiss none of the problems which have occupied the thoughts of past philosophers; he admits expressly their legitimacy; but he insists their solution is only half the task of a science of law. It is not enough to frame the general theory of a legal science; equally important is the development of the principles of its application. In the twentieth century there has been over-emphasis on the second half of that program. It is thought that legal systems can be reformed on the basis of an objective

\(^{\text{15}}\) 6 Works 390.
Bacon made no such mistake. He was aware that all technologies are dependent for their success upon the previously formulated principles of a general science. He determined therefore that his theory of law would be an entire one; it would be general in its ultimate principles, but applicable to use, taking into consideration the practical problems which many legal systems must meet.

He thought that the perfection of law was attained when it was certain in meaning, just in precept, convenient in execution, agreeable to the form of government, and productive of virtue in those that live under it. There was only one end of law and that was the happiness of the citizens. However, that end will be effected only if the people be rightly trained in religion, sound in morality, protected by arms against foreign enemies, guarded by the shield of the laws against civil discords and private injuries, obedient to the government and the magistrates, and rich and flourishing in forces and wealth. For all those objects, laws are the sinews and instruments. He thought that education—duties taught and understood—was a surer obligation of obedience than blind habit. To assert otherwise was to affirm that a blind man may tread more certainly with a guide than a seeing man can with a light.

Bacon's theory of the origin of law and justice rests on the principle that they are produced through the reaction of the group to behavior held to affect the well-being of the whole community. That principle had been clearly formulated by Polybius and has been further developed in modern times by Bagehot and Sumner. Bacon's views are colored by the great struggle of the seventeenth century over the problems of public law. He held that in civil society, either law or force prevails. But there is a kind of force which pretends law,

19 *Works* 313.
20 *Works* 104.
21 *The Histories*, VI, 6.
22 Bagehot, *Physics and Politics* (1873); Sumner, *Folkways* (1906).
23 9 *Works* 311.
and a kind of law which savors of force rather than equity. Thus there are three fountains of injustice: mere force, a malicious ensnarement under color of law, and harshness of the law itself.

Private right rests on the following ground. A man who commits an injury, receives either pleasure or profit from the act, but incurs danger from the precedent. For others do not share in the particular pleasure or profit, but look upon the precedent as applicable to themselves. Hence they readily agree to protect themselves by laws in order to prevent the injury from occurring to them. But it may happen that those whom a law protects are not as numerous or as powerful as those whom it endangers. Under those circumstances the law is often overthrown. Furthermore, private right depends upon the protection of public right. For the law protects the people, and magistrates protect the laws; but the authority of the magistrates depends on the sovereign power of the government, the structure of the constitution, and the fundamental laws. Therefore, if this part of the constitution is sound and healthy, the laws will be of good effect, but if not, there will be little security in them. It is not, however, the only object of public law, to be attached as the guardian of private right, to protect it from violation and prevent injuries; but its purposes extend also to religion, arms, discipline, ornaments, wealth, and, in a word, to everything that regards the well-being of a state.

It is difficult to determine the extent to which Bacon’s political opinions are here finding indirect expression. Indeed, it is no easy task to ascertain his theory of the English constitution. His views on the subject were never formally reduced to writing; they must be pieced together from his actions and from occasional expressions found in his works. At the same time, allowances must be made for the arguments he advanced in his capacity as an attorney, and for the opinions he suggested for the purpose of securing royal favor. Altogether, however, he appeared to believe in some form of benevolent despotism, in which an enlightened monarch moved unrestrainedly within
the imprecise limits of his royal prerogative, but advised by able ministers and informed by a Commons upon the condition of the country. In Elizabeth's reign he had argued that a king's grant repugnant to law was void; but by 1612 he was apparently of a different view. A lawyer who had been retained by clients to find objections to a commission in point of law, which he did, was formally charged with slandering the King's Commission and with censuring his prerogative. Bacon held the offence to be a great one; first, that he presumed to censure the King's prerogative at all; secondly, that he generalized his opinion more than was pertinent to the question; and lastly, that he had erroneously, falsely, and dangerously given opinion in derogation of it. "I make a great difference," Bacon said, "between the King's grants and ordinary commissions of justice, and the King's high commissions of regiment, or mixed with causes of state." The proceedings are not complete, but the attorney admitted unreservedly that he had done wrong, and this in the presence of Coke and Tanfield who were present as assessors; he would scarcely have done so, it would seem, if the common law had given him any support.

It appears likely that Bacon's political views led him to assert that private rights were dependent ultimately for their security upon the preservation of public law, and that the authority of public law extended to everything that affected the well-being of the state. What did Bacon mean by public law? In the Roman system it was that part which was concerned with the government of the Roman state; private law was that part which looked to the interests of individuals. Ulpian added that public law was the law relating to religion, to priests and to officials. When Bacon came to consider the union of the whole of Great Britain under one law he seized upon the distinction as a useful one. It enabled him to put to

25 15 Works 12. The date is sometime before October 11, 1587.
26 4 Spedding 355.
27 Institutes of Justinian I. 1. 4.
28 D. I. 1. 1. 2.
one side, as inexpedient to be handled at that time, all law affecting property. "I consider," he said, "that it is a true and received division of law into *jus publicum* and *privatum*, the one being the sinews of property, and the other of government. For that which concerneth private interest of *meum* and *tuum*, in my simple opinion, it is not at this time to be meddled with." Thus putting private law aside, he thought that the lawyers of Scotland and England should set down the laws of their respective nations in brief articles, to be printed in parallel columns for appropriate action by the King. The public law thus set forth would consist of four parts: First, the criminal law; secondly, the law concerning the causes of the church; thirdly, that having to do with magistrates, officers, and courts, including the consideration of the regal prerogative, of which the rest were but streams; finally, those concerning certain special politic laws, usages, and constitutions, connected with the public peace, strength and wealth of the state. As a specimen Bacon appended a statement of the law of capital crimes.

But a more important issue was at stake than a convenient division for the purposes of legal exposition. It was an indirect attack on Coke and the mediaeval tradition of the rule of law. It was a wedge that would remove officials from the jurisdiction of the law to which other persons were subject. That such was his intention seems clear enough. The courts are not to attempt to control the crown in the exercise of its prerogative. The judges are lions supporting the throne on both sides: "let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty." The issue took a concrete form in Bacon's efforts to prohibit the common law judges by means of the writ *De non procedendo Rege inconsulto* from proceeding with a case in which the

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29 15 Works 317.
30 Montesquieu asserted that to determine which of two different systems of laws is more agreeable to reason, we must take them each as a whole and compare them in their entirety. *The Spirit of Laws* XXIX, 11.
31 12 Works 270.
interests of the crown were concerned. As a statesman and trained administrator Bacon was convinced that certain administrative actions of the state ought to be beyond the control of the common law, that the principles of the common law were not adapted for the handling of such matters. In his view, at least under James I, the chancellor’s functions were political as well as judicial. “The writ,” he wrote the King, “is a mean provided by the ancient law of England, to bring any case that may concern your Majesty in profit or power from the ordinary Benches, to be tried and judged before the Chancellor of England, by the ordinary and legal part of this power. And your Majesty knoweth your Chancellor is ever a principal counsellor and instrument of monarchy, of immediate dependence on the king; and therefore like to be a safe and tender guardian of the regal rights.” "The working of this writ," Gardiner writes, "if Bacon had obtained his object, would have been, to some extent, analogous to that provision which has been found in so many French constitutions, according to which no agent of the Government can be summoned before a tribunal, for acts done in the exercise of his office, without a preliminary authorization by the Council of State." Although the practice can be traced to the Middle Ages, we find the Council and the Star Chamber of Tudor and Stuart times especially solicitous in the protection of officials from the ordinary processes of law; thus, the Council directed a jailer to disobey a writ of habeas corpus, and to make a return that the commitment was by the queen’s special command. “It is clear,” Holdsworth remarks, “that the ideas which underlie these activities lead directly to the growth of a system of administrative law, and that in all questions of doubtful jurisdiction the Council was claiming to exercise the powers of a tribunal des conflits.” However, as he remarks elsewhere,
when the jurisdiction of the Council fell with the victory of the Parliament in 1641, English law was saved from a system of administrative law and developed instead a theory of ministerial responsibility. In Hale's *Analysis of the Law*, first published in 1713, officials are regarded as persons, and the general law of persons controls their conduct equally with that of private individuals. Bacon's theory of a division of law into public law and private law had disappeared. Blackstone, who expressly adopted Hale's scheme as the basis of the arrangement of the *Commentaries*, also treated officials as subject to the law of persons. The significance of treating public law as part of the private law of persons was fully perceived by Austin who regarded Hale's adoption of this arrangement, which was held on the continent to be a great absurdity, as a striking indication of Hale's originality and depth of thought. For himself, he had no doubt that public law should not be opposed to the rest of the law but should be treated under the law of persons. Bacon's idea of public law, however, has reappeared today in the struggle now going on with respect to the place of administrative agencies in the modern state. "Public law," Jennings has written recently, "is gradually eating up private law. Industrial law is being controlled by administrative organs and is at the same time eating in the law of obligations. Quotas and marketing schemes under administrative control reduce the operation of commercial law. Housing and planning legislation takes the law of property under public control. This is only to say that *laisser-faire* has been abandoned, the public lawyer is ousting the private lawyer, and the rights and duties of institutions are superseding the ordinary rights and duties of private citizens." This analysis admittedly stems from continental views, particularly those of Hauriou; at the same time they represent a return, so far as English law is concerned, to Bacon's

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position. It may well be that Bacon finally will have his triumph over Coke.

Bacon believed that the common law exceeded the civil law in fitness for the English system of government; for the civil law was not made for the countries in which it rules. As the common law is more worthy than the statute law, so the law of nature is more worthy than both of them. The English law is grounded upon the law of nature, and from the latter law flow three things: preservation of life, liberty, and marriage. All national laws are to be taken strictly in any point in which they abridge and derogate from the law of nature.

CERTAINTY

All Bacon's thinking, as we have seen, was directed towards the single end of the achievement of certainty in the various departments of knowledge. It was no less the ultimate ideal of his logical method than it was the constant objective of his proposals for reform in the affairs of men. In jurisprudence, it was the point of departure of his entire theory. Certainty was the primary necessity of law. It was so essential to law, he believed, that law cannot even be just without it. "For if the trumpet give an uncertain sound, who shall prepare himself to the battle?" So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes. He remarks also that Aristotle had well said "that that is the best law which leaves least to the discretion of the judge"; and this can come about only if the laws are certain.

This idea lay also at the basis of his proposals for the improvement of the laws of England. His project for the codification of English law, entitled A Proposition touching the Compiling and Amendment of the Laws of England was advanced upon the express ground "that our laws, as they now

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42 6 Works 391.
43 15 Works 202.
44 15 Works 225-6.
45 I Corinth. XIV. 8.
46 Rhet. 1354a.
47 9 Works 314.
48 6 Spedding 61.
stand, are subject to great incertainties, and variety of opinion, delays, and evasions: whereof ensueth, 1. That the multiplicity and length of suits is great. 2. That the contentious person is armed, and the honest subject wearied and oppressed. 3. That the judge is more absolute; who, in doubtful cases, hath a greater stroke and liberty. 4. That the chancery courts are more filled, the remedy of law being often obscure and doubtful. 5. That the ignorant lawyer shroudeth his ignorance of law in that doubts are so frequent and many. 6. That men's assurances of their lands and estates by patents, deeds, wills, are often subject to question, and hollow; and many the like inconveniences." The project was not adopted, and English law followed the path of Coke and not Bacon. Nevertheless, his arguments for certainty in this specific field were later to be the subject of a remarkable testimony. In 1826, Sir Robert Peel as Home Secretary moved for leave to bring in his bill for the consolidation of the laws relating to theft and asked permission to use Bacon's paper for the preface of his speech, as comprising in a short compass every argument that could be cited in favor of the measure he proposed to introduce, and satisfactorily confuting every objection that could be brought against it. "The lapse of two hundred and fifty years has increased," he said, "the necessity of the measure which Lord Bacon then proposed, but it has produced no argument in favor of the principle, no objection adverse to it, which he did not anticipate." 49

With the insight to be expected of him, Bacon has thus isolated the central problem of all juristic thinking. In the jurisprudence of Plato and Aristotle it was expressed in the words: Shall the law or the just man rule? In the language of the present day we seek for the means of reconciling rule with discretion, the general security with individual needs, stability with change. Must we choose between justice according to law and justice without law? Maine 50 observed that "the more

49 Ibid.
50 Ancient Law (1931) 61. For the most extensive analysis of the question in contemporary literature, see Frank, Law and the Modern Mind (1930).
progressive Greek communities... disembarrassed themselves with astonishing facility from cumbersome forms of procedure and needless terms of art, and soon ceased to attach any superstitious value to rigid rules and prescriptions. It was not for the ultimate advantage of mankind that they did so, though the immediate benefit conferred on their citizens may have been considerable. No durable system of jurisprudence could be produced in this way. A community which never hesitated to relax rules of written law whenever they stood in the way of an ideally perfect decision on the facts of particular cases, would only, if bequeathed any body of judicial principles to posterity, bequeath one consisting of the ideas of right and wrong which happened to be prevalent at the time. Such a jurisprudence would contain no framework to which the more advanced conceptions of subsequent ages could be fitted. It would amount at best to a philosophy, marked with the imperfections of the civilization under which it grew up. Unless there are rules, there will be no certainty in the judicial process; they are an assurance that human affairs will follow a general pattern and will not be at the mercy of ignorant or improperly influenced officials. They sometimes limit an able judge and prevent a full consideration of an individual's claim. Nevertheless, it is important for people to know as precisely as may be the consequences of their actions before they act. If there are no rules to guide human conduct and to govern the

51 Hans Schmidt, a religious fanatic, hacked his mistress to death and was found guilty of murder in the first degree. His defense was insanity; he claimed to have heard the voice of God calling upon him to kill the woman as a sacrifice and atonement. Among the grounds for a new trial, urged on appeal, was that his story at the trial was a fabrication, and that he was not mentally unsound. He insisted that the woman had died as the result of an abortion, the penalty for which was less than death since such a crime was manslaughter and not murder. He therefore asked that he be given another opportunity to put before a jury the true narrative of the crime. However, the rule is that the evidence must not have been discovered since the trial. Cardozo rejected Schmidt's contention on the ground that the evidence to support the new plea was not newly discovered, since it was known to Schmidt at the time of the trial. Cardozo suggested in his opinion that the matter be referred to the Executive, insomuch as the Court was powerless to give relief. People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915). Schmidt was eventually executed. For the case from the psychiatric point of view, which insists he was insane, see White, Insanity and the Criminal Law (1923) 61.
decision of controversies, human affairs would become so un­
certain as to be intolerable.

But that is only one side of the question. Rules are made
for the general case, and in particular cases they may operate
too harshly. They may crystallize obsolete practices and
theories, as our law of insanity has crystallized discarded medi­
cal concepts; they may become too rigid and formalistic; they
may become too detailed and invade provinces they would do
well to omit.

If law is to be a sound agency of social control it must there­
fore find a place within its system for both the legal rule and
judicial discretion. Legal thought must solve the problem of
the limits to be allowed each sphere of activity, and the methods
by which they may be adjusted to each other. Bacon reduced
the task of solving this dilemma to two general cases. He
believed that uncertainty of law is of two kinds; the one, where
no law is prescribed; the other where the law is ambiguous and
obscure. His object was to find some rule of certainty for these
two situations. The narrow compass of human wisdom cannot
take in all the cases that time may discover; hence new and
omitted cases often present themselves. Thus, in the nature of
things, legal rules cannot be made for all cases. Judicial dis­
cretion, therefore, has an inescapable function; but it was
Bacon’s position that that discretion was not to be anarchic in
its exercise, but itself be subject to certain general rules and
standards.

Omitted Cases

When an omitted case appeared Bacon thought the remedy
was threefold. There should be a reference either to similar
cases, or an employment of examples which have not yet grown
into law, or a decision by a court empowered to decide accord­
ing to the arbitration of a good man and sound discretion.
Bacon considered each of the remedies in detail.\footnote{9 Works, 314-325.}

In omitted cases, the rule of law is to be drawn from cases
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similar to them, but with caution and judgment. A number of rules are to be observed in the process. "Let reason be esteemed prolific, and custom barren. Custom must not make cases. Whatever therefore is received contrary to the reason of a law, or even where its reason is obscure, must not be drawn into consequence." 53 These are obscure assertions and their meaning is far from clear. The last sentence is an adaptation of the troublesome view of Paulus that that which has been received against the reason of the law is not to be drawn into a precedent. 54 Paulus' statement appears to mean that a custom not supported in reason is not necessarily invalid; but it must not be used as a precedent either, for similar cases or as a basis for logical deduction. 55 Bacon, however, appears to go further than this. He seems to say that if a rule of law fails to cover a case the omission must not be supplied by reference to practices established by custom; the gap must be filled by some process of reason. Yet the doctrine, however curious it may now seem to us, was not a novel one to the lawyers of the seventeenth century. The sixteenth century had witnessed the settlement of the property rights of the villeins. Since those rights were held to be customary the courts had been compelled to analyze with great care the relationship of custom to the common law. In order to work out a compromise between the interests of the villeins and those of the lords it had become necessary to confine sharply the force of custom. Littleton 56 maintained that a custom had to be reasonable before its validity was admitted, and Coke 57 devised the standards of reasonableness by which customs were to be tested. Custom came to be regarded as a perilous idea, the sting of which must be pulled. In the Case of Tanistry, 58

53 9 Works 315.
54 Quod contra rationem juris receptum est, non est producendum ad consequentias. D. 1. 3. 14.
55 Brie, Die Lehre vom Gewohnheitsrecht (1899) 21.
56 Tenures, § 80.
57 Copyholder, § 33.
58 (1608), Dav. 29. For a criticism of the case, see Maine, Early History of Institutions (1888) 185 et seq.
decided in 1608, the common law tests of custom were applied to the Irish Brehon law of succession. Although the existence of the custom could not be denied, the judges with the aid of the tests were able to pronounce illegal the native Irish tenures of land.

Bacon gave no example of what he had in mind in his condemnation of custom, but there is no doubt that he shared in the general hostility of his time towards the notion. He seemed to favor entirely, to the disregard of custom, an extension of the law through the process of analogical reasoning. That is a legitimate device of the judicial process. For some years, for example, the United States Supreme Court had been troubled by the degree of control to be allowed state regulatory bodies over gas transported into the state in interstate commerce. It solved the problem finally on the analogy of the "original package"; when the gas passed from the distribution lines into the supply mains it was "like the breaking of an original package, after shipment in interstate commerce" and was therefore subject to local regulation. \(^59\) However, custom itself is equally as potent a force in the legal process as analogical reasoning. Bacon himself stood at the very threshold of the classical instance of the development of the law through the transformation of customary rules into legal ones. It was from the customs of merchants that Lord Mansfield was to construct our modern mercantile law.

Nevertheless, Bacon pointed to a real difficulty. It is no longer fashionable to refer to the spirit of the law, but we still are permitted to remark upon its policy. Now a practice may be widely customary but be contrary to a law's policy. Thus Bacon himself was opposed to slavery but he could not deny that it was a widespread custom. \(^60\) It was Mansfield himself who refused to follow mercantile custom and settled the English law that there was no right of property in negro slaves. \(^61\) Coke's solution of the problem was thus a sounder

\(^60\) *9 Works* 305.
\(^61\) *Somersett's Case* (1771) 20 S. T. 1.
one than Bacon's. Coke found room within the law for both reason and custom. Reason, however, for Coke was no ordinary reason, but "artificial and legal reason" and custom had to be tested by the criteria of the law itself before the law would adopt it.

As a guide in the handling of omitted cases through the analogical technique Bacon laid down a number of general principles. Laws which promote the general welfare should be liberally construed. This amounts to an invitation to judges to appraise the political wisdom of the statutes they are construing. As a rule of construction it is too amorphous to be of real assistance. During the development of democratic theory in the nineteenth century an attempt was made to give the rule more concreteness by holding that laws which promoted the security of individual rights should be liberally construed and that statutes in favor of the power of the state should be strictly construed. Bacon accepted the rule that penal statutes should be strictly construed against the state; however, he thought that if the offense were an old one and taken cognizance of by the laws, but an unprovided case appears, we ought by all means to depart from the decrees of law rather than leave offenses unpunished. In its modern form the rule has been best stated perhaps by Mr. Justice Story. In referring to the rule that penal statutes are to be strictly construed, he said: "I agree to that rule in its true and sober sense; and that is that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule, that requires the court to adopt one in preference to another, simply because

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62 Co. Litt. 62a.
it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonize best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature." Thus, the Motor Vehicle Theft Act made it an offense to transport in interstate commerce any "self-propelled vehicle not designed for running on rails." In holding that the transportation of a stolen airplane was not under the act, Mr. Justice Holmes observed that "although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statutes should not be extended to aircraft simply because it may seem to us that a similar policy applies." Although Bacon's rule may be thus rejected in modern decisions, it has nevertheless been applied from time to time by the common law courts. When a statute repealed the common law (especially in matters of frequent occurrence and long standing), Bacon did not approve proceeding by analogy to omitted cases. When the state has long been without a statute on a matter, even on those matters to which attention has been particularly called, there is little danger in allowing the cases omitted to want for a remedy from a new statute. Statutes framed for an emergency should not be used as an analogy for omitted cases. Consequence does not draw consequence, but the analogical extension should stop within the next case; otherwise there will be a gradual lapse into dissimilar cases, and sharp-

65 U. S. v. Wiltberger, 5 Wheat. 76, 96 (1820).
ness of wit will have greater power than authority of law. When laws and statutes are concise in style, then extend them freely; when they enumerate particular cases, proceed more cautiously; for as exception corroborates the application of law in cases not excepted, so enumeration invalidates it in cases not enumerated. Thus, in a case suggested by Bacon “if the law be that for a certain offense a man shall lose his right hand, and the offender hath before had his right hand cut off in the wars, he shall not lose his left hand, but the crime shall rather pass without the punishment which the law assigned than the letter of the law shall be extended.” An explanatory statute stops the streams of the statute which it explains, and neither of them admit of extension afterwards. The judge must not make a superextension, when the law has once begun an extension. Formality of words and acts does not admit of an extension to similar cases; for formality loses its character when it passes from custom to discretion; and the introduction of new things destroys the majesty of the old. Bacon thought that the extension of the law to posthumous cases, which were not in existence at the time of the passing of the law was easy. Where a case could not be expressed, because it had no existence, a case omitted is taken for a case expressed, if there exists the same reason for it.

Bacon's first remedy for the achievement of certainty in the process of judicial decision was thus a resort to the method of analogical reasoning. No method is indeed more fundamental in legal thinking. It is the basis of the theory of precedents and is therefore at the root of the common law system of case law. From the non est simile and n'est pas semblable of the Year Books to the "not in point," "distinguishable" and "on all fours" of the modern courts the method has been the constant mainstay of the judicial process.

Bacon's little treatise on jurisprudence went into numerous editions on the Continent. We know that Savigny thought highly of Bacon's system, or at least parts of it; and the basic

64 14 Works 238.
ideas in Savigny's notable discussion of legal analogy in the law bear a close resemblance to those of Bacon. In Savigny's view opinions on the methods to be followed in filling gaps in the law may be reduced to two positions. Either the gap is filled by a deduction from a principle of natural law, or it is filled by the process of reasoning from analogy. Savigny believed the latter procedure to be the only sound one. The ascertainment of law by analogy may present itself in his opinion in two forms. There may first appear a new legal relation previously unknown which cannot be incorporated in any typical institution of existing positive law. In our day we are witnessing the appearance of such a relation. It is impossible to fit the labor relationship under any of the typical legal institutions now existing—master and servant, contract, associations, or other major division. Nevertheless, as Savigny insisted, if friction is to be avoided, the new institution must be brought into harmony with existing law. In the second form, and this is the common case, a new question arises in a domain of law already established. Thus, in the field of labor law, the question is presented to what extent ought unions be subject to anti-trust measures. In Savigny's view a question of this kind must be determined on the basis of the internal kinship of the principles of law which obtain in its field. In both forms analogy becomes the instrument of legal progress. It may operate in the legislative domain where it can be applied with the greater freedom. It may also operate as a method of strict interpretation which enables the judge to resolve novel questions.

Savigny pointed out that analogy assumes an inner consistency in the law; not necessarily, however, a rigid deductive system, but an organic consistency produced by seeing, as a whole, the practical nature of the jural relations and the institutions governing them. Our starting point must always be a particular datum and the solution of the difficulty will result

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67 For Savigny's view of Bacon's jurisprudence see Vom Beruf unserer Zeit für Gesetzegebung und Rechtswissenschaft (1892) 12. For his theory of analogy see System des heutigen Römischen Rechts (1840) 290.
from our development of it. Sometimes the datum is a rule of positive law and then the decision is said to be reached *ex argumento legis*; but more frequently we start with a theory of law which itself has been created by abstract reasoning. In both cases the procedure is essentially different from extensive interpretation with which it is often confounded. Extensive interpretation does not aim to fill a gap in the law, but endeavors to rectify the erroneously expressed letter of the law by having recourse to its spirit. When, on the contrary, we use the analogical method we assume a gap in the law which we wish to fill in harmony with the organic unity of the law. Analogical interpretation cannot be applied if the datum which is taken as the point of departure has the character of an exception to the general rule. In such a case the application of analogy must be rejected because a fundamental requisite for the application of analogy, namely, the absence of a rule, is not present. If, for example, a statute is partially repealed by a new statute, what is not repealed is still in effect. If it is decided to extend the repeal to the portion still in force that would not be employing analogy because the rule is present. It would rather be a case of extensive interpretation, but of an arbitrary and groundless character. For the same reason, analogy must not be employed to interpret privileges since the rule in such case is never lacking. Similarly, Savigny insisted we must never extend an anomalous law, a *jus singulare* beyond its immediate limits, because in that case the rule is present and would only be destroyed by being extended. If an anomalous law is used, not to extend the exception which it sanctions, but to decide an open question of the same general type, there is a true analogy which is not subject to rejection. Nevertheless, in such a case the analogy ought not to be sought in the *jus singulare*, but in the usual rules of law, for analogical interpretation depends solely upon the internal consistency of the whole body of the law. Anomalous rules are transplantings to the legal field from other domains and it is impossible to attribute to them the organic creativeness of ordinary law.
Analogical reasoning can be reduced to the formula that when two things resemble each other in one or more respects, and a certain proposition is true of the one, it is therefore true of the other. X has the properties $p_1, p_2, p_3 \ldots$ and $f$; Y has the properties $p_1, p_2, p_3 \ldots$. Therefore, Y also has the property $f$. Thus, Francesco Sizzi, a seventeenth century writer, argued that Galileo's discovery of Jupiter's satellites was impossible because "there are seven windows in the head, two nostrils, two eyes, two ears, and a mouth; so in the heavens there are two favorable stars, two unpropitious, two luminaries, and Mercury alone undecided and indifferent. From which and many other similar phenomena of nature, such as the seven metals, etc., which it were tedious to enumerate, we gather that the number of planets is necessarily seven." In modern Aristotelian logic it is insisted that analogical reasoning, when entirely quantitative, is mathematical in character, and is necessary, like other mathematical reasoning. If, in respect of weight, $a : b :: c : d$, and if $a$ weighs twice as much as $b$, then $c$ must weigh twice as much as $d$. However, it is also insisted that as soon as we connect with the relation $c : d$, on the ground of its identity with the relation $a : b$, a consequence which is not known to depend entirely on that relation, our reasoning ceases to be demonstrative. Suppose that by rail the distance from Washington to Fredericksburg bears the same relation to the distance from Washington to Baltimore as the distance from Washington to Annapolis bears to the distance from Washington to Gaithersburg; and that it costs half as much again to send a ton of coal to Baltimore from Washington as to Fredericksburg; we cannot infer that the rate from Washington to Gaithersburg will be half as much again as it is to Annapolis; for the rate need not depend entirely on the relative distance, which is all that is alleged to be the same in the two cases. It is therefore argued that analogy should be restricted to arguments turning on similarity of relations alone. However, it has been pointed

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out that the mathematical statement is not analogical in the sense that it states a *similarity* of relations; the proportion of $a$ to $b$ is identical with that of $c$ to $d$; each is twice the other. In an empirical case, if it could be established that the relations of $a$ and $b$ are identical with those of $c$ and $d$, then the consequences entailed by these relations in the one instance would necessarily be entailed by the same relations in the other instance. But, in fact, it can never be shown that any pairs, triads, tetrads, etc. of actual things are identical in their relations. They are only similar. And this means that an empirical analogy, turning on resemblance in relations, does not differ in principle from one turning on resemblance in properties.  

In modern logic analogy is treated as a case of probable inference the force of which is dependent upon the character of the initial resemblance and the relative comprehensiveness of the properties which are asserted to be connected. That is to say, the initial resemblance must be such that a relationship of inference or implication may exist between the property that forms the basis of the analogy and the property to be inferred from it. If it is granted that man's existence is dependent upon the presence of air, then the question whether Mars possesses air would be an important one in determining whether it was inhabited by man. A relationship of inference exists between the property of possessing air and the conclusion that man may inhabit Mars. The strength of the analogy depends upon the existence of a resemblance having this initial character. When we pass from the character of the initial resemblance to the comprehensiveness of the inferred properties we find that the more comprehensive they are the less likely is the conclusion to be true. Keynes gives an example of a poor analogy from Hume: "Nothing so like as eggs; yet no one, on account of this apparent similarity, expects the same taste and relish in

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70 Eaton, *General Logic* (1931) 552.
71 This position was established by Keynes, *A Treatise on Probability* (1921) 222. For a non-mathematical exposition see Stebbing, *A Modern Introduction to Logic* (1930) 249.
all of them.” There would be some probability for the conclusion on the basis of the outward resemblance of the eggs. Keynes points out that “if Hume had expected the same degree of nourishment as well as the same taste and relish from all of the eggs, he would have drawn a conclusion of weaker probability.” There is therefore a dependence of the probability of an analogical conclusion upon its scope or comprehensiveness. Those of a wider scope are less probable than those of narrower comprehensiveness. “It is important to understand,” Keynes adds, “that the common sense of the race has been impressed by very weak analogies.” 72

If the gap in the law could not be filled by a parity of reasoning, then, Bacon thought, there should be a resort to examples which have not yet grown into law.73 He distinguishes on the one hand between custom, which is a kind of law, and of examples which by frequent use have passed into customs as a tacit law, and on the other, examples which happen seldom and at distant intervals, and have not yet acquired the force of law. He is concerned solely with the latter, and his object is to show when, and with what caution, the rule of justice may be sought from them where the law is deficient.

Argument by example has always been a frequent practice of the courts. Sometimes the example is used to mark a limit, or borderline, which the case before the court either falls short of or overpasses. Thus, the United States Supreme Court had before it the question whether an attorney should be disbarred because he had participated in a lynching. It marked a limit through the example of lynch law itself. It said: “Whatever excuse may ever exist for the execution of lynch law in savage or sparsely settled district, in order to oppose the ruffian elements which the ordinary administration of law is powerless to control, it certainly has no excuse in a community where the

72 Ibid. 247. Elsewhere he states that “scientific method, indeed, is mainly devoted to discovering means of so heightening the known analogy that we may dispense as far as possible with the methods of pure induction.” Ibid. 241.

73 G Works 314, 317.
laws are duly and regularly administered."

More frequently, however, the court uses examples for what might be termed the argument from the fearful. In order to meet a contention of counsel the court will suggest an example; but the court then points out that even to suggest that the practice embodied in the example is valid would be unthinkable. Now the matter before the court is similar to the example; ergo, to approve it is also unthinkable. Thus, the United States Supreme Court was called upon to determine whether certain provisions of the Agricultural Adjustment Act of 1933, involving the payment of money to promote a plan of crop control were in conflict with the Federal Constitution. The Court remarked: "It is said that Congress has the undoubted right to appropriate money to executive officers for expenditure under contracts between the government and individuals; that much of the total expenditures is so made. But appropriations and expenditures under contracts for proper governmental purposes cannot justify contracts which are not within federal power. And contracts for the reduction of acreage and the control of production are outside the range of that power. An appropriation to be expended by the United States under contracts calling for a violation of a state law clearly would offend the Constitution. Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action." The argument from the fearful is a handy weapon for dissenting judges and is widely employed by them, particularly to make the rule established by the majority self-evidently ridiculous. Thus the Supreme Court refused to intervene in a criminal case in which the State Court had held that the requirements of fairness had been met. Due process under the Federal Constitution did not, in the Supreme Court’s view, require a separate examination by the Federal Court of the facts. In his dissent Mr. Justice Holmes observed

74 Ex parte Wall, 17 Otto 265 (1883).
that it was significant that the State did “not go so far as to say that in no case would it be permissible on application for *habeas corpus* to override the findings of fact by the state courts.” He seized upon this as the crux of the matter, and proceeded to put some cases of such a character that the majority decision could not be applicable to them. “To put an extreme case and show what we mean, if the trial and the later hearings before the Supreme Court had taken place in the presence of an armed force known to be ready to shoot if the result was not the one desired, we do not suppose that this Court would allow itself to be silenced by the suggestion that the record showed no flaw. To go one step further, suppose that the trial had taken place under such intimidation that the Supreme Court of the State on writ of error had discovered no error in the record, and still imagine that this Court would find a sufficient one outside of the record, and that it would not be disturbed in its conclusion by anything that the Supreme Court of the State might have said. We therefore lay the suggestion that the Supreme Court of the State has disposed of the present question by its judgment on one side.”

The argument from example is the stock in trade of the rhetorical approach and was so treated by Aristotle who regarded it as the rhetorical form corresponding to induction. He also observed that it was the type of argument best suited for deliberative arguments.

Bacon’s rules for the use of examples are merely a formulation of common sense guides. Examples are not to be sought from tyrannical, factious or dissolute times, but from those which are good and moderate. The latest examples are to be accounted the safest. If something has been done recently without inconvenient consequences it may probably be repeated without hazard. However such cases have less authority; and if a reform is needed, modern examples savor more of their own age than of right reason. Ancient examples are to be received

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77 *An. Post.* 71* 9; Rhet. 1356b 2, 1393a 25; Rhet. 1368a 30. For the method of refuting the argument from example see Rhet. 1403a 5.
cautiously and with proper selection; for lapse of time produces changes so that what in respect of time appears ancient is, by reason of the changes really new. Therefore, the best examples are those of the middle time, or else such a time as is most in conformity with the present age; sometimes this is to be found in a more remote age rather than in that immediately preceding. Bacon also insisted that the courts should keep within, or rather on this side of the limits of the example, and on no account go beyond them. He pointed out that where there is no rule of law everything should be looked on with suspicion; and therefore, as in obscure cases, the courts should proceed with great caution. The courts should beware of fragments, and epitomes of examples, and should look carefully into the whole of examples and all the attendant circumstances. If it is unreasonable to judge of part of a law, without examining the whole, the rule is even clearer in examples, the use of which is doubtful if they do not exactly correspond. It is of great importance to consider the hands through which examples have passed, and to consider also by whom they have been sanctioned. If they stem only from functionaries in the ordinary business of the court, without the manifest knowledge of the higher officers, or from the teacher of all errors, the people, they are to be condemned and held of little account. But if they have passed under the eyes of legislators, judges, or the principal courts in such a manner that they must necessarily have been strengthened by at least tacit approval, they are entitled to more authority. Examples which have been published, although little used, but which have been thoroughly discussed, deserve more authority; but those, which have fallen into oblivion, deserve less. Examples, Bacon remarks, like waters are most wholesome in a running stream. Examples which relate to the law should not be sought from historians, but from public acts and the most careful traditions. It is a misfortune even of the best historians that their legal knowledge is deficient. An example which the same or the succeeding age has upon the recurrence of the case rejected, should not be readily
readmitted. The fact that it was once adopted does not tell so much in its favor as the subsequent abandonment tells against it. Examples are to be used for advice, not for rules and orders. Therefore, they should be so employed as to turn the authority of the past to the use of the present.

If, however, neither a parity of reasoning nor the use of examples is available, what then? When the rule of law is deficient in such a case Bacon's solution is the ancient Greek one. He would entrust the matter to the judgment and discretion of a conscientious man. New matters arise both in criminal causes which require punishment, and in civil causes which require relief. The courts which should take cognizance of the former Bacon calls Censorian, and of the latter, Praetorian. Bacon's commentators have usually condemned the institution of these courts; an evidently troubled authority begins his note on them with the remark "Hic vera utopia proponitur." However, it is clear that Bacon was attempting an idealized description of the Court of Star Chamber, and of the equity jurisdiction of the Court of Chancery. Bacon regarded the Star Chamber as "one of the safest and noblest institutions of this kingdom," a view which was shared by Coke who described it as "the most honorable Court (our Parliament excepted) that is in the Christian world." In 1616, when James I decided the dispute between the common law courts and the court of chancery in favor of the latter, Bacon pointed out that the order made the Chancery the court of the King's "absolute power."

Bacon proposed that Censorian Courts should have power and jurisdiction, not only to punish new offenses, but also to increase the punishments appointed by law for old ones, where the cases where heinous and enormous, provided they were not capital. An enormous crime has something of the nature of a new one. Similarly, the Praetorian Courts should have power both to abate the rigor of the law and to supply its defects.

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78 9 Works 321.
79 3 Works 145.
80 Ibid.
81 11 Works 130.
82 Fourth Inst. 65.
If relief is due to a person whom the law has neglected, much more is it due to one whom it has wounded. The Praetorian and Censorian Courts should, therefore, entirely confine themselves to monstrous and extraordinary cases, and not encroach upon the ordinary jurisdictions, in order to avoid an inclination to supplant rather than to supply the law. These jurisdictions should reside only in the Supreme Courts, and not be shared by the lower; for the power of supplying, extending and moderating laws differs little from that of making them. The courts should not be entrusted to the charge of one man, but should consist of many. Decrees should not be issued silently, but the judges should give the reasons for their decisions openly and in full court. What is free in point of power would thus be restrained by regard to character and reputation. There should be no authority to shed blood; nor should sentence be pronounced in any court upon capital cases, except in accordance with known and certain law. In the Censorian Courts there should be opportunity for three verdicts so that the judges would not be obliged to acquit or condemn, but would be at liberty to declare the fact "not proven." In addition to the penalty there should be power also to admonish or to inflict a light disgrace; punishing the offender, as it were, with a blush. In the Censorian Courts attempts at great crimes and offenses should be punished even though the end has not been consummated. This might even be the principal function of these courts. It is as well the part of severity to punish attempts, as of mercy to prevent the completion of crimes, by punishing the intermediate acts.

The Praetorian Courts must be careful not to afford relief in such cases that the law has not so much omitted as treated as unimportant, or because of their character, held not worth redress. Under no circumstances should the Praetorian Courts be permitted to hold that everything is a matter of discretion under color of mitigating the rigor of the law; to proceed otherwise would break the strength of the law and relax its sinews. The Praetorian Courts should not have authority under
any pretext of equity to decree against an express statute. This would transform the judge into a legislator, and would permit him to hold everything to be discretionary. The law courts must be kept separate from the equity courts. If the jurisdictions are mixed, the distinction of cases will not be retained, and discretion will in the end supersede the law. Judges in the Praetorian Courts ought, as far as possible, to establish rules for their own guidance, and should announce them publicly. It is clear that the best law is the one which leaves the least to the discretion of the judge; similarly, the best judge is the one who leaves the least to himself.

Retrospective Laws

In order to make his theory logically complete Bacon glanced hastily at retrospective laws. He was concerned with the situation when one law follows and amends another, and draws the omitted cases along with it. He was in accord with our present day view that laws of this kind must be used seldom, and with great caution. He did not approve of a Janus in laws. However, he believed that any person who evades and narrows the words or meaning of a law improperly deserved to be himself ensnared by a subsequent law. Thus in cases of fraud and captious evasion it is just that laws should be retrospective, and mutually assistant; that a man who plots to deceive and upset the present laws should at least be apprehensive of future ones.

However, laws which confirm the real intention of statutes against the defects of forms and usages very properly include past actions. The principal inconvenience of a retrospective law is that it creates disturbance; but confirmatory laws of this sort tend rather to promote peace and to settle past transactions. However, there are other types of retrospective laws. There is the type which prohibits and restrains future acts, but which necessarily is connected with the past. Thus, in Bacon’s view, which was certainly not widely shared at the time of the passage of the National Prohibition Act, a law which would prohibit certain artisans from henceforth selling their wares
seems only to bear upon the future, yet it operates in the past; for that type of artisan is deprived of a skill which he learned in his youth and is now too old to acquire another one. He thought that declaratory laws should not be enacted except in cases where they may be justly retrospective. He argued that every declaratory law, though it does not mention the past, yet by the very force of the declaration must necessarily apply to past transactions. This is true because the interpretation does not date from the time of the declaration, but is made, as it were, contemporary with the law itself.

To sum up, Bacon took the view that in order to achieve justice in the cases not clearly provided for by statute or otherwise the judge has three courses open to him. He may proceed on the analogy of precedents, or by the use of examples, or by his own sound judgment and discretion. This theory was put forward as an attempt to meet the problem of certainty. It can be looked at, however, from another and equally important point of view.

It can be taken as a seventeenth century effort to describe in logical terms the nature of the judicial process. In its wonderful generality it is an extraordinary achievement, and easily holds its own with the notable analyses of modern times. At one pole is the frankly amorphous estimate by Cardozo. "My analysis of the judicial process comes then to this, and little more," he \(^{83}\) wrote. "Logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. . . . The judge legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstice cannot be staked for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in

\(^{83}\) The Nature of the Judicial Process (1921) 112.
the practice of an art." This is an altogether admirable statement of the elusive qualities of the judicial process. But is the art of judicial decision really so elusive? May we not, as Bacon did, call logic to our aid and endeavor, in spite of the transcendent subtlety of the material, to exhaust the possibilities that confront the judge? At the other pole from Cardozo is the severely analytical analysis of Pound. “Supposing the facts to have been ascertained,” he writes, “decision of a controversy according to law involves (1) selection of the legal material on which to ground the decision, or as we commonly say, finding the law; (2) development of the grounds of decision from the material selected, or interpretation in the stricter sense of the term; (3) application of the abstract grounds of decision to the facts of the case.” As an abstraction from countless thousands of opinions of the apparent behavior of judges when engaged in the process of deciding cases the statement is as admirable as Cardozo’s. Moreover, in his exposition Pound gives full recognition to all the evasive qualities of law and life that were the burden of Cardozo’s discourse. Nevertheless, does not Pound’s analysis err as much at one extreme as Cardozo’s did at the other? Is not Pound’s approach too analytical, or more properly, is it an accurate description of the judicial process? It states a theory of the way a judge’s mind functions in reaching a decision. Dewey’s analysis of that very process seems much closer to the truth. The judge begins with an indeterminate or problematic situation. An important step is for the judge to determine exactly what the problem is. To ask the right question, Bacon long ago observed, is the half of knowledge. The way in which the problem is conceived decides what specific suggestions are entertained and which are dismissed; what data are selected and which rejected; it is the criterion for relevancy and irrelevancy of hypotheses and conceptual structures. Upon the determination of the problem, a possible solution then presents itself as an

84 The Theory of Judicial Decision (1923) 36 Harv. Law Rev. 940, 945.
85 Logic (1938) 101 et seq. 120-22.
idea. Ideas are the anticipated consequences or forecasts of what will happen when certain operations are carried out. Various activities are involved in executing the operations, and in the process the problem may be further delimited. Eventually, the ideas that represent possible modes of solution are all tested and a final conclusion is reached. It is unnecessary to dwell upon the material difference between this conception of the process of judicial decision and the one put forward by Pound. The vital point is that the judge does not first find the facts, then ascertain and develop the law, and then apply the results to the facts. He does even not know what the operative facts of the case are until the apparently relevant facts have been tested in conjunction with the ideas that forecast the solution. He does not know what the law is until he has settled upon the solution which he believes he will accept. At that point the judge then “finds the law,” and it may well be that the provisional solution will have to be abandoned if the “law” as the judge “finds it” will not permit the proposed solution. The judge will then seek a different solution, and again “find the law.” This process will continue until a solution is found which will withstand the test of the law, the facts and any other materials the judge deems relevant.

Bacon's analysis falls far short of Dewey’s in point of logical completeness; but it is not opposed to it. It suggests that the judge when he develops an idea that anticipates the solution is limited to the three possibilities discussed above, namely, the idea must have an analogical basis, or be grounded on the use of examples, or flow from a conception of justice or reason. Bacon does not suggest that the judge, after his solution has been anticipated, is limited to any particular method of reasoning or the use of any particular material; but he does insist that if there is a gap in the law the judge's possibilities of closing it are confined to three channels.

So far it has been assumed that there are “gaps” in the law; that, in fact, in most litigated cases no statute is clearly applicable and no previous decision is plainly controlling. One
branch of modern legal theory denies the validity of this assumption, and asserts that there is no such thing as a genuine gap. The argument turns on the meaning to be given the word "gap." A municipal corporation was authorized by statute to open and widen streets according to the procedure described in the statute; but the statute prescribed no procedure for cases of widening streets, and the court held the statute to that extent inoperative.\textsuperscript{86} In one sense there was such a gap in the law in this instance that the court was powerless to close it. Kelsen,\textsuperscript{87} however, argues that there is no such thing as a genuine gap in the sense that a legal dispute cannot be decided according to the valid norms, by reason of the omission of a provision directed to the concrete case. That is to say, in the street-widening case the court disposed of the controversy and therefore no "gap" exists. Kelsen would probably apply the same argument to those instances in which the courts hold that the matters submitted to them are not within their province at all, e. g., the determination of political questions. Kelsen points out further that when we speak of a "gap" what we generally mean is not, as the expression might deceive us into thinking, that a decision is logically impossible for lack of a norm, but only that the logically possible decision, confirming or disposing of the claim, is felt, by the agent competent to decide, that is, to apply the law, to be too inexpedient or too unjust, or so inexpedient or so unjust, as to give rise to the impression that the legislator could never have considered this case, and that had he considered it, would and could not have decided in this way. The so-called "gap" is, therefore, nothing else than the difference between the positive law and some other order considered to be better, truer and juster. There is a large element of truth in this analysis; but it is not complete. It does not cover the case handled in Bacon's inquiry. All that Kelsen says can be granted; but there will still remain for analysis the nature of the task which confronts the judge when he has

\textsuperscript{86} Chaffee's Appeal, 56 Mich. 244, 22 N. W. 871 (1885).

\textsuperscript{87} The Pure Theory of Law (1935) 51 Law Q. Rev. 517.
before him for settlement a matter which is not clearly embraced within the statutes or the controlling decisions.

**Obscurity of Laws**

We have the second kind of uncertainty in the law, of which Bacon spoke, where the law is ambiguous and obscure. He thought obscurity of law arose from four sources: either from an excessive accumulation of laws, especially if they are mixed with those which are obsolete; or from an ambiguity, or want of clearness and distinctness in drafting them; or from negligent and ill-ordered methods of interpreting law; or lastly, from a contradiction and inconsistency of judgments.\(^9\)

Bacon's remedy for an excessive accumulation of laws was an adaptation of ancient Athenian practice. Every year the Athenians appointed six men to examine the contradictory titles of their laws—the so-called *Antinomies*—and to report to the people those which could not be reconciled so that a definite resolution might be passed with respect to them. However, Bacon insisted that there ought not to be too great an eagerness to reconcile those contradictory titles by fine and far-fetched distinctions. Obsolete laws as well as antinomies should be repealed.

If the laws are too voluminous or too confused to be handled by that method, there should be a new digest. The preparation of the digest should be considered an heroic work, and its authors should be reckoned among legislators and reformers of law. In this regeneration and reconstruction of the laws, the words and text of the old laws and law books should by all means be retained, although it is necessary to extract them by scraps and fragments, and afterwards connect them together in proper order. In laws we ought not so much to look to style as to authority, and its patron, antiquity. Otherwise the work will appear rather a matter of scholarship and method, than a body of commanding laws. This new book of laws ought to be confirmed by the legislative power of the state, since under

\(^9\) *Works* 326.
pretence of digesting old laws, new laws might be secretly imposed.

Bacon approved neither of prolixity or too much conciseness in drawing up laws. He thought it impossible to achieve certainty by attempting to enumerate and express every particular case in apposite words. That procedure, in fact, raises a number of questions about words. The interpretation which proceeds according to the meaning of the law is rendered more difficult because of the conflict of words. Bacon’s opposition to brevity, as being the style of majesty and command, was based on the fear that the law should become like Aristotle’s Lesbian rule; that is to say, it might fit any situation. We should therefore aim at a mean, and look for a well-defined generality of words. This mean will not attempt to express all the cases comprehended, and it will exclude with sufficient clearness the cases not comprehended. However, in ordinary laws and proclamations of state, in which lawyers are not generally consulted, but every man trusts to his own judgment, everything should be fully explained, and pointed out at a level of meaning possible to the capacity of the people. Although he does not refer to Plato explicitly, it is a fair guess that Bacon was aware of his plea for the use of the preamble. Bacon lived at the end of the great age of the preamble in English statutory law and he thought that preambles were necessarily used in most cases, at least as times were then. They were not needed so much to explain the law, as to persuade Parliament to pass it, and also to satisfy the people. However, he thought it best to avoid preambles as much as possible, and to let the law commence with the enactment. Though the intention and purport of a law is sometimes understood from the prefaces and preambles, yet its latitude or extension should by no means be sought there. For the preamble often selects a few of the more plausible and specious points by way of example, even when the law contains many other things.

The influence of Bacon’s experience as a practicing lawyer

**Plucknett, A Concise History of the Common Law (2nd ed. 1936) 288.**
on his theory of jurisprudence is nowhere better shown than in his remarks on the methods of legal exposition. He believed there were five methods of expounding law and removing ambiguities: namely, by reports of judgments; by authentic writers; by auxiliary books; by prelections; or by the answers and decrees of learned men. He believed that if all these methods were properly instituted they would be of great service against the obscurity of laws.

Above everything else, he insisted that the judgments delivered in the supreme and principal courts on important cases be reported, especially if the questions were doubtful, difficult or novel. For, as he observed, judgments are the anchors of laws, as laws are of the State. The cases should be recorded precisely, the judgments themselves word for word; the reasons which the judges allege for their judgments should be added; the authority of cases brought forward as examples with the principal case should not be mixed with it; the perorations of counsel should be omitted unless they contain something very remarkable; reporters should be drawn from the ranks of the most learned counsel and receive a liberal salary from the State; judges themselves should not meddle with the reports—they may be too fond of their own authority and thus exceed the province of a reporter.

The body of law itself should be composed only of the laws that constitute the common law, the constitutional laws or statutes, and reported judgments. Besides these, no other should be deemed authentic, or at least they should be sparingly accepted. Bacon thought that nothing contributed so much to the certainty of laws as to keep the authentic writings within moderate bounds and to get rid of the enormous multitude of authors and doctors of law. He believed that because of them the meaning of laws is distracted, the judge is perplexed, the proceedings are made endless, and the advocate himself, as he cannot master so many books, takes refuge in abridgements. Perhaps some one good commentary and a few classic authors, or rather some few selections from some few of them may be
received as authentic. The rest should be kept for use in libraries so that the judges or counsel may inspect them if necessary; they should not be allowed to be pleaded in court or to pass into authorities.

There should be many auxiliary books. Students should be educated and trained through the use of Institutes, or comprehensive surveys of the law apparently after the model of Justinian and Coke. The Institute should be arranged in an orderly manner and run through the whole private law, giving a slight sketch of everything; so that when a student comes to study the body of law he will find nothing entirely new or of which he has not had a slight notion beforehand. Public laws should not be treated in the Institutes, but should be drawn from the original sources. It is not clear whether Bacon intended his Institutes to be arranged alphabetically or on the composite plan of Justinian’s Code and Digest, and Coke’s Institutes. By the Fourteenth Century English lawyers had discovered the great advantages of the alphabetical arrangement as the best scheme to make English law accessible, although the first alphabetical encyclopedia written in English was not published until 1704.90

To these remarks Bacon added observations on the proper construction of books dealing with legal terms, rules of law, antiquities of law, summaries, and forms of pleading. He thought it was a sound precept not to take the law from the rules, but to make the rule from the existing law; the proof is not to be sought from the words of the rule, as if it were the text of law. The rule, like the magnetic needle, points at the law, but does not settle it. The law should be taken from sworn judges and not from the answers of learned men. Care should be taken that judgments proceed after mature deliberation; that courts preserve mutual respect for one another; and that the way to a repeal of judgments be narrow, rocky, and as it were, paved with flint stones.

Conclusion

Bacon’s great merit as a legal philosopher lay in his firm grasp of method, the distinctness with which he formulated the task before him, and the resoluteness with which he adhered to the ideal he had set himself. He possessed a synoptic view of knowledge generally, and the main direction of his thought was towards methodology. He saw that the principles of a scientific methodology were as applicable to law as to other departments of knowledge. In considering those principles in relation to jurisprudence he perceived with the utmost clearness that much previous juristic speculation had fallen into either utopianism on the one hand or provincialism on the other. He therefore aimed at a jurisprudence which would be always practical but which would possess all the necessary characteristics of a genuine scientific theory. Modern logic has dealt harshly with his theory of inductive generalization; that, however, was only one aspect of his conception of scientific method, although it is the part on which he lavished the greatest attention. There is no evidence, or at least none has been suggested, that his ideas of the inductive process have vitiated his theory of jurisprudence. His juristic speculations are in fact the product of no single method. So far as he went in reducing his ideas to writing he realized what he considered to be the ideal of jurisprudence. He developed a general theory of large practicality. He was able to do that because he always kept before him the facts of English legal history. That deprived his system of a measure of generality, but it increased, at least for the Anglo-American lawyer, its utilitarian value. His actual achievement in jurisprudence is of a high order. In his first principles he perhaps takes too much for granted; but his analysis of the nature of the judicial process goes unerringly to the central problem and his proposed solutions merit, in the main, more attention than they receive in modern thought.