Abbreviations

Manuscripts

British Library, London

B1 Add. 18235, fols. 41–147 ("Some Chapters touching the Law of Nature")

B2 Harley 7159, fols. 1–266 ("Some Chapters touching the Law of Nature")

B3 Hargrave 485 ("Treatise of the Nature of Lawes in Generall and touching the Law of Nature")

Printed Works

Abridgment	[Sir Matthew Hale], "The Publisher's Preface Directed to the Young Students of the Common-Law," in Henry Rolle, *Un abridgment des plusieurs cases et resolutions del common ley* (London: A. Crooke, 1668)
Baxter, *Add. Notes*	Richard Baxter, *Additional Notes on the Life and Death of Sir Matthew Hale, the late universally honoured and loved Lord Chief Justice of the Kings Bench* (London: Richard Janeway, 1682)

Cromartie, *Hale*	Alan Cromartie, *Sir Matthew Hale, 1609–1676: Law, Religion and Natural Philosophy* (Cambridge: Cambridge University Press, 1995)
Dialogue	Sir Matthew Hale, "Reflections on Hobbes' Dialogue," in William Searle Holdsworth, *A History of English Law*, 15 vols. (London: Methuen, 1922–1965), 5:500–13
Discourse	Sir Matthew Hale, *A Discourse of the Knowledge of God, and of Our Selves* (London: William Shrewsbery, 1688)
DLGT	Richard A. Muller, *Dictionary of Latin and Greek Theological Terms: Drawn Principally from Protestant Scholastic Theology* (Grand Rapids: Baker, 1985)
History	Sir Matthew Hale, *The History of the Common Law of England*, ed. Charles M. Gray (Chicago: University of Chicago Press, 1971)
Burnet, *Life*	Gilbert Burnet, *The Life and Death of Sir Matthew Hale, Kt. sometime Lord Chief Justice of His Majesties Court of Kings Bench* (London: William Shrowsbery, 1681)
OED	*Oxford English Dictionary Online*, http://www.oed.com
Pleas	Sir Matthew Hale, *Historia placitorum coronæ. The History of the Pleas of the Crown*, 2 vols. (Savoy [London]: E. and R. Nutt, and R. Gosling, 1736)
Primitive	Sir Matthew Hale, *The Primitive Origination of Mankind, considered and examined according to the Light of Nature* (London: William Godbid, for William Shrowsbery, 1677)
Works	Sir Matthew Hale, *The Works, Moral and Religious*, ed. T. Thirwall, 2 vols. (London: H. D. Symonds, 1805)

Sir Matthew Hale (1609–1676) and Natural Law in the Seventeenth Century*

General Introduction

The legal history of England and the United States of America is commonly recognized as following a unique path distinct from the rest of Europe. Whereas continental European nations followed the Roman civil law (*Corpus iuris civilis*) compiled by Justinian, England developed its own body of customary law known as common law.[1] Among legal historians of English common law, Sir Matthew Hale (1609–1676) ranks as one of the most familiar names along with Sir Edward Coke and Sir William Blackstone. After an early career as a lawyer, during which time he served as counsel for the defense at the famous trials of Archbishop Laud in 1643 and Christopher Love in 1651, Hale was appointed Justice of the Common Pleas (1654–1658), and at the Restoration was appointed

* I am grateful to Matthew T. Gaetano, Todd M. Rester, and Richard A. Muller for their many helpful comments.

1 This is not to deny that English jurists also profited from principles drawn from the civil law. See David J. Ibbetson, *Common Law and Ius Commune*, Selden Society Lecture (London: Selden Society, 2001); Charles Donahue Jr., "*Ius commune*, Canon Law, and Common Law in England," *Tulane Law Review* 66 (1992): 1745–80; and Richard H. Helmholz, "Continental Law and Common Law: Historical Strangers or Companions?" *Duke Law Journal* 1990, no. 6 (December 1990): 1207–28.

successively as Chief Baron of the Exchequer (1660–1671) and Chief Justice of the King's Bench (1671–1676).[2] In the judgment of one historian, he was not only "accounted by his contemporaries the most learned lawyer of the age" but was so well received over the course of centuries of scholarship that he is now known as "one of the greatest jurists of the modern common law."[3]

Hale's reputation is in no small measure due to the posthumous publication and circulation of his manuscripts relating to common law. With the exception of his short introduction to Chief Justice Rolle's *Abridgment* (1668),[4] Hale chose not to publish his legal writings during his lifetime and even prohibited the posthumous publication of all his manuscripts in his will.[5] Yet Hale's manuscripts circulated and were copied among lawyers long after his death,[6] and there were claims that Hale "changed his mind" regarding his prohibition on the publica-

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2 For Hale's life, see Alan Cromartie, "Hale, Sir Matthew," in *Oxford Dictionary of National Biography*, 60 vols. (Oxford: Oxford University Press, 2004), 24:534–40; Edmund Heward, *Matthew Hale* (London: Robert Hale, 1972); and J. B. Williams, *Memoirs of the Life, Character and Writings of Sir Matthew Hale* (London: Jackson and Walford, 1835). The definitive intellectual biography remains Cromartie, *Hale*.

3 Thomas Garden Barnes, *Shaping the Common Law: From Glanvill to Hale, 1188–1688*, ed. Allen D. Boyer (Stanford: Stanford University Press, 2008), 222. Cf. Cromartie, "Hale, Sir Matthew," 539: "Hale has continuously enjoyed the reverence of lawyers as the greatest Stuart jurist after Coke, and treatments of his place in legal history have virtually always been tinged with piety."

4 [Sir Matthew Hale], "The Publisher's Preface Directed to the Young Students of the Common-Law," in *Abridgment*.

5 Williams, *Memoirs*, 348; [Edward Stephens], "Preface" to Sir Matthew Hale, *Contemplations Moral and Divine* (London: William Godbid for William Shrowsbury and John Leigh, 1676), A3.

6 See Francis Hargrave, Preface to *A Collection of Tracts Relative to the Law of England, from Manuscripts*, ed. Francis Hargrave, vol. 1 (Dublin: Lynch, 1787), i–v; Henry Home of Kames, *Memoirs of the Life and Writings of the Honourable Henry Home of Kame*, 2 vols. (Edinburgh: William Creech, 1807), 1:238; and *The Parliamentary History of England, from the earliest period to the year 1803*, 36 vols. (London: T. C. Hansard, 1806–1820), 16:169–70.

tion of his manuscripts.[7] In any case, after Hale's death many of his manuscripts were published.[8] Of these published manuscripts, Hale's *Historia placitorum coronae* (1736) and *History of the Common Laws of England* (1713) exercised a great influence on two centuries of legal thought. According to Alan Cromartie, *Historia placitorum coronae* "became an unchallenged authority on English criminal law," while the *History* provided a "sketch of the legal past that was unrivalled for two centuries."[9] This judgment is corroborated by Holdsworth, who nearly a century ago called Hale's *History* "the ablest introductory sketch of a history of English law that appeared till the publication of Pollock and Maitland's volumes in 1895."[10] Hale's *Analysis of the Law* (1713) also had a large impact on Blackstone, who based his own *Analysis of the Laws of England* (1756) on that of Hale.[11] Moreover, Blackstone appears to have been indebted to Hale's explanation of the common law as the embodiment of the accumulated wisdom of generations,[12] an explanation that has often invited parallels between Hale and Edmund Burke.[13]

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7 Hale, *Discourse*, a5v; Burnet, *Life*, 185.

8 For a catalogue of Hale's unprinted and printed MSS, see Cromartie, *Hale*, 240–44; and for content summaries, see Heward, *Matthew Hale*, 124–55.

9 Cromartie, *Hale*, 6.

10 William Searle Holdsworth, *A History of English Law*, 17 vols. (London: Methuen, 1922–1972), 6:586.

11 Sir William Blackstone, *An Analysis of the Laws of England* (Oxford: Clarendon Press, 1756), vii. Cf. David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989), 35, who refers to this preface as "the first of Blackstone's several profound debts to Hale's jurisprudence.…"

12 Lieberman, *Province of Legislation Determined*, 44, 122.

13 J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (New York: Norton, 1967), 35–36, 171–73; Harold J. Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale," *The Yale Law Journal* 103, no. 7 (1994): 1651–1738 at 1735; Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1989), 23, 66; D. E. C. Yale, "Hobbes and Hale on Law, Legislation and the Sovereign," *Cambridge Law Journal* 31, no. 1 (1972): 121–56 at 127; Cromartie, "Hale, Sir Matthew," 536.

Unfortunately, most of Hale's other manuscripts have suffered from centuries of neglect. Among these manuscripts is Hale's undated *Some Chapters touching the Law of Nature*, likely written ca. 1668–1670 under the original title "Of the Law of Nature" (hereafter *Law of Nature*), which survives in multiple hand copies, although Hale's original is lost.[14] With the publication of Richard Tuck's *Natural Rights Theories* (1979) and Cromartie's *Sir Matthew Hale* (1995), interest in Hale's natural-law theory revived.[15] Hale's *Law of Nature* has been called his "most elaborate statement of his general moral ideas"[16] and the fullest articulation of a generally held view of the relationship between common law and natural law in seventeenth-century England.[17] Even so, Hale's *Law of Nature* has continued to be ignored or read in a highly selective manner. Harold Berman, lamenting that "no one of his written works constitutes an adequate statement of his legal philosophy," attempted "to reconstruct the coherent legal philosophy" underlying Hale's entire corpus, including Hale's theory of natural law, but did so in apparent ignorance of the existence of Hale's own treatise on natural law.[18] The selective treatment of Hale's *Law of Nature* is reflected in the focus of the secondary literature on questions of the relationship between natural law and common law,[19] the nature of property rights, and the influence of

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[14] See the Textual Introduction below for details.

[15] Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 162–65; Cromartie, *Hale*, 90–97.

[16] Cromartie, *Hale*, 90.

[17] Gerald J. Postema, "Classical Common Law Jurisprudence (Part I)," *Oxford University Commonwealth Law Journal* 2, no. 2 (2002): 155–80 at 176.

[18] Berman, "The Origins of Historical Jurisprudence," 1707–8. Hale's *Law of Nature* is nowhere mentioned.

[19] Postema, "Classical Common Law Jurisprudence (Part I)," 176–80; Postema, "Classical Common Law Jurisprudence (Part II)," *Oxford University Commonwealth Law Journal* 3, no. 1 (2003): 1–28 at 22–27; Michael Lobban, "Custom, Nature, and Authority: The Roots of English Legal Positivism," in *The British and Their Laws in the Eighteenth Century*, ed. David Lemmings (Woodbridge: Boydell Press, 2005), 29–31, 35–36; Michael Lobban, *A History of the Philosophy of Law in the Common Law World, 1600–1900*, A Treatise of Legal Philosophy and General Jurisprudence 8 (Dordrecht: Springer, 2007), 61–64.

Hale's mentor and friend John Selden (1584–1654).[20] Furthermore, despite the fact that Hale's *Law of Nature* has been referred to as belonging to a "hybrid" genre, "being partly legal and partly religious,"[21] most treatments of it continue to neglect the theological dimension of the *Law of Nature*.[22] Yet a proper reading of Hale's *Law of Nature* requires recognition of the theological context within which seventeenth-century lawyers viewed their own discipline. It was not uncommon for English lawyers to admit that law borrowed principles from other sciences, and in particular from the discipline of theology.[23] Hale himself produced a number of theological works alongside his legal works, and his *Law of Nature* is permeated with theology.

While most scholars have accepted the view that Hale largely followed Selden's approach to natural law, I shall argue that Hale is far more eclectic in his use of Selden. To be sure, Hale does utilize elements of Selden's account of natural law, but this eclectic reception takes place within a larger framework that shows strong continuity with Hale's early Reformed Puritanism and ideas gleaned from Francisco Suárez (1548–1617) and Hugo Grotius (1583–1645). And although Hale's view of natural law in *Law of Nature* remains in many respects continuous with his early Puritanism, it also represents a significant religious and soteriological shift in his later thought in the direction of Arminianism. This Arminian change is specifically reflected in Hale's argument that natural law serves the goal of making salvation possible for virtuous pagans with no knowledge of Judeo-Christian scripture. These points require clarification. In what follows, we will first survey some of the background relevant to Hale's

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20 Tuck, *Natural Rights Theories*, 162–65; Cromartie, *Hale*, 90–97.

21 Heward, *Matthew Hale*, 132.

22 The theology of the treatise is discussed briefly in Cromartie, *Hale*, 90–91, 167; and Murray Raff, "Matthew Hale's *Other* Contribution: Science as a Metaphor in the Development of Common Law Method," *Australian Journal of Law and Society* 13 (1997): 73–117, at 112–13.

23 Sir Henry Finch, *Law, or, A Discourse Thereof* (London: [Adam Islip] for the Societie of Stationers, 1627), 6–7; William Noy, *A Treatise of the Principall Grounds and Maximes of the Lawes of the Kingdome* (London: R.H., 1641), 1; Michael Hawke, *The Grounds of the Lawes of England* (London: H. Twyford, T. Dring, Jo. Place, and W. Place, 1657), 1–2.

intellectual development as it pertains to natural-law theory. This will provide some context for a synopsis of Hale's *Law of Nature* and an analysis of the main topics in the *Law of Nature*.

Hale's Scholastic Education and Religious Development

Since the theory of natural law concerns the foundations of morality, standing as it were at the intersection of theological, philosophical, and juridical disciplines, an account of Hale's intellectual development as it relates to these disciplines is necessary for understanding many of the features of his *Law of Nature*. Hale's early ethical and religious formation owed much to Puritan influences. Before he reached the age of five, Hale's parents died and his father's closest relative Anthony Kingscot, a man known to have "inclined to the way of those called Puritans," assumed guardianship of the young Hale. At the age of 16, Hale was sent by Kingscot to Magdalen Hall, Oxford, where his tutor was Obadiah Sedgwick (d. 1658), who later became a well-known Puritan preacher.[24] From 1605, when John Wilkinson was appointed principal, Magdalen Hall had become a "stronghold of the Puritans in Oxford" under his leadership.[25] Hale's early Puritan formation, which he found reinforced both at home and in school, left a lasting impression on his life and thought.

Although Hale only remained at Oxford for about three years (1626–1629) before entering the law profession at Lincoln's Inn, he is said to have "laid the foundation of some learning and knowledge which he afterwards built upon.…"[26] The only knowledge we have of his reading at Oxford is the witness of one of Hale's editors. The editor, likely Hale's son-in-law Edward Stephens (d. 1706), had approached Hale regarding the occasion and extent of his knowledge of the scholastics. According to Stephens' account, Hale replied, "At Oxford; and that he there read Aquinas, Scotus, and Suarez, and others, whom he particularly

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[24] Burnet, *Life*, 5–6.

[25] Sidney Graves Hamilton, *Hertford College* (London: F. E. Robinson & Co., 1903), 108.

[26] Anthony à Wood, *Athenae Oxonienses*, 3rd ed., 4 vols. (London: F. C. and J. Rivington, et al., 1813–20), 3:1090.

named; but these I remember."[27] This account appears accurate; Hale himself demonstrated familiarity with the opinions of Aquinas and Suárez, calling the latter "the acute and judicious Suarez."[28] Hale's remarks are also representative of a positive reception Suárez enjoyed among many Puritans in early seventeenth-century England.[29] Richard Baxter (1615–1691), an intimate friend of Hale for the last decade of his life, praised Suárez's *De legibus* as "one of the best [books] on that Subject that is extant among us"[30] and observed—with possible reference

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27 See the preface to Hale, *Discourse*, a3v. Cf. Charles B. Schmitt, *John Case and Aristotelianism in Renaissance England* (Kingston: McGill-Queen's University Press, 1983), 64–67. Cromartie attributes the preface in *Discourse* to Baxter, but J. B. Williams attributed it to Edward Stephens. See Cromartie, *Hale*, 141; and Williams, *Memoirs*, 408. Williams was likely correct, since the author refers to himself as "Mr. S," and he took responsibility for publishing Hale's *Contemplations* (1676), which we know was edited by Stephens. See Hale, *Discourse*, *3r, *4r. According to Baxter, *Add. Notes*, A7r, Stephens was "most familiar" with Hale and had planned to write on Hale's life.

28 E.g., on the doctrine of creation: Hale, *Primitive*, 72, 81. Hale refers here to Suárez's *Metaphysicae Disputationes*. See also *B1*, 106r.

29 See citations to Suárez's *De legibus* regarding the natural law and law of nations in Richard Byfield, *The Doctrine of the Sabbath Vindicated* (London: Felix Kyngston for Philemon Stephens and Christopher Meredith, 1631), 12–13, 46–48; Anthony Tuckney, *Praelectiones theologicae* (Amsterdam: Stephan Swart, 1679), *pars secunda*, 316–20; and Nathaniel Culverwell, *An Elegant and Learned Discourse of the Light of Nature*, ed. Robert A. Greene and Hugh MacCallum (Toronto: University of Toronto Press, 1971), xxii–xxix, 28–31, 37, 51–53, 56. Cf. J. P. Sommerville, *Royalists and Patriots: Politics and Ideology in England, 1603–1640*, 2nd ed. (New York: Longman, 1999), 76–77; and John Selden, *The Table Talk of John Selden*, ed. Frederick Pollock (London: Quaritch, 1927), 23.

30 Richard Baxter, *Catholick Theologie: Plain, Pure, Peacable: For the Pacification of the Dogmatical Word-warriours* (London: Robert White, 1675), Part I, 53; cf. Baxter, Preface to *Methodus Theologiae Christianae* (London: M. White & T. Snowden, 1681), [5]. On Baxter's Suárezian natural-law theory, see David S. Sytsma, "Richard Baxter's Philosophical Polemics: A Puritan's Response to Mechanical Philosophy" (PhD diss., Princeton Theological Seminary, 2013), chap. 7.

to Hale—that "the Authors of Politicks and Laws, (especially Suarez *de Legibus* and Azorius) I find are commonly read by Lawyers.…"[31]

Besides an exposure to Suárez and medieval scholastics, Hale's early education at Oxford's Puritan "stronghold" also contributed to an early enthusiasm for Reformed religious beliefs and practices. According to Burnet, even after Hale began pursuing a profession in law, he directed his studies to theology above those in law, arithmetic, philosophy, and history:

> But above all these, he seemed to have made the Study of Divinity the cheif of all others, to which he not only directed everything else, but also arrived at that pitch in it, that those who have read, what he has Written on these subjects, will think, they must have had most of his time and thoughts.[32]

The best indication of Hale's early beliefs is found in his theological treatise *A Discourse of the Knowledge of God, and of our Selves*, which was written when he was around the age of 30 or 31 (ca. 1639–1641), after he had already begun practicing law.[33] There Hale espouses ideas typical of the Reformed theology that would shortly thereafter find expression in the Westminster Confession of Faith (1646).[34] He argues for a covenant of works made with Adam,[35] original sin and guilt,[36] the resulting corruption of all the soul's faculties,[37] a total inability to will

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[31] Richard Baxter, *The Second Part of the Nonconformists Plea for Peace* (London: John Hancock, 1680), 129. For a late seventeenth-century example that confirms this remark, see George Dawson, *Origo Legum, or, A treatise of the origins of laws, and their obliging power* (London: Richard Chiswell, 1694), 3–4. Juan Azor, S.J. (d. 1603) was known for his *Institutionum moralium*, 3 vols. (Rome, 1600–1611).

[32] Burnet, *Life*, 28.

[33] See the preface to Hale, *Discourse*, a2r. Cf. Cromartie, *Hale*, 141.

[34] Cf. Cromartie, *Hale*, 149–55.

[35] Hale, *Discourse*, 156–57. Cf. *The humble advice of the Assembly of Divines, now by authority of Parliament sitting at Westminster, concerning a Confession of Faith* [hereafter WCF] (London: E. Tyler, 1647), 7.2, 19.1.

[36] Hale, *Discourse*, 160–61; 201–2, 245. Cf. WCF 6.1–3.

[37] Hale, *Discourse*, 276–81. Cf. WCF 6.2.

spiritual good,[38] God's providence through necessary, voluntary, and contingent secondary causes,[39] predestination and effectual calling,[40] Christ's intentional and effectual satisfaction for the elect alone,[41] and the perseverance of the saints.[42] He was, we might say, at least a five-point Calvinist.

Hale's religious practices were a mixture of seventeenth-century Reformed Anglicanism and the Puritanism of his youth.[43] His non-Puritan Anglican sympathies are seen in his celebration of Christmas, as evidenced by his seventeen extant Christmas poems (ca. 1651–1668), in contrast to strict Puritans who decried the practice.[44] Yet the *Discourse* also reveals the impact of his early Puritan education in rigorous attention given to practical and affective matters, including the cultivation of spiritual "watchfulness," particularly with reference to a strict Lord's Day observance.[45] Following standard Puritan practice, throughout his life Hale observed a strict observation of the Lord's Day (the only permissible activity being works of piety, charity, and necessity), spending up to two or three hours in theological meditation, and advising his children and grandchildren to do the same.[46]

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38 Hale, *Discourse*, 229. Cf. WCF 9.3.

39 Hale, *Discourse*, 129–33. Cf. WCF 5.2.

40 Hale, *Discourse*, 170–73. Cf. WCF 3.6, 10.1.

41 Hale, *Discourse*, 227–28, 230. Cf. WCF 8.5.

42 Hale, *Discourse*, 407–9. Cf. WCF 17.1.

43 On the strong presence of Reformed Anglicanism throughout the seventeenth-century, especially at Oxford, see Stephen Hampton, *Anti-Arminians: The Anglican Reformed Tradition from Charles II to George I* (Oxford: Oxford University Press, 2008).

44 Robert C. Evans, Stephen Paul Bray, and Christina M. Garner, "The 'Christmas Poems' of Sir Matthew Hale: Brief Preface and Annotated Texts," *Ben Jonson Journal* 20, no. 1 (2013): 95–125; Burnet, *Life*, 112–15; Chris Durston, "Lords of Misrule: The Puritan War on Christmas 1642–60," *History Today* 35 (December 1985): 7–14.

45 Hale, *Discourse*, 328–79 (watchfulness), 370–71 (Lord's Day). Cf. Theodore Dwight Bozeman, *The Precisianist Strain: Disciplinary Religion & Antinomian Backlash in Puritanism to 1638* (Chapel Hill: University of North Carolina Press, 2004), 110–17.

46 Burnet, *Life*, 76; Baxter, *Add. Notes*, 23–24; Preface to Hale, *Discourse*, A3v; Hale, "Directions touching the keeping of the Lord's Day," in *Works*, 1:194–204; Hale,

Hale's early theological pursuits had a direct and lasting impact on his view of the natural law. Already in the *Discourse* we find Hale's discussion of the natural law woven into the fabric of his exposition of Reformed theology. He addresses the natural law in relation to a variety of theological topics, including God, providence, humanity, Scripture, the covenant of works, redemption, mortification, and sanctification.[47] While Hale's views on soteriology later moved in an Arminian direction, most of the doctrine relating to law in the *Discourse* continued into his later thought, including the *Law of Nature*. From the *Discourse* onward, Hale expressed his theory of natural law against the background of a scholastic faculty psychology reflective of his Oxford training, in which the content of the natural law is grounded in a teleological account of human nature and its inclinations directed to a hierarchy of ends (a form of essentialism), known to the intellect through both inscribed principles and discursive reasoning, and applied through acts of the conscience.[48] All of these aspects are consonant with a Puritan education.[49] Hale at this time also followed the traditional notion that the Decalogue and the Sermon on the Mount constituted a republication and clarification of the

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"Concerning the Observation of the Lord's Day or the Christian Sabbath," in *A Letter of Advice to his Grand-children, Mary, Gabriel, Anne, Mary and Frances Hale* (London: Taylor and Hessey, 1816), 72–78; and Hale, "Considerations concerning the Present and Late Occurrences, for my own use and observation," in Williams, *Memoirs*, 62. Cf. WCF 21.8; John H. Primus, *Holy Time: Moderate Puritanism and the Sabbath* (Macon, GA: Mercer University Press, 1989); and Kenneth L. Parker, *The English Sabbath: A Study of Doctrine and Discipline from the Reformation to the Civil War* (Cambridge: Cambridge University Press, 1988).

47 Hale, *Discourse*, 23 (God); 33–35, 37–38 (providence); 46–47, 52–55, 92–96 (humanity); 102–3, 110–14 (Scripture); 153–57 (covenant of works); 228, 254–55 (redemption); 277–79, 367–69 (mortification); 438–46 (sanctification).

48 Hale, *Discourse*, 46–47, 51–55, 154–56.

49 See the treatment of natural law in William Ames, *De conscientia et eius iure, vel casibus* (Amsterdam, Joan. Janssonius, 1631), 5.1.1–36. Cf. Lee W. Gibbs, "The Puritan Natural Law Theory of William Ames," *Harvard Theological Review* 64, no. 1 (1971): 37–57.

natural law originally given to Adam but effaced with the fall.[50] This republication of the natural law related directly to Hale's Sabbatarianism. Early seventeenth-century Sabbatarians, drawing heavily on continental Reformed theologians such as Girolamo Zanchi (1516–1590) and Franciscus Junius (1545–1602), argued that the Sabbath (aside from the particularity of the day) was part of the natural law established at the creation, republished in the Decalogue, and moved from the seventh to the first day by Christ.[51] This was the same view held by Hale.[52]

Sometime between writing the *Discourse* (ca. 1639–1641) and the *Law of Nature* (ca. 1668–1670) Hale's religious perspective underwent a shift in the direction of Arminianism away from the Calvinism of his youth. According to his editor, in later years Hale "somewhat altered his opinion touching some Points in

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50 Hale, *Discourse*, 436–43. Cf. John Witte Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), chap. 4; Stephen Grabill, *Rediscovering the Natural Law in Reformed Theological Ethics* (Grand Rapids: Eerdmans, 2006), 88–90, 145–47, 165, 168. For medieval background, see Jean Porter, *Natural and Divine Law: Reclaiming the Tradition for Christian Ethics* (Grand Rapids: Eerdmans, 1999); and Michael B. Crowe, *The Changing Profile of the Natural Law* (The Hague: Martinus Nijhoff, 1977), 81, 114–15.

51 See Nicholas Bownd, *Sabbathum Veteris et Novi Testamenti: Or the true doctrine of the Sabbath* (London: Felix Kyngston, 1606), 7–8, 18–22, 31–32, 50–51, 61, 65, 70–71, et passim (citing Zanchi, Junius, et al.); John Sprint, *Propositions Tending to Proove the Necessarie Use of the Christian Sabbaoth or Lord's Day* (London: H.L. for Thomas Man, 1607), 5–6, et passim (citing Zanchi, Junius, et al.); Henry Burton, *The Law and the Gospell reconciled* (London: I.N. for Michael Sparkes, 1631), 45–47 (citing Junius); George Walker, *The Doctrine of the Sabbath* (Amsterdam, 1638), 80 (citing Zanchi); and Andrew Willet, *Hexepla in Genesin, that is, A Sixfold Commentarie upon* Genesis (London: Tho. Creede for Thomas Man, 1608), 40–43, praising Bownd's treatise as containing "a most sound doctrine of the Sabbath, as layde downe in the former positions" of himself. Cf. Patrick Collinson, "The Beginnings of English Sabbatarianism," *Studies in Church History*, vol. 1, ed. C. W. Dugmore and Charles Duggan (London, 1964), 207–21, at 212–15; Primus, *Holy Time*, 148–50; and Parker, *The English Sabbath*, 29–32, 97–98, 167–68.

52 Hale, "Directions touching the keeping of the Lord's Day," in *Works,* 1:197–98.

Controversie, especially between the Remonstrants and Contra-Remonstrants."[53] In a manuscript likely written in the late 1650s, Hale still affirmed the traditionally Calvinist belief that the light of nature is insufficient for salvation.[54] But after the Restoration he moved toward an Arminian soteriology which understood the gospel of the new covenant as offering forgiveness of sins by a condition of imperfect, sincere obedience.[55] He also came to affirm the view, commonly associated with Arminianism, that virtuous pagans could be saved through obedience to the natural law (discussed below). In the last years of his life Hale professed that "Points controverted between the Arminians and Calvinists" regarding God's decrees, his influence on the human will, the resistibility of grace, and so forth were impossible to determine and of "inconsiderable moment."[56] Yet, despite this Latitudinarian profession regarding disputed doctrines, Hale continued to struggle until the end of his life with predestination, and Baxter testifies that in the last year of his life Hale became an avid reader of Baxter's *Catholick Theologie* (1675), which Baxter claims to have helped resolve Hale's indetermination just before death about points of controversy.[57] Whether or not Hale changed his mind in the last year of his life, the soteriology present in his *Law of Nature* is clearly representative of his Arminian turn.

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[53] Hale, *Discourse*, a1v. The editor is likely Edward Stephens (see note 27). Remonstrants and Contra-Remonstrants refer respectively to the Arminian party and their traditional Reformed opponents in the Netherlands.

[54] Cromartie, *Hale*, 164 (at note 43). Cf. Hale, *Discourse*, 92, 228–29; Canons of Dort, head 3/4, art. 1–5 and *rejectio errorum* 5, in Philip Schaff, ed., *The Creeds of Christendom*, 3 vols. (New York: Harper & Brothers, 1877), 3:564–65, 569.

[55] Hale, *Works,* 1:252, 255–56, 191–92; Cromartie, *Hale*, 159, 167. Cf. Hampton, *Anti-Arminians*, 59–60, 69–70. Contrast Hale's early perspective of faith and justification in *Discourse*, 246–47, 264–70.

[56] Sir Matthew Hale, *The Judgment of the late Chief Justice Sir Matthew Hale, of the nature of True Religion, the Causes of its Corruption, and the Churches Calamity, by Mens Additions and Violences: With the desired Cure* (London: B. Simmons, 1684), First Discourse, 6, 13.

[57] Cromartie, *Hale*, 157–58, 167–68; Baxter, *Add. Notes*, 30, 33–34; Baxter, Preface to Hale, *Judgment*, A3r–v.

Although Hale turned away from his early Calvinism later in life, he resisted the other major seventeenth-century intellectual shift, the new mechanical philosophy associated with René Descartes (1596–1650), Pierre Gassendi (1592–1655), and Thomas Hobbes (1588–1679). Baxter, who conversed at length with Hale on philosophical questions, relates that overall Hale maintained an Aristotelian philosophical perspective regarding nature in the face of new ideas of motion and causality:

> We neither of us approved of all of *Aristotle*; but [Hale] valued him more than I did. We both greatly disliked the Principles of *Cartesius* and *Gassendus* (much more of the Bruitists, *Hobs* and *Spinosa*); especially their doctrine *de Motu* [of motion], and their obscuring, or denying *Nature it self*, even the *Principia Motus* [principle of motion], the *Virtutes formales* [formal virtues], which are the Causes of Operations.[58]

In this respect, Hale stands apart from English Latitudinarians who had a reputation for embracing Cartesian and atomist philosophy over against the received Aristotelianism of the schools.[59] Indeed, although Hale thought that new experiments could help to reform philosophy, he was critical of "our new philosophers, as some call the *Cartesians*," and thought that "*Aristotle* was a man of far greater experience, as well as study, than they."[60] Accordingly, while Hale accepted

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[58] Baxter, *Add. Notes*, 6.

[59] Richard Baxter, *Reliquiæ Baxterianæ, or, Mr. Richard Baxter's narrative of the most memorable passages of his life and times*, ed. Matthew Sylvester (London: T. Parkhurst et al, 1696), Part II, 386; Part III, 19–20; S. P. [Simon Patrick], *A Brief Account of the new Sect of Latitude-Men, Together with some reflections upon the New Philosophy. By S. P. of Cambridge. In answer to a Letter from his Friend at Oxford* (London, 1662); Joseph Glanvill, "Anti-Fanatical Religion, and Free Philosophy. In a Continuation of the New Atlantis," in *Essays on Several Important Subjects in Philosophy and Religion* (London: J.D., 1676); John Gascoigne, *Cambridge in the Age of the Enlightenment: Science, Religion and Politics from the Restoration to the French Revolution* (Cambridge University Press, 1989), 40–68. According to Baxter, Latitudinarians embraced both new philosophy and Arminianism.

[60] Baxter, *Add. Notes*, 9–10. Cf. Sir Matthew Hale, Preface to *Observations touching the Principles of Natural Motions* (London: W. Godbid for W. Shrowsbury, 1677), A4v–A5v.

non-Aristotelian explanations of non-living elements,[61] he still retained a traditional Aristotelian hierarchy of vegetative, sensitive, and rational souls, and a basic commitment to faculty psychology, whereby the soul is characterized by various powers, habits, and acts.[62] In his final years (ca. 1671–1676), Hale sought to reform Aristotle's philosophy of the soul in light of Jan Baptist van Helmont's (1579–1644) philosophy of "active virtues" which he correlated with Aristotelian substantial forms and qualities.[63] But Hale did not intend this as a radical overthrow of Aristotelian philosophy, as is evident from his continued appeal to Aristotle's definition of motion and his description of Aristotle as "the greatest Master of Experience and Observation" with respect to his *On the Soul* and *Physics*.[64]

In Hale's *Law of Nature*, there is little indication of his late Helmontian terminology.[65] On the other hand, Aristotle retains his privileged status as the "most Learn'd" of the philosophers (*B1*, 64r), "the Great Philosopher" (*B1*, 86v), "the great master of Observation and Learning" (*B1*, 88v), or simply "the great master" (*B1*, 102r). Hale also assumes a concept of "Specifical Natures" or "internal & essential active forms" in relation to living things, "whereby they move themselves, in their growth and vegetation, and whereby they are determin'd within their several species" (*B1*, 103v). This understanding of form as the principle of motion, growth, and natural kind suggests an Aristotelian perspective. And in his view of free choice, Hale arguably leans in a Thomistic direction whereby the exercise of the will depends on the intellect for the specification of the good (*B1*,

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61 Hale, *Primitive*, 9–11. He is equally critical of Aristotelian, Gassendian, and Cartesian assumptions in this regard. For discussion of this aspect of Hale's thought, see Cromartie, *Hale*, 195–17.

62 Hale, *Primitive*, 52–64.

63 Hale, *Principles of Natural Motions*, 7–24. Cf. Cromartie, *Hale*, 206–9, 218–19, 223–24.

64 Hale, *Principles of Natural Motions*, 2, A4v.

65 I have not found a single example of the Helmontian terms *virtus activa*, *vis activa*, *virtutes essentiales*, *vires essentiales*, or ferments which Hale uses elsewhere, e.g., *Principles of Natural Motions*, 8–15.

46v–47r).[66] In a broad philosophical sense with respect to the nature of living beings, Hale's *Law of Nature* still inhabits a similar world of ideas with great medieval and early modern scholastics such as Aquinas and Suárez.

Natural Law and Seventeenth-Century Common Law

Besides his early scholastic education at Oxford, Hale's legal training and practice certainly contributed to his views on natural law. When Hale entered Lincoln's Inn, he joined a longstanding legal culture in which lawyers were trained to view natural law as both a source and rule for positive law. Throughout the last century most historians of English common law dismissed the natural law as of no practical relevance to the development of common law, a sentiment reflected in Roscoe Pound's remark, "English lawyers have never had much concern with philosophy and natural law found little place in their books."[67] But the researches of legal historians Richard Helmholz and David Ibbetson have recently unearthed a wealth of evidence to the contrary. They argue that until the early nineteenth century natural law was widely accepted in theory and regularly used in judicial rulings, and as a result played a substantive role in the development of English and American common law.[68] Helmholz writes, "Indeed it is difficult to discover

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66 Hale, *Discourse*, 57; *Works*, 1:385; *Primitive*, 57; *Pleas*, 1:15. Cf. Aquinas, *Summa theologiae*, I-II q. 9, a. 1; and Hugues Parent, "Histoire de l'acte volontaire en droit pénal anglais et canadien," *McGill Law Journal* 45 (2000): 975–1020, at 994–97. The description of the will's "power to suspend" (*B1*, 46v) may also point to an eclectic Scotist accent.

67 Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* (New Haven: Yale University Press, 1957), 74, as cited along with other examples in Richard H. Helmholz, "Natural Law and Human Rights in English Law: From Bracton to Blackstone," *Ave Maria Law Review* 3, no. 1 (2005): 1–22, at 3.

68 Helmholz, "Natural Law and Human Rights," 1–22; Richard H. Helmholz, "The Law of Nature and the Early History of Unenumerated Rights in the United States," *University of Pennsylvania Journal of Constitutional Law* 9 (2007): 401–21; David J. Ibbetson, "Natural Law and Common Law," *Edinburgh Law Review* 5 (2001): 4–20. See also James W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore, MD: Johns Hopkins University Press, 2000), 158–59; and Mark W. Bailey, "Early Education in the United States: Natural Law Theory and Law as a Moral Science," *Journal of Legal Education* 48, no. 3 (1998): 311–28. For me-

a jurist writing before 1850 who expressed any doubts about the existence and importance of the law of nature in the regulation of human society."[69] In his estimation, although ordinarily positive law and natural law were thought to harmonize, so that appeals to positive and natural law typically went hand and hand,[70] judges in special cases could and did invoke natural law as a source of law. Such special cases normally involved situations where positive laws were silent, unclear, or the equitable application of the law required an exception to a particular case.[71] In the extraordinary case of a direct conflict between natural and positive law, such positive law was thought to be "void" and no longer obligating in conscience, although in practice judges were reluctant to directly overturn a statute by an appeal to natural law.[72] In the seventeenth century, natural law played a substantive role in legal practice, as an influential number of lawyers considered it as a source and rule for interpreting the customary common law.[73] As one historian

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dieval background on the judicial use of natural law, see Norman Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge: Cambridge University Press, 1990), 70–83.

69 Richard H. Helmholz, "Judicial Review and the Law of Nature," *Ohio Northern University Law Review* 39 (2013): 417–34, at 419.

70 Cf. Richard H. Helmholz, "Bonham's Case, Judicial Review, and the Law of Nature," *Journal of Legal Analysis* 1, no. 1 (2009): 325–54, at 333–35.

71 Helmholz, "Natural Law and Human Rights," 17–18; Helmholz, "Bonham's Case," 335–36; Helmholz, "Judicial Review," 424–27, 430–33; Tubbs, *The Common Law Mind*, 93–109, 121–26, 176.

72 Helmholz, "Bonham's Case," 345–46; Helmholz, "Judicial Review," 427–30; cf. Mark D. Walters, "St. German on Reason and Parliamentary Sovereignty," *Cambridge Law Journal* 62, no. 2 (2003): 335–70, at 343–44 and 361–66; Tubbs, *The Common Law Mind*, 185–86.

73 For the following I am indebted to Alan Cromartie, "The idea of common law as custom," in *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, ed. Amanda Perreau-Saussine and James B. Murphy (Cambridge: Cambridge University Press, 2007), 203–27; and Tubbs, *The Common Law Mind*, 148–78. See also Alan Cromartie, "General Introduction" to Hobbes' *A Dialogue Between a Philosopher and a Student, of the Common Laws of England*, ed. Alan Cromartie, in *The Clarendon Edition of the Works of Thomas Hobbes*, vol. 11, *Writings on Common Law and Hereditary Right*, ed. Alan Cromartie and Quentin Skinner

has put it, lawyers in the tradition of Sir Edward Coke saw the common law as "natural law applied to English life."[74] The practical role of natural law can be clearly seen in the account given by early seventeenth-century lawyers regarding the construction of the general principles which they used as a guide in making particular judgments. By the early seventeenth century, a renewed attention to method and Aristotelian logic had transformed English legal literature, resulting in textbooks on legal maxims.[75] In all likelihood, Hale studied from these books as well, for the attorney-general William Noy (1577–1634)—who "directed [Hale] in his Study" and befriended him to such an extent that Hale was called "young Noy"[76]—had himself written a popular book of legal maxims.[77] These maxims, which lawyers also called "grounds," "principles," "eruditions," or "rules," were thought to be midway between reason and law: a maxim is the "conclusion of reason" but the "foundation of Law."[78] Maxims were compiled from two sources, natural law and custom, as summarized in the following definition of Sir John Doddridge (1555–1626):

> A Rule or Principle of the Law of England, is a Conclusion either of the Law of Nature, or derived from some generall custome used within the Realme, containing in a short summe the reason and direction of many particular and speciall occurrences.[79]

(Oxford: Clarendon Press, 2005), xxvi–xxxii; Sommerville, *Royalists and Patriots*, 87–90.

74 Alan Cromartie, "The Constitutionalist Revolution: The Transformation of Political Culture in Early Stuart England," *Past & Present* 163 (May 1999): 76–120, at 82, 86.

75 Tubbs, *The Common Law Mind*, 167–78; Wilfred Prest, "The Dialectical Origins of Finch's Law," *Cambridge Law Journal* 36, no. 2 (1977): 326–52, at 327–28.

76 Burnet, *Life*, 19–20.

77 William Noy, *A Treatise of the Principall Grounds and Maximes of the Lawes of the Kingdome* (London: R.H., 1641). Many printings followed: 1642, 1651, 1660, 1663, 1667, 1677, 1757, 1794.

78 Sir John Doddridge, *The English Lawyer* (London: I. More, 1631), 152. Cf. Hawke, "To the Candid and Courteous Gentlemen and Students of the Colledges and Seminaries of the Lawes," in *The Grounds of the Lawes of England*, A7, a5^{r}.

79 Doddridge, *The English Lawyer*, 153.

Since maxims summarized the grounds of legal reasoning, and were a kind of mixture of natural law and custom, maxims were subject to revision by natural law. According to Sir Henry Finch (ca. 1558–1625), the deductions of the natural law are the "Lords Paramount" of maxims, and "rule and overrule" them.[80]

For lawyers such as Doddridge and Finch, the common law was certainly general custom, but it was also a product of a discursive rational process, practiced by a learned professional class. Lawyers drew upon the reasoning of past judicial rulings, formulated principles or maxims through a process of "disputation and argument,"[81] and then used these maxims, in the words of Sir Francis Bacon, as "laws of lawes."[82] This view of law as the product and profession of trained reason found expression in the idea—shared by Doddridge and Coke (despite their differences)—that the common law was "reason," however not unlearned reason but rather the "artificial" reason of those skilled in the law.[83] Similarly, Finch called common law "nothing els but common reason: but what reason? not that which everie one doth frame unto himselfe: but refined reason."[84] Hale's mentor Noy said that maxims "shall alwayes be determined by the Judges, because they are knowne to none but the learned."[85]

By the mid-eighteenth century the early seventeenth-century view of common law as actively refined reason gave way to the idea that common law is general

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80 Finch, *Law, or, A Discourse Thereof*, 5.

81 Doddridge, *The English Lawyer*, 242.

82 Sir Francis Bacon, *A Collection of Some Principall Rules and Maximes of the Common Lawes of England* (London: [Robert Young for] the assignes of I. More Esq., 1630), B2^{r}.

83 Doddridge, *The English Lawyer*, 242; Sir Edward Coke, *The first part of the Institutes of the Lawes of England* (London: [Adam Islip] for the Societie of Stationers, 1628), sect. 80b. Cf. Cromartie, "The Constitutionalist Revolution," 83, 86–87; Cromartie, "General Introduction" to Hobbes' *Dialogue*, xxxi; Cromartie, *Hale*, 17–19; and Sommerville, *Royalists and Patriots*, 89. For differences between Doddridge and Coke, see Tubbs, *The Common Law Mind*, 167–70.

84 Finch, *Law, or, A Discourse Thereof*, 75.

85 Noy, *A Treatise of the Principall Grounds*, 21.

custom derived from popular consent, and Hale contributed to this shift.[86] In conformity to his own description of law as the command of one in authority, Hale argued that the common law obligates not by force of its reason but from the tacit consent of legislative authority.[87] However, the older perspective of common law as partly derivative of natural law and developed into the artificial reason of lawyers also found a place in Hale's thought. Hale assumed that the common law prohibited many of the very same things as were also prohibited "by the laws of God and nature," even though particular punishments were a determination of positive law.[88] There is some indication that Hale accepted juridical reasoning as a source for new laws in his *History of the Common Law*.[89] The view of the common law as "refined reason" is suggested by Hale's comment that "Common Law does determine what of those Customs are good and reasonable, and what are unreasonable and void."[90] Hale accepted the view that the judge may make further deductions from the common law which harmonized with the "great Substratum" of existing common law, or even make decisions where the only guide is the "common Reason of the Thing."[91] He reserved a place for the courts and judges in the reformation of law apart from parliament.[92] Hale's view of the role of judicial reasoning is also reflected in his defense of common law against Hobbes' objections. Hobbes had objected that Coke's doctrine of "artificial reason" implied judicial authority beyond the will of the sovereign. According to Hobbes, "It is not Wisdom, but Authority that makes a Law."[93] Against this

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86 See Cromartie, "The idea of common law as custom," 220–27.

87 This appears plainly, e.g., in chapter one of our text (*B1*, 51v–52r).

88 Hale, *Pleas*, 1:1.

89 See Cromartie, *Hale*, 106–7, who instances Hale, *History*, 40.

90 Hale, *History*, 18.

91 Hale, *History*, 46.

92 Sir Matthew Hale, "Considerations Touching the Amendment or Alteration of Laws," in *A Collection of Tracts Relative to the Law of England, from Manuscripts*, ed. Francis Hargrave, vol. 1 (Dublin: Lynch, 1787), 272.

93 Cromartie, "General Introduction" to Hobbes' *Dialogue*, xxxii.

attack of Hobbes, Hale defended the necessity for a professional class of lawyers who excelled in acquired knowledge of their craft.[94]

Hale's studies at Lincoln's Inn formed him in the early seventeenth-century common law tradition. A second major influence on his life and thought was his deep friendship with John Selden, with whom he became close friends in the late 1630s. This friendship, which was to last until Selden's death in 1654, had an enduring impact on Hale's thought in general and in particular his natural-law theory. Baxter said of Hale late in life, "I know you are acquainted [with] how greatly he valued Mr. Selden, being one of his Executors; his Books and Picture being still near him."[95] According to Burnet, Selden encouraged Hale to pursue a wide scope of learning, which included studies in the Roman civil law and both ancient and modern philosophy.[96] One of the early works we can be sure that Hale read carefully is Hugo Grotius' *De jure belli ac pacis* (1625), a work which Selden himself praised as "that outstanding" and "that incomparable" book.[97] But the work which Hale cited more than any other in his *Law of Nature* is Selden's *De jure naturali & gentium, juxta disciplinam Ebraeorum* (1640). In his *Law of Nature*, Hale does not cite many authorities other than the Bible, but he refers to Selden's work on six separate occasions. When Hale mentions Selden it is always with the greatest respect, but his use of *De jure naturali* is eclectic, and as we shall see, not uncritical.

Synopsis

Hale's *Law of Nature* appears to have been composed, at least in part, as a private exercise to help with his own meditations. He cites few authorities

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94 Hale, *Dialogue*, 501–2; Cromartie, *Hale*, 101–3.

95 Baxter, *Add. Notes*, 40.

96 Burnet, *Life*, 22–28.

97 Cromartie, *Hale*, 48, argues that Hale's views on sovereign power likely derive from Grotius. For Selden's praise of Grotius' *De jure belli*, see John Selden, *De jure naturali & gentium, juxta disciplinam Ebraeorum, libri septem* (London: Richard Bishop, 1640), 34–35: "…Hugo Grotius, qui in eximiis illis de Jure Belli ac Pacis libris…"; and 125: "…ex incomparabili illo viri Amplissimi Hugonis Grotii opere de Jure Belli ac Pacis…" Cf. G. J. Toomer, *John Selden: A Life in Scholarship*, 2 vols. (Oxford: Oxford University Press, 2009), 2:496, 505.

besides the Bible which gives the impression of an exercise conducted largely from memory. Given the prominence of biblical citations and theological argument in *Law of Nature*, it is possible that it was composed, as was Hale's custom in writing his other theological meditations, on Sunday afternoons between the evening sermon and supper.[98] The main reason he wrote such manuscripts was to "fix" his thoughts and "keep them from wandring."[99] An eyewitness to Hale's actual writing reports that Hale wrote in a spontaneous manner:

> His usual Manner of writing these things was this: When he had resolved on the Subject, the first thing he usually did, was with his pen upon some loose piece of paper, and sometimes upon a corner or the margin of the Paper he wrote on, to draw a Scheme of his whole Discourse, or of so much of it as he designed at that time to consider. This done he tap'd his thoughts and let them run [*sic*], as he expressed it to me himself; and they usually ran as fast as his hand (though a very ready one) could trace them; insomuch that in that space, as he hath told me, he often wrote two sheets, and at other times between one and two; and I have my self known him write according to that proportion, when I have been reading in the same room with him, for divers hours together. So that these writings are plainly a kind of extempore Meditations, only they came from a Head and Heart well fraught with a rich Treasure of Humane and Divine Knowledge, which the famous Legislator Justinian makes the necessary qualifications of a compleat Lawyer.[100]

The picture painted by this account is that of a fast and free-flowing writing style. Against this background, it is remarkable that Hale's *Law of Nature* also evidences a great degree of order and method.

As the title of Hale's *Law of Nature* indicates, almost the entire treatise is devoted to the law of nature. After three introductory chapters on the nature, effects, and kinds of laws comprising the treatment of laws in general and a "premise" to natural law (*B1*, 42r), Hale turns to a discussion of natural law, which fills the

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98 Hale, *Discourse*, A3v; Baxter, *Add. Notes*, 31.

99 Hale, *Contemplations Moral and Divine*, A2r; Hale, *Discourse*, A4r. See Cromartie, *Hale*, 6 who provides manuscript evidence showing this was Hale's own stated reason for writing.

100 Hale, *Discourse*, A4.

remaining ten chapters. Near the beginning of chapter four Hale provides the reader with his own sketch of the contents of the remaining chapters:

> And now to pursue the method propounded, I shall endeavour to shew first, what those Laws are that are thus given: Secondly that these Laws are given to Mankind by Almighty God and that not only as Rules of direction, but as obliging Law's: 3. The Manner how they are given; 4. The End for which they are given; 5. I shall consider the Objections Against it. (*B1*, 59r–v)

From this sketch, we can gather the internal organization of the remainder of the treatise. Hale organizes the remaining chapters along the lines of Aristotelian causality into material, formal, and final causes.[101] In chapters four and five, Hale begins to discuss what the laws of nature are (their material cause). Chapter four treats the question of sources or "the *Media* whereby the discovery of these Naturall Laws is made" (*B1*, 62r). Chapter five gives "some account of the particulars" of the natural laws (*B1*, 66v). These two chapters form a kind of summary of the material content of Hale's natural-law theory.

The remaining chapters (6–13), with the exception of chapter twelve on human law, provide a more detailed elaboration on the natural law according to its material, formal, and final causes. In chapter six Hale treats the "matter" of natural law which he had begun discussing in chapter five. The material content of the natural law consists of its "intrinsick Moral goodness" and "congruity to Right reason" prior to all other law (*B1*, 93r). Chapters seven through ten deal with two aspects of the formal cause of natural law, namely its obligation and promulgation.[102] In chapter seven he argues that goodness alone is not sufficient to obligate, and so the "Formall reason" of natural law consists in God's command as lawgiver. Hale proceeds in chapters 8–11 to a lengthy discussion of its promulgation. He divides this publication into two kinds: "primitive and

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[101] Cf. Sir Matthew Hale, "Notes on circuitus autumnalis" [1668], fols. 15r–16r, the James Marshall and Marie-Louise Osborn Collection, Beinecke Rare Book and Manuscript Library, Yale University, New Haven, CT. These initial notes of a plan for the present treatise organize the natural law into its efficient, final, formal, and material causes (fol. 16r). See the Textual Introduction for further details.

[102] Hale, "Notes on circuitus autumnalis," fol. 16r, Osborn Collection, places promulgation under the formal cause of natural law.

natural" and "supplementall or adventitious" (*B1*, 99r). Natural publication is discussed in chapters 8–10, which treat respectively God's common irradiation through the *intellectus agens* (ch. 8), implanted common notions (ch. 9), and ratiocination and conscience (ch. 10). Supplemental publication is discussed in chapter eleven, where Hale argues that the natural law was externally restored or repeated in four main epochs: Adam to the Deluge, the Deluge to Sinai, Sinai to Christ, and finally Christ to the present. Chapter thirteen, Hale's most heavily theological section of the work, discusses the "end" or final cause of the natural law. Hale prefaces the chapter with remarks on God's providential government in directing humanity to a higher end than the animals through natural law, and then proceeds to argue at length for the controversial claim that natural law is God's means of salvation for virtuous pagans.

While chapters 6–13 fall into Hale's treatment of the causality of natural law, chapter twelve on human laws sits uneasily within this framework. The likely solution to this discrepancy lies in Hale's original "method" sketched at the beginning of chapter four, where he tells the reader that in the fifth and final place he would "consider the Objections Against [natural law]" (*B1*, 59v). In his introduction to chapter twelve, Hale tells the reader that part of the purpose of the chapter is to "prevent or answer a tacite Objection that may arise." The great objection that he seeks to address in this chapter is why human law is necessary since the natural law already "accomodates to the great End of the human Nature" with effectual publication both in nature and revelation (*B1*, 133v). This retrospective glance at the end and publication of the natural law (i.e., ch. 13 and 8–11), when compared with Hale's own sketch of his method for the treatise, suggests that chapter twelve was at least intended to be written, or was even in fact written, after the completion of the other chapters. Why Hale may have rearranged the final chapters I leave to the reader's imagination.

Law in General

At the opening of his *Law of Nature*, Hale provides a definition of law in general which forms the basis for the entire ensuing discourse. Although he claims not to be bound by scholastic terms (*B1*, 42r), his practice is nonetheless characteristic of a scholastic attention to precise definitions and terms. Law, he claims, consists of seven aspects: it is (1) a rule of reason for (2) moral actions, (3) instituted and promulgated to (4) rational creatures, (5) by one who has

authority (6) to obligate by way of command and (7) to exact obedience. Terms (2) and (4) combine into the basic notion that law is properly for rational and not irrational creatures. The idea that law is a rule of reason in rational creatures and directing them to a good end is an ancient notion expressed in Cicero and Aquinas, and need not detain us.[103] It is rather the description of law as a command given to rational creatures alone, which requires some explanation, since it has invited the greatest amount of interpretation.

Hale's definition of law as a command has rightly been taken as a basic continuity between him and Selden. As Cromartie, following in the steps of Tuck, recognized, "Selden regarded law as a command, imposed on a reasonable creature, with a penalty attached." On this point, Cromartie observed, "Hale simply agreed with his mentor [Selden]."[104] Yet since Hale does not cite Selden (or anyone else) on this particular point, it is an open question whether this definition is, as Tuck assumed, particularly "Seldenian."[105] Indeed, as Johann Sommerville has pointed out, this aspect of Selden's thought is not unique; rather, it "was that of a conventional voluntarist," and Selden was interpreted as such by contemporaries.[106] There is also the added datum that Hale, writing ca. 1639–1641, when he was largely recapitulating his early scholastic and Puritan education at Oxford, already presents law as a command imposed on rational creatures with obligation and penalty.[107] Are we to believe that after only recently

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[103] Cicero, *De legibus*, 1.6; Aquinas, *Summa theologiae*, I-II q. 90 a. 4.

[104] Cromartie, *Hale*, 90. This view is succinctly expressed in Selden, *De jure naturali*, 92–93: "For pure, unaided reason merely persuades or demonstrates; it does not order, nor bind anyone to their duty, unless it is accompanied by the authority of someone who is superior to the man in question." (*Quin ratio, quatenus talis solum & simplex, suadet & demonstrat, non jubet, aut ad officium, nisi superioris eo qui jubetur accedat simul autoritas, obligat*.). I follow the translation provided in Tuck, *Natural Rights Theories*, 93–94.

[105] Tuck, *Natural Rights Theories*, 162.

[106] J. P. Sommerville, "John Selden, the Law of Nature, and the Origins of Government," *The Historical Journal* 27, no. 2 (1984): 437–47, at 443.

[107] Hale, *Discourse*, 22–23: "In respect of Obligation … A Law commanding or forbidding a thing under a pain.… A power to exact an Obedience to that Law, and to inflict the punishment that follows upon the breach of this Law." The same view appears in

becoming acquainted with Selden in the late 1630s, Hale rapidly absorbed a specific "Seldenian" theory of law as command? No, the most plausible sources for Hale's early views are the scholastic authors Hale is known to have been reading (Scotus, Aquinas, and Suárez). Given this datum of Hale's early expression of law as command applicable to rational creatures, and the fact that Hale provides no indication in chapter one of his *Law of Nature* regarding whom he is following in his definition of law, it is surprising that alternative possibilities to Selden's influence have rarely been entertained.[108] But if we look beyond Selden for possible sources of Hale's definition of law among authors whom Hale, along with his close friends Selden and Baxter, is known to have read, Suárez is an obvious candidate.

A comparison between Suárez and Hale on the nature of law in fact yields remarkable parallels. Suárez opened his *De legibus* by objecting that Aquinas's definition of law as a rule for action was too general since it would also apply both to irrational creatures and various arts such as grammar. Instead, Suárez insisted, law should be more narrowly construed as applicable to the moral acts.[109] This is the same reasoning employed by Hale, who argues that a rule by itself is "too large and comprehensive" a notion that could apply to the arts of rhetoric, logic, and medicine (*B1*, 42v). Therefore, like Suárez, Hale specifies that law refers properly to moral acts (*B1*, 44r). Both Suárez and Hale, moreover, restrict the application of law to rational creatures capable of free acts, for the reason that such is necessary for moral government by command (*B1*, 46r).[110]

These similarities on their own may not suffice to prove definitively a distinctively Suárezian influence. After all, Puritans such as Ames similarly excluded

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Discourse, 155–57. That law properly applies to rational, and not irrational, creatures, can be gathered from Hale's comments at *Discourse*, 22; and *Discourse*, 54: "We find in the Creatures, several Instincts, incident almost to every Creature, which are connatural with it … yet are not Laws or Principles of Nature." On Hale's education see above.

[108] Postema, "Classical Common Law Jurisprudence (Part II)," 25, suggests a parallel to Suárez but does not develop the point further.

[109] Francisco Suárez, *Tractatus de legibus et legislatore Deo*, 1.1.1, 1.1.5, in *Opera omnia*, 28 vols. (Paris: L. Vivès, 1856–1866), 5:1, 2.

[110] Suárez, *De legibus*, 1.3.2–3 (*Opera*, 5:7–8).

the inclinations of irrational creatures from the proper definition of law.[111] But when these continuities with Suárez are combined with the evidence produced below for continuity with Suárez on the foundations and content of the natural law, the case appears quite strong. We should also observe that despite strong continuities with Suárez, Hale does integrate some distinctive points from Selden with respect to the natural law and its publication, as Cromartie has rightly observed, and upon which we will touch below.

Divine Foundation of Natural Law

The reader who is already familiar with the older English treatises of Sir John Fortescue and Christopher St German will notice a striking difference in the opening chapters of Hale's *Law of Nature*. The term eternal law (*lex aeternae*) is nowhere to be found. Instead of the familiar Thomistic description of natural law as the "participation of the eternal law in a rational creature" found in the earlier authors,[112] Hale's typology of law begins with divine and human law, and then subdivides divine law into natural and positive law (*B1*, 56r–v). There was some precedent for Hale's typology of law. Of the lawyers, Henry Finch omitted eternal law and divided all laws into divine and human, although unlike Hale, Finch placed natural and positive law under human law.[113] Of the theologians, William Ames in his popular *De conscientia et eius iure, vel casibus* closely approximated the typology of Hale.[114] However, the most likely source for Hale's typology of law is Selden, who set forth the same division and subdivision.[115]

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111 Ames, *De conscientia*, 5.1.13.

112 Sir John Fortescue, *De Natura Legis Naturae*, I.v, I.xlii, in *Works*, ed. Thomas (Fortescue), Lord Clermont, 2 vols. (London, 1869), 1:68, 1:107 (citing Aquinas, *Summa theologiae*, I-II q. 96 a. 2 ad 3; and I-II q. 91 a. 2 co); Christopher St German, *Doctor and Student*, ed. T.F.T. Plucknett and J.L. Barton (London: Selden Society, 1974), 13. Cf. Doe, *Fundamental Authority in Late Medieval English Law*, 61 (Fortescue), 113n23 (St German).

113 Sir Henry Finch, *Nomotechnia; Cestascavoir, Vn Description Del Common Leys Dangleterre Solonqve les Rules del Art* (London: [Adam Islip] for the Societie of Stationers, 1613), 1–2.

114 Ames, *De conscientia*, 5.1.3–5.

115 Selden, *De jure naturali*, 102.

Despite first appearances, the difference between Hale and the older Thomistic description of natural law as rooted in eternal law should not be exaggerated. The best precedents for Hale's typology did not intend any radical break with the notion of eternal law. Ames' definition of natural law reads, "the natural law is the same as what is ordinarily called eternal law. But it is called eternal, insofar as it is in God himself from eternity, while [it is called] natural insofar as it is implanted and impressed in human nature by the author of nature."[116] With Selden, the relation to the Thomistic definition is explicit. He says, citing Alexander of Hales, Aquinas, and Suárez, that recent theologians "say that [the natural law] is *the participation of the eternal law in a rational creature*, and indeed divine."[117] If Selden is to be believed, divine law and eternal law could be taken synonymously.

More important than the terminology is the reality which the concept of eternal law pointed to, viz., the exemplary pattern and providence of God directing all natures to their specific ends, with the natural law being the participation of the rational creature in this pattern and governance.[118] It is not difficult to establish Hale's conceptual continuity with these ideas. Hale's agreement with the concept of natural law as a participation in God's exemplary wisdom is clear from his description of the natural law as "little and finite transcripts of the perfect and infinite Exemplar" (*B1*, 94r–v), "small Modeles" and "impressions and strictures of the Divine Exemplar" (*B1*, 93v). Hale also places the natural law given to rational creatures within the overall context of God's providence directing the "severall Ends" of creatures "suitable to their kinds and Natures" (*B1*, 57r). While Hale

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[116] Ames, *De conscientia*, 5.1.6: "Jus naturale, vel lex naturalis est eadem quae dici solet lex aeterna. Sed aeterna dicitur, quatenus est in ipso Deo ab aeterno: naturalis aute[m] quatenus indita est, & impressa naturae hominum ab authore naturae."

[117] Selden, *De jure naturali*, 102: "Primum autem aiunt [*] esse participationem Legis aeternae in rationali creatura, adeoque divinum." The marginal note at [*] reads: "Alexander Alensis part. 3, quaest. 26. art. 4. S. Thom. I. secundae q. 19 [= 91]. art. 2. Suarez. de legibus lib. I. cap. 3. & lib. 2. cap. 6. §. 13. &c." Selden continues to cite a number of theologians (Luis de Molina, Alonso de Castro) and jurists (Fernando Vázquez de Menchaca, Joachim Mynsinger von Frundeck, et al.).

[118] Aquinas, *Summa theologiae*, I-II q. 91 a. 1–2; q. 93 a. 1; Suárez, *De legibus*, 1.3.6–8 (*Opera*, 5:8–9).

still retains the conception of natural law as rooted in God's exemplary wisdom and part of God's providence, he declines to call this eternal law.

Hale's silence with respect to eternal law could be due to his position—shared with Suárez, Ames, Baxter, and others—that law is properly a moral rule that binds rational creatures, and can only be metaphorically applied to the inclinations of irrational creatures (*B1*, 44v).[119] Suárez had already objected that the use of eternal "law" as a designation for God's providence is "highly metaphorical," although he still retained the terminology on other grounds.[120] Given Hale's similar premises that limited the proper scope of law to rational creatures, his substitution of divine law for eternal law may have been his way of jettisoning terminology incompatible with his basic definition of law. In any event, Hale, unlike scholastics such as Suárez, preferred not to be bound by the forms of traditional terms and expressions, so long as the meaning remained clear (*B1*, 42r).[121]

While Hale is silent regarding eternal law, he does discuss another question in which he is clearly indebted to Suárez. Within the context of the formal reason (*ratio formalis*) of the natural law, Suárez had addressed a long-running scholastic debate on whether the natural law is properly understood to be indicative (*lex indicativa*) or prescriptive (*lex praeceptiva*). According to Suárez, the former intellectualist view would entail that the natural law does not depend on God as legislator, whereas the latter voluntarist view would entail that acts are good simply because God wills them. Suárez took a *via media* between these extremes by arguing that the natural law is both indicative and prescriptive.[122] Now Hale follows Suárez's solution quite closely in chapter seven of *Law of*

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[119] Suárez, *De legibus*, 1.1.2 (*Opera*, 5:1); Ames, *De conscientia*, 5.1.13; Richard Baxter, *A Holy Commonwealth, or, Political Aphorisms, Opening the true Principles of Government* (London: Thomas Underhill and Francis Tyton, 1659), 317–20; Francis Turretin, *Institutes of Elenctic Theology*, 3 vols. (Phillipsburg, NJ: P&R Publishing, 1992–1997), 11.1.5, 11.1.10.

[120] Suárez, *De legibus*, 2.1.7 (*Opera*, 5:87). Cf. Tattay Szilárd, "Reason, Will, Freedom: Natural Law and Natural Rights in Later Scholastic Thought" (PhD diss.: Pázmány Péter Catholic University, 2012), 89–90.

[121] Cf. Suárez, *De legibus*, 2.1.5 (*Opera*, 5:86–87).

[122] Suárez, *De legibus*, 2.6.3–5 (*Opera*, 5:104–5). The question of the *ratio formalis* is raised in *De legibus*, 2.5.1. Cf. M. B. Crowe, "The 'Impious Thesis': A Paradox in

Nature, even framing the chapter title in terms of the "Formall reason" of the natural law (*B1*, 94v). Having altered the traditional terminology (from *lex* to *vis*), Hale writes that the natural law consists of two things: *vis indicativa* as the "natural goodness & natural evill" of the natural law, and "*vis praeceptiva*, or *imperativa*, that gives this that we call the Law of Nature, the true formall reason of a Law, and there upon induceth an Obligation" (*B1*, 95r–v). The *vis indicativa* is the expression of God's wisdom and power as found in human inclinations (or "propensions") and the rational faculty whereby good and evil is discerned. The *vis praeceptiva* "proceeds from the soveraign will of God as the Supream Rector and Legislator of Mankind" (*B1*, 95v–96r).[123] Like Suárez, Hale also thinks that the *vis praeceptiva* superadds obligation regarding things that are intrinsically good or evil (*B1*, 96r).[124] We have then, in chapter seven of Hale's *Law of Nature*, a recapitulation of Suárez's *via media* between intellectualism and voluntarism, according to which the divine wisdom is the foundation for the intrinsic goodness of the natural law while the divine will is the foundation for the obligation of the natural law.

The picture that emerges from Hale's various remarks on the divine foundations of the natural law is one that is neither entirely intellectualist nor entirely voluntarist. In its broad outlines it appears close to Suárez's attempt at a *via media* between those extremes. Although Hale omits the terminology of eternal law, he nevertheless finds the ultimate foundation of the content of natural law in God's eternal exemplary wisdom and the proximate foundation in the inclinations and rational nature of humanity. This aspect of the natural law ensures an essentialist or realist foundation for the natural law. For Hale, God's will gives to natural law its formal character as "law," providing the additional binding force required to obligate rational creatures.

Sources and Content of Natural Law

The question of whether or to what extent seventeenth-century theories of natural law, beginning with Grotius, constitute an intellectual revolution and the

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Hugo Grotius?" *Tijdschrift voor Filosofie* 38, no. 3 (Sep. 1976): 379–410, at 390–95; and Szilárd, "Reason, Will, Freedom," 94–110.

123 Cf. Suárez, *De legibus*, 2.6.13 (*Opera*, 5:108–9).

124 Cf. Suárez, *De legibus*, 2.6.11–12 (*Opera*, 5:108).

inauguration of a "modern" natural law theory is an ongoing debate. Among the proponents of a distinctively "modern" idea of natural law, Richard Tuck has argued that beginning with Grotius the contents of the natural law became "minimalist," or reduced to the principles of self-preservation and not doing harm to others.[125] An alternative theory, as argued by Merio Scattola, locates an intellectual revolution not in Grotius but in Samuel Pufendorf (1632–1694) and Christian Thomasius (1655–1728), who are said to have constructed a novel moral epistemology independent of theology and set over against the perspective of the older scholasticism.[126] My present concern is not with the merits of these arguments,[127] but rather as a point of comparison with Hale. For it can be easily

[125] Richard Tuck, "The 'Modern' Theory of Natural Law," in *The Languages of Political Theory in Early-Modern Europe*, ed. Anthony Pagden (Cambridge: Cambridge University Press, 1987), 99–119. Others have argued a secular turn beginning with Grotius: A.P. D'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (London: Hutchinson's University Library, 1951), 52–53; and Knud Haakonssen, *Natural Law and Moral Philosophy from Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996), 29.

[126] Merio Scattola, "Scientific Revolution in the Moral Sciences: The Controversy between Samuel Pufendorf and the Lutheran Theologians of the Late Seventeenth Century," in *Controversies within the Scientific Revolution*, ed. Marcelo Dascal and Victor D. Boantza (Amsterdam: John Benjamins, 2011), 251–75; Scattola, "Before and After Natural Law: Models of Natural Law in Ancient and Modern Times," in *Early Modern Natural Law Theories: Contexts and Strategies in the Early Enlightenment*, ed. T. J. Hochstrasser and P. Schröder (Dordrecht: Kluwer, 2003), 1–30; Scattola, "*Scientia Iuris* and *Ius Naturae*: The Jurisprudence of the Holy Roman Empire in the Seventeenth and Eighteenth Centuries," in *A History of the Philosophy of Law in the Civil Law World, 1600–1900*, ed. Damiano Canale, Paolo Grossi, and Hasso Hofmann, A Treatise of Legal Philosophy and General Jurisprudence 9 (Dordrecht: Springer, 2009), 1–41.

[127] For compelling critiques of a Grotian revolution, see Terence Irwin, *The Development of Ethics: A Historical and Critical Study*, vol. 2, *From Suarez to Rousseau* (Oxford: Oxford University Press, 2008), 70–99; Scattola, "*Scientia Iuris* and *Ius Naturae*," 18–21; Johann P. Sommerville, "Selden, Grotius, and the Seventeenth-Century Intellectual Revolution in Moral and Political Theory," in *Rhetoric and Law in Early Modern Europe*, ed. Victoria Kahn and Lorna Hutson (New Haven: Yale University Press, 2001), 318–44; and Brian Tierney, *The Idea of Natural Rights: Studies on*

shown that Hale's view of the content of natural law is neither minimalist nor independent of theology nor anti-scholastic. Instead, Hale is directly critical of a minimalist approach to natural law and sets forth an account of the kinds of precepts of natural law that is nearly identical to that of Suárez.

In chapter four, after briefly defining natural law as implanted common notions directing humanity to pursue good and avoid evil (*B1*, 59r–v), Hale begins with a warning to the reader regarding two major errors in the approach to natural law taken by "moderne" philosophers. These are over-speculation and reductionism. Among recent philosophers, argues Hale, some have over-speculated on the particulars of natural law, thereby drawing conclusions about the natural law "not intended as the common Rule for all Mankind," whereas others have minimized or "shrunk up" the natural law making self-preservation "the only Cardinall Law" from which the rest are deduced (*B1*, 60r). While it is unclear which over-speculative philosophers he has in mind, the reduction of natural law to self-preservation and deductions thereof is certainly a reference to Hobbes.[128] This was an entirely conventional reading of Hobbes' natural-law theory.[129]

In the seventeenth century, there was no agreement on the method of determining which precepts belong to the natural law. One option, taken by the Calvinist jurist Johannes Althusius (1557–1638), was to collate principles from legal, philosophical, and theological sources in light of biblical law, particularly the Decalogue.[130] Grotius summarized other options which did not entail

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Natural Rights, Natural Law, and Church Law, 1150–1625 (Atlanta: Scholars Press, 1997), 317–24.

128 Hobbes, *De cive*, 1.7; *Leviathan*, 14.1–3.

129 Johann P. Sommerville, *Thomas Hobbes: Political Ideas in Historical Context* (New York: St. Martin's Press, 1992), 49; Samuel I. Mintz, *The Hunting of Leviathan: Seventeenth-Century Reactions to the Materialism and Moral Philosophy of Thomas Hobbes* (Cambridge: Cambridge University Press, 1962), 143–46. This is a reading also taken by various modern scholars, e.g., Irwin, *Development of Ethics*, 2:126–28; and Sommerville, *Thomas Hobbes*, 32–33.

130 See John Witte Jr., "A Demonstrative Theory of Natural Law: Johannes Althusius and the Rise of Calvinist Jurisprudence," in Johannes Althusius, *On Law and Power*, trans. Jeffrey J. Veenstra (Grand Rapids: CLP Academic, 2013), xlix–lxxiii; adapted from Witte, "A Demonstrative Theory of Natural Law: The Original Contribution of

a direct appeal to biblical revelation: one could proceed *a priori* by reasoning that conforms to reasonable nature itself, or *a posteriori* from effects by collecting the general opinions of "all nations, or such as are more civilized" (*omnes gentes*, *aut moratiores omnes tale*).[131] Grotius himself employed both of his proposed methods, and he was followed by Nathaniel Culverwell (1619–1651), who praised Grotius as a model for deriving natural law from the agreement of nations (*consensus gentium*).[132] But the argument from common agreement also had its critics. Hobbes, Pufendorf, John Locke, and many others into the eighteenth century rejected this approach.[133] Selden, whose position on this question is unique and has been characterized as "diametrically opposed to the Dutchman [Grotius]," rejected the derivation of natural law from either reason alone or the more civilized nations as unreliable guides, favoring in their place the Jewish tradition.[134]

In light of the consistent portrayal in the secondary literature of Hale as "Seldenian" it may come as some surprise that on such a foundational matter as determining the common notions of natural law Hale gently sets aside the method of his friend (*B1*, 66r).[135] In fact, Hale's view of the matter is close to that of

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Johannes Althusius," in *Public Theology for a Global Society: Essays in Honor of Max L. Stackhouse*, ed. Deirdre King Hainsworth and Scott R. Paeth (Grand Rapids: Eerdmans, 2010), 21–36.

131 Hugo Grotius, *De jure belli ac pacis libri tres* (Amsterdam: Joannes Blaeu, 1667), 1.1.12.

132 Grotius, *De jure belli*, Prol. 39–40; Culverwell, *Discourse of the Light of Nature*, 72–73.

133 Hobbes, *De cive*, 2.1; Samuel Pufendorf, *De jure naturae et gentium* (Lund: Adam Junghans, 1672), 2.3.7; John Locke, *Essays on the Law of Nature*, ed. W. von Leyden (Oxford: Clarendon Press, 1954), 37, 161n3. On Hobbes, Pufendorf, and the later reception, see Tetsuya Toyoda, *Theory and Politics of the Law of Nations: Political Bias in International Law Discourse of Seven German Court Councilors in the Seventeenth and Eighteenth Centuries* (Leiden: Martinus Nijhoff, 2011), 25–39.

134 Selden, *De jure naturali*, 86–91; Sommerville, "Selden, Grotius," 336–37.

135 Contra Tuck, *Natural Rights Theories*, 163: "[Hale] proceeded to outline the source of the natural laws in very Seldenian terms: they were not naturally intuited, but had been made known historically to mankind, first through the seven *praecepta Noachidarum*

Grotius, and is best seen as an adaptation of the position of the Dutchman. Hale argues, using the same term as Grotius, that the opinions of the more civilized nations (*gentes moratiores*), when taken together with other means, provide a guide to the most general notions of natural law (*B1*, 62r–63v). While no one means is sufficient by itself, the concurrence of *gentes moratiores*, the wisest philosophers, the "unpassionate" judgment of one's own reason and conscience, and the agreement or suitability with human nature together allow for an induction of common notions (*B1*, 62r). To put this another way, Hale argues that the most general concepts of natural law ought to (1) agree with the essence of humanity, (2) meet the internal approval of a sound mind, and (3) meet with external approval by the wisest people, whether individuals or nations, spread across time and space. Although this method of concurrence among several sources is reminiscent of the method of concordance advocated by the Calvinist jurist Althusius, it differs in that Hale declines to give biblical revelation special priority in the determination of common notions. The reason for this difference is not a radically secular mindset on Hale's part (he agrees that Scripture provides easier and clearer access to natural law; *B1*, 69r),[136] but a methodological problem: Scripture is not as broadly communicated to humanity and Scripture itself does not provide a rule by which to distinguish natural from positive laws contained therein (*B1*, 61r–v).

As far as the enumeration of the "heads of the natural law" (*Capita Legis Naturalis*) is concerned (*B1*, 58r), Hale follows a path already tread by Suárez. In his *De legibus*, Suárez helpfully summarized four possible ways of distinguishing natural law precepts into various "heads" (*capita*). First, they can be distinguished objectively with respect to the beings to whom they are ordered (God, neighbor, and self). Second, they can be distinguished by virtues (justice, charity, natural love, etc.). Third, they can be distinguished by their order to the intellect according to whether they are more or less well known. Fourth, they can be distinguished according to human inclinations. Suárez ascribes the third and fourth ways to Thomas Aquinas and Thomas de Vio (Cajetan).[137] For his part,

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and then through the Decalogue." Hale's view is exactly opposite: the natural law *is* naturally intuited.

136 Hale, *Discourse*, 102–3, 110–12.

137 Suárez, *De legibus*, 2.8.3–4 (*Opera*, 5:116–17).

although Hale assumes that natural law can be described as virtues or inclinations (ways two and four), he organizes the *capita* of the natural law in only two main ways: the epistemic order of the intellect (*B1*, 69v–72v) and the objective order of beings (*B1*, 72v–92v). By his own account, Hale omits discussion of various virtues such as charity and distributive and commutative justice (*B1*, 92v). He does, however, discuss human inclinations both in relation to the formation of society (*B1*, 87v–88v) and more at length in the publication of the natural law (*B1*, 110r–130v).

Hale's account of natural law principles distinguished by their relation to the intellect is nearly identical to that of Suárez. Aquinas, assuming an Aristotelian epistemology that moves from general to particular knowledge, had distinguished between primary principles of practical reason and their proximate conclusions as secondary principles.[138] Suárez expanded on this view by distinguishing three kinds (*triplici genere*) of precepts. The first two kinds were primary principles. He divided the primary principles into the most general principles (*prima principia generalia*; e.g., do good and avoid evil) and the more determinate and particular principles (*principia magis determinata et particularia*; e.g., one must live temperately), the latter being known in themselves (*per se nota ex terminis*). The third kind of precepts were comprised of conclusions, whether more easily known by many or known with difficulty and reflection by few.[139] Hale describes this same division of principles and conclusions but employs some different terms and examples, and distinguishes the precepts into four kinds (now with two distinct types of conclusions). For Hale, the first type of natural law consists of principles "most universall" or "most remote from any particular determination." The second type consists of "much more restrictive" principles which have "self evidence in them" and are immediately assented to "without Argumentation." As with Suárez's description of conclusions, Hale's third and

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[138] Aquinas, *Summa theologiae*, I-II q. 94 a. 4–6. Cf. R. A. Armstrong, *Primary and Secondary Precepts in Thomistic Natural Law Teaching* (The Hague: Martinus Nijhoff, 1966).

[139] Suárez, *De legibus*, 2.7.5 (*Opera*, 5:113). This division of conclusions into more or less easily known is similar to Aquinas, *Summa theologiae*, I-II q. 100 a. 1. Cf. Armstrong, *Primary and Secondary Precepts*, 99–107.

fourth types consist respectively of easily deducible conclusions or more remote and "not easily elicited" conclusions (*B1*, 69v–71v).

With the remaining part of chapter five, Hale provides a description of the *capita* of the natural law as they relate to God, self, and others. By Hale's own account, this is not an exhaustive account, but his own approximation of the principles and most immediate conclusions of natural law. Accordingly, he eschews consideration of those "secondary or deducible Laws of Nature" which English lawyers typically identified with the "maxims" of common law (*B1*, 72r).[140] Within this exposition Hale includes a comparatively large account of the natural law as it relates to the foundations of civil government, whether antecedent, preparatory, or following its institution (*B1*, 81r–92v). In this account, Hale incorporates a traditionally Aristotelian view of political society as originating from the sociable nature of humanity (*B1*, 86v, 88v) and attacks Hobbes' "Imaginary state of warr" (*B1*, 81v). Human government, in Hale's estimation, also derives its obligation from an antecedent natural law of keeping promises (*B1*, 81v). This notion can be found in Grotius but Hale's particular expression of it, "faith must be kept" (*fides est servanda*), is identical to that found in Selden.[141]

A notable aspect of Hale's account of natural law is his lengthy account of property rights within a framework of natural rights (*B1*, 83r–87r). The early modern idea of subjective natural rights is now recognized not as of uniquely modern origin, but as having both deep roots in medieval canon law (ca. 1150–1250) and a strong reception among Protestants.[142] Brian Tierney has argued for the centrality of two ideas stemming from medieval natural rights discourse. "These were," he claims, "the idea of a permissive natural law and the idea of self-dominion." Permissive natural law refers to that which is permitted but not

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[140] Cf. Cromartie, *Hale*, 38–39; and comments in our text at *B1*, 72v.

[141] Grotius, *De jure belli*, Prol. 15, 2.11.1–5; Selden, *De jure naturali*, 107; Selden, *Table Talk*, 70, 100; Selden, *Mare clausum seu de dominio maris* (London: R. Meighen, 1635), 16. Cf. Cromartie, *Hale*, 91–92.

[142] See Tierney, *Idea of Natural Rights*, 43–77; Tuck, *Natural Rights Theories*, 13–15; and Witte, *Reformation of Rights*, 20–37. For recent studies, see Virpi Mäkinen, ed., *The Nature of Rights: Moral and Political Aspects of Rights in Late Medieval and Early Modern Philosophy*, Acta philosophica Fennica 87 (Helsinki: The Philosophical Society of Finland, 2010).

commanded by natural law, whereas self-dominion refers to the mastery and self-ownership (under God) that one has over one's own actions and things as a consequence of free choice.[143] Together, these concepts of permissive natural law and self-dominion carve out a significant area for human freedom within a larger framework of natural law precepts. Hale clearly agrees with these concepts. He asserts that besides the precepts of the natural law, "there is that which they call *Lex permissiva* [permissive law]" which refers to things indifferent or undetermined by the natural law (*B1*, 133v, 52v). He also asserts a dominion rooted in free choice but under the greater dominion (*sub graviore regno*) of God (*B1*, 47r). By this dominion, which is antecedent to positive law, one is said to have a property in oneself, and consequently may give oneself to another by contract (marriage and slavery) and protect oneself from injury (*B1*, 82v).[144] This dominion also forms the basis for property rights (*B1*, 83r).

Due to the assumption that property was originally the common right of all, the question of the institution of private property became a commonly discussed problem in the medieval era. One answer provided by canon lawyers was that private property is a matter belonging to the natural law not by command or prohibition, but rather by permission.[145] To this explanation some canonists added the argument of first possession: since the act of acquiring property is not injurious to others and things had no owner, individuals ought to be permitted personal use of property. The institution of private property itself is a matter permitted by natural law, but upon its institution by human agreement it is protected by natural law. We find this line of argument appropriated by Suárez.[146] This is also

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143 Brian Tierney, "Dominion of Self and Natural Rights Before Locke and After," in *Transformations in Medieval and Early-Modern Rights Discourse*, ed. Virpi Mäkinen and Petter Korkman (Dordrecht: Springer, 2006), 173–203, at 176, 180. On permissive natural law, see Tierney, "Permissive Natural Law and Property: Gratian to Kant," *Journal of the History of Ideas* 62, no. 3 (2001): 381–99.

144 Cf. Tierney, "Dominion of Self," 192, who reads Hale as similar to Suárez.

145 Tierney, "Permissive Natural Law and Property," 384–85.

146 Tierney, *Idea of Natural Rights*, 137–45, 306–7. See also Francisco Suárez, "What Kind of Corporeal or Political Life Men Would Have Professed in the State of Innocence," *Journal of Markets & Morality* 15, no. 2 (Fall 2012): 527–63, translated and with an introduction by Matthew T. Gaetano.

the general argument of Hale. Like Suárez, Hale agrees that while "most of the methods of acquisition of property seems to be by institution," there is also a right of "first possession" which is "superadded somewhat by his industry" to that "primitive right in common." A key reason shared with Suárez for this first acquisition is that "no Man hath a right totally to exclude another" from what is common to all (*B1*, 83r–84r).[147] Accordingly, Hale's argument for first acquisition ought not be read only as a reaction to Hobbes' merely contractual basis for property, but also as an adaptation of an older tradition of thought.[148] Yet within this shared framework of thought, Hale differs quite radically from the earlier medieval tradition on the specific question of the case of extreme necessity. It was a commonplace of medieval theology and canon law, and subsequently of early modern rights discourse, that in case of extreme necessity someone may rightly take from another since in such a time all things become common.[149] Hale disagreed. He objected that the principle of extreme necessity could be easily abused and opened up private property to a "strange insecurity." Hale argued instead that the civil magistrate provides sufficiently for necessities through poor relief.[150] In so doing, Hale shifted the relief for extreme necessity from the realm of natural to positive law. This strong defense of property rights was, as Cromartie comments, an "unusual legal theory."[151]

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147 Cf. Suárez, *De legibus*, 2.14.16–17 (*Opera*, 5:140–41); and James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press, 1980), 80.

148 Cromartie, *Hale*, 93–94; Tuck, *Natural Rights Theories*, 164–65. Like Tuck, Cromartie rightly views Hale as going to an opposite "extreme" from Selden and Hobbes, but omits the traditional pedigree of Hale's position.

149 Scott G. Swanson, "The Medieval Foundations of John Locke's Theory of Natural Rights: Rights of Subsistence and the Principle of Necessity," *History of Political Thought* 18, no. 3 (1997): 399–459; Virpi Mäkinen, "Self-preservation and Natural Rights in Late Medieval and Early Modern Political Thought," in *The Nature of Rights*, 93–108.

150 Hale, *Pleas*, 1:54–55.

151 Cromartie, *Hale*, 95–96.

Publication of Natural Law

For Hale, the publication or communication of the natural law is principally twofold. First, God publishes the natural law in human nature. Second, God republishes the natural law in special revelation communicated in various ages from Adam to Christ. There is nothing original about this general framework. In fact, with the exception of Hale's description of the agent intellect in chapter eight, there is little substantive difference between his mature account of the publication of the natural law and that of his early Puritan treatise *Discourse of the Knowledge of God, and of our Selves*. In comparison with the *Discourse*, Hale's *Law of Nature* provides a more detailed account of the publication of the natural law first in the heart and then in special revelation, but grafts onto this account Selden's distinctive theory of the enlightening work of God's active intellect (*intellectus agens*).

Hale identifies four means of publication to human nature: (1) God's irradiation through *intellectus agens*, (2) implanted common notions and inclinations, (3) the exercise of reason, and (4) conscience (*B1*, 99r). The first of these, irradiation through *intellectus agens*, is certainly a Seldenian influence. Hale, following Selden, argues for a common illuminating principle, *intellectus agens*, which supplies all human minds with eternal truths or first speculative and practical principles (*B1*, 101r–v). He also steers clear of the heterodoxy of Averroism which would replace individual intellects with a created universal *intellectus agens*. Instead, he identifies *intellectus agens* with the uncreated divine intellectual light in a way that would harmonize with a biblical description of God's enlightening agency (*B1*, 101r–103r, 106v–107v).[152]

According to Hale, the natural law is manifested in human nature through both implanted common notions and inclinations. He uses a variety of synonyms to describe these notions and inclinations. Common notions he calls "imprinted Characters," "connaturall implanted principles," "impressed noticies," "common notices," and "congenite & ingrafted Principles." Inclinations he calls "tendencys," "propensions," "instincts," and "by'ass[es]" (*B1*, 110r–124r).[153] These notions and inclinations are distinct from one another and analogous to the instincts of animals, but they are also "weak and confused" at first and thus

[152] Cromartie, *Hale*, 91, 168–70.

[153] Hale, *Primitive*, 60–61, 317–18, 352–53, 365; Hale, *Discourse*, 37, 46.

can be either improved by exercise or corrupted by sensual appetite, idleness, bad customs, and bad education (*B1*, 110v–111r). Following the conventional Protestant exegesis of Romans 2:14–15, Hale identifies common notions both with the law written on the heart and Stoic preconceptions (*B1*, 59v, 113r–v).[154] He describes inclinations in a manner similar to Aquinas and Protestant scholastics as teleological tendencies to "proper Ends" antecedent to the "actuall exercise of the ratiocination or will" (*B1*, 117r).[155]

Reason and conscience participate in the publication of the natural law by drawing out the consequences and applying these common notions and inclinations to particular circumstances. By reason Hale means discursive exercise of the rational faculty which organizes, compares, and improves on speculative and practical principles about good and evil (*B1*, 120r–124r). In his *Law of Nature*, Hale describes conscience as that which persuades a person of the divine obligation of the natural law and applies the natural law to particular circumstances. This application takes place by means of a syllogism, wherein right reason supplies the major premise of the general rule and conscience provides the minor premise of a particular circumstance and then draws a conclusion either of absolution or condemnation (*B1*, 124r–v). In this description of conscience, Hale maintains strong continuity with Reformed scholasticism, which typically described the conscience as the application of a practical syllogism.[156] Although it is unclear

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[154] Philip Melanchthon, *Loci communes rerum theologicarum* (1521), in *Opera quae supersunt omnia*, ed. C.G. Bretschneider and H.E. Bindseil, vol. 21 (Braunschweig: C.A. Schwetschke, 1854), cols. 116–17; ET: *Commonplaces: Loci Communes 1521*, trans. Christian Preus (St. Louis: Concordia, 2014), 62. John Calvin, *Commentary on the Epistle of Paul the Apostle to the Romans*, trans. John Owen (Edinburgh: Calvin Translation Society, 1849), 96–97; and Andrew Willet, *Hexapla: that is, A Six-fold Commentarie upon the most Divine Epistle of the Holy Apostle S. Paul to the Romanes* (Cambridge: Cantrell Legge, 1611), 117–18.

[155] Cf. Hale, *Discourse*, 37; Aquinas, *Summa Theologica*, I q. 80 a. 1; Ames, *De conscientia*, 5.1.14–16; Girolamo Zanchi, *On the Law in General*, trans. Jeffrey J. Veenstra (Grand Rapids: CLP Academic, 2012), 10–11; *DLGT*, s.v. *appetitus*.

[156] Ames, *De conscientia*, 1.1.8–11; Rudolph Goclenius, *Lexicon philosophicum* (Frankfurt: Matthias Becker, 1613), s.v. *conscientia* (p. 447); Johann Heinrich Alsted, *Theologia casuum, exhibens anatomen conscientiae et scholam tentationum* (Hanau: Conrad Eifrid, 1630), 11; Robert Sanderson, *Bishop Sanderson's Lectures on Conscience*

from *Law of Nature* whether Hale viewed conscience precisely as a faculty, habit, or act of the soul (a point of scholastic debate), elsewhere he clearly placed conscience under the nature of the soul's acts (as distinct from faculties and habits).[157] This view of conscience as an act was recognized by Hale's contemporaries as both distinctively Thomistic and the "most common opinion" of Reformed theologians.[158] It is therefore probable that, despite a passing reference to "faculty of Concience" (*B1*, 124r), Hale's description of the "actings" of the conscience in *Law of Nature* (*B1*, 98v, 121r) reflects this "most common" Thomistic and Reformed position that he expresses in his other writings.

Salvation of Virtuous Pagans

Although in other respects Hale maintains much continuity with his Reformed Protestant youth, when he comes to discuss the end of the natural law in chapter thirteen he clearly favors a position closer to his Arminian or Latitudinarian contemporaries. During the 1640s and 1650s a number of theologians, called by their contemporaries Latitudinarians (and by modern scholars Cambridge Platonists), challenged the then-dominant Augustinian theology, embodied in Protestant confessions including the Thirty-Nine Articles, which denied salvation

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and Human Law, trans. Christopher Wordsworth (Lincoln: James Williamson, 1877), 10–13; Jeremiah Dyke, *Good Conscience* (London: I.D. for Robert Milbourne, 1624), 22–23. Like Ames, Hale elsewhere labels the acts of conscience as *synteresis* (general principle), *syneidesis* (minor premise), *epicrisis* (concluding judgment). See Hale, *Primitive*, 64. On conscience's practical syllogism, see also Hale, *Discourse*, 51–55.

157 Hale, *Discourse*, 51: "Conscience … is a high act of the Understanding…"; Hale, *Primitive*, 57 (within acts of the soul, pp. 55–57).

158 Robert Sanderson, *Bishop Sanderson's Lectures on Conscience and Human Law*, trans. Christopher Wordsworth (Lincoln: James Williamson, 1877), 14: "Aquinas … resolves it to be an Act, whose opinion is received not only by Scholastic Writers … but by the Divines of the Reformed Churches…. But, if I may speak freely, this most common opinion is altogether to be disapproved…." See, e.g., Ames, *De conscientia*, 1.1.5–6 (for Aquinas); and Immanuel Bourne, *The Anatomie of Conscience* (London: G.E. and M.F. for Nathaniel Butter, 1623), 6–7, 10 (against Aquinas).

apart from special grace and revealed knowledge of Christ.[159] By the Restoration the Latitudinarians had gained a reputation for inclining toward Arminianism and being specifically favorable to the salvation of virtuous pagans. Baxter described the Latitudinarians as "many of them *Arminians* with some Additions, having more charitable Thoughts than others of the Salvation of Heathens and Infidels…."[160] John Humfrey (1621–1719) also identified the salvation of pagans with later Arminian theology: "I remember *Arminius* in some place of his works, does expressly exclude all Heathens from salvation; though many that have tread in his steps otherwise, have been more kind to the Nations."[161] Hale was friendly with a number of theologians who inclined toward Arminian theology, including Isaac Barrow (1630–1677) and the Latitudinarians John Tillotson (1630–1694), and Edward Stillingfleet (1635–1699).[162] Selden also inclined in this direction and affirmed the salvation of virtuous pagans.[163] It is possible that Hale, who cited Selden's opinion on the matter favorably (*B1*, 146r), came to accept a more Arminian perspective through the influence of such friendships.

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159 See D. W. Dockrill, "'No other Name': The Problem of the Salvation of the Pagans in Mid-seventeenth Century Cambridge," in *The Idea of Salvation*, ed. D. W. Dockrill and R. G. Tanner (Auckland, New Zealand: University of Auckland, 1988), 117–51. For confessional statements, see Augsburg Confession, art. 18; Formula of Concord, art. 2; Heidelberg Catechism, q. 20; Thirty-Nine Articles, art. 13, 18; Canons of Dort, head 3/4, art. 1–5 and *rejectio errorum* 5; WCF 9.3 (*Creeds of Christendom*, 3:18–19, 106–14, 313, 495, 499, 564–65, 569, 623).

160 Baxter, *Reliquiæ Baxterianæ*, Part II, 386.

161 John Humfrey, *Peaceable Disquisitions* (London: Thomas Parkhurst, 1678), 55. Cf. Jacob Arminius, *Works*, trans. James Nichols, vol. 1 (London: Longman, et al., 1828), 14–16.

162 Burnet, *Life*, 74. Cf. John Coffey, *John Goodwin and the Intellectual Revolution: Religion and Intellectual Change in 17th-Century England* (Woodbridge: Boydell Press, 2006), 227; John Gascoigne, "Isaac Barrow's Academic Milieu: Interregnum and Restoration Cambridge," in *Before Newton: The Life and Times of Isaac Barrow*, ed. Mordechai Feingold (Cambridge: Cambridge University Press, 1990), 250–90, at 257–61; Hampton, *Anti-Arminians*, 60–63.

163 Nicholas Tyacke, *Anti-Calvinists: The Rise of English Arminianism, c. 1590–1640* (Oxford: Clarendon Press, 1987), 145–46; Selden, *Table Talk*, 123; Selden, *De jure naturali*, 832–33.

In his final chapter, Hale boils the controversy over the salvation of pagans down to the question of whether those without an "explicit knowledge of Christ" can be saved by means of following the natural law. He argues that it is "more than probable" that this is true (*B1*, 140r). Among the numerous arguments Hale provides in support of his position, at least two point to an Arminian repudiation of the Reformed position. First, Hale appeals to the principle "to the one who does as much as is in oneself grace is not denied" (*agenti quantum in se est non denegatur gratia*) as a basis for concluding that God will be merciful to those who follow the natural law (*B1*, 143v). This expression is nearly identical to the so-called late-medieval *facientibus* principle so strenuously rejected by the sixteenth-century Protestants, but later revived by Arminius.[164] Second, Hale rejects the view that pagan virtues are "splendid sins" (*splendida peccata*) as "uncharitable" and "unsound" since that position would negate any possibility of reward to those who seek to do good (*B1*, 145v). In so doing, Hale repudiates an identifiable early modern Augustinian opinion affirmed not only by traditional Calvinists such as Anthony Tuckney (1599–1670) and Francis Turretin (1623–1687), but also, on the Roman Catholic side, by Michael Baius (1513–1589) and the Jansenists. While affirming the objective goodness of virtue inasmuch as it conformed with the demands of the moral law, such theologians nonetheless contended that virtues lacking faith were formally sinful before God on account of proceeding from a sinful heart and intention in a fallen state of sin.[165]

The cumulative weight of Hale's arguments for the salvation of pagans points toward an understanding of grace which is universally available and identified

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[164] The late-medieval expression is "to those who do what is in them God does not deny grace" (*facientibus quod in se est Deus non denegat gratiam*). Cf. *DLGT*, s.v. *facere quod in se est*. For Arminius' usage, see J.V. Fesko, "Arminius on *Facientibus Quod in Se Est* and Likely Medieval Sources," in *Church and School in Early Modern Protestantism: Studies in Honor of Richard A. Muller on the Maturation of a Theological Tradition*, ed. Jordan J. Ballor, David S. Sytsma, and Jason Zuidema (Leiden: Brill, 2013), 347–60.

[165] Anthony Tuckney, *None but Christ, or a Sermon Upon Acts 4.12.* (London: John Rothwell and S. Gellibrand, 1654), 109; Turretin, *Institutes of Elenctic Theology*, 10.5.2, 10.5.11. Both cite Augustine, *Contra Julian*, 4.3. On Baius and the Jansenists, see T. H. Irwin, "Splendid Vices? Augustine For and Against Pagan Virtues," *Medieval Philosophy and Theology* 8 (1999): 105–27, at 105–7.

in the first place not with the special work of the Holy Spirit, but rather with the general working of God's *intellectus agens* giving light to all humanity (*B1*, 140r–v).[166] Such a view contrasts sharply not only with Hale's youth, but also with those more moderate Reformed theologians who held out hope for the salvation of pagans. For the latter appealed not to a general grace, but rather to the possibility of God's extraordinary mercy within a framework of special grace and the means of faith.[167] Granting this discontinuity, the innovative character of Hale's position ought not to be exaggerated as an anticipation of universalism. For despite opening the door of salvation to the most virtuous pagans, Hale still believes that the means available to reason alone pales in comparison to the ease and clarity of the gospel. The "light of Nature," concludes Hale, "are like the *Tabulae post naufragium* [planks after a shipwreck] which may bring men to the Shore, thô not without great difficulty and hazard, but the light and means of the Gospel is like the passage in a safe & strong ship which is better fitted to chide Storms and dangers of the Sea" (*B1*, 146v).

166 Cf. Cromartie, *Hale*, 170–72, 231–32.

167 Culverwell, *Discourse of the Light of Nature*, 165–67; John Wilkins, *Of the Principles and Duties of Natural Religion* (London: T. Basset, et al., 1678), 396–97; Richard Baxter, *The Reasons of the Christian Religion* (London: R. White, 1667), 396–400. On Wilkins as a broad-minded Reformed theologian, see Hampton, *Anti-Arminians*, 16–17.

Textual Introduction

This publication is a critical edition of a transcription of the first five chapters of Hale's unpublished treatise on natural law. The entirety of the transcribed treatise is scheduled to be released in a later volume of the Sources in Early Modern Economics, Ethics, and Law series published by CLP Academic.

The Manuscripts*

In Gilbert Burnet's early list of Hale manuscripts (printed 1681), there is a record of a work, "Of the *Law* of *Nature*, Fol."[168] The autograph is unfortunately no longer extant, but three copies, including a seventeenth-century copy of the autograph, survive. Burnet's list of titles matches closely the titles of extant manuscripts written in Hale's own hand,[169] so the original title of the autograph was presumably "Of the Law of Nature."

Hale had drafted three pages of notes for a "treatise on natural law" (*De lege naturali tractatus*) in the autumn of 1668, and these notes are without doubt an initial outline of Hale's "Of the Law of Nature."[170] Therefore the treatise itself

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* I am grateful to Zoe Stansell and the staff of the manuscript collections at the British Library for their assistance regarding these manuscripts and their digital reproduction.

168 Burnet, *Life*, 191.

169 Cf. Cromartie, *Hale*, 240–42; and Burnet, *Life*, 190–94.

170 Sir Matthew Hale, "Notes on circuitus autumnalis" [1668], fols. 15r–16r, the James Marshall and Marie-Louise Osborn Collection, Beinecke Rare Book and Manuscript Library, Yale University, New Haven, CT. The top of fol. 15r reads "De lege naturali tractatus". There are two pages of notes under the heading "de lege in genere" which reflect details of the content of chapter one of the finished treatise (fols. 15v–16r). On the last page under the heading "de lege naturali" is the outline "1 Quid sit lex naturalis / 2 An sit aliqua talis lex / 3 De causis huius legis" and under this some notes regarding the efficient, final, formal, and material causes of natural law (fol. 16r). The material cause includes subpoints "in habitudine ad / deum / alium / seipsum" (in relation to God, others, oneself), which correspond to the "three relations, habitudes or ranks" of natural law in chapter five of the finished treatise (*B1*, 72v). For a partial transcription of this MS, lacking the last pages, see Maija Jansson, "Matthew Hale on

was likely composed sometime late 1668 or shortly thereafter.[171] Internal evidence is consistent with this date of composition. Around 1664 Hale seems to have favored traducianism with respect to the origin of the soul, but by 1672 he certainly held the position of creationism,[172] and this latter creationist doctrine is favored in the present treatise (*B1*, 109v). Between ca. 1664 and 1673 Hale composed a number of works which discuss the nature of the animal soul,[173] and in the present treatise he refers to his previous detailed description of animal instincts, "which I have elsewhere done" (*B1*, 116r). At least from 1671 Hale began incorporating Helmontian philosophical terminology in his description of the soul,[174] but this terminology is absent from the present treatise, which seems to preclude a date of composition ca. 1671–1676. With these observations, we can suggest a date of composition ca. 1668–1670.

The three witnesses to Hale's "Of the Law of Nature" are housed at the British Library, London:

1. Add. MS 18235, fols. 41–147 (*B1*).[175] This is a copy of the autograph and the copy-text for the present transcription. It is written in an exceptionally legible hand. The title page reads: "Some Chapters touching the Law of Nature. By the late Lord Cheif Justice Hale and copied From his owne Writing Lent to S^{r} Rob^{t} Southwell by his Grand Son Mathew Hale of Lincolns-Inn Esq^{r} 1693" (*B1*, 41r).

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judges and judging," *Journal of Legal History* 9, no. 2 (1988): 201–13. I am grateful to June Can of the Beinecke Library for help with this MS.

171 Cf. Cromartie, *Hale*, 90, 167n61.

172 See Cromartie, *Hale*, 225–29, who shows that creationism is present in Hale's 1672 treatise "De generatione vegetabilium et animalium" (Lambeth MS 3504). Creationism is also present in Hale's *Primitive*, 352, which was composed at intervals between the late 1660s and his death (Cromartie, *Hale*, 198).

173 Cromartie, *Hale*, 218n3, 226n51.

174 See Cromartie, *Hale*, 206–9, 223; and Sir Matthew Hale, Preface to *Observations touching the Principles of Natural Motions* (London: W. Godbid for W. Shrowsbury, 1677), 8–15. Key Helmontian terms include *virtus activa*, *vis activa*, *virtutes essentiales*, *vires essentiales*, and ferments.

175 Acquired by the British Museum in 1850. *Catalogue of Additions to the Manuscripts in the British Museum, in the years MDCCCXLVIII—MDCCCLIII* ([London]: The Trustees, 1868), 91.

2. Harley MS 7159, fols. 1–266 (*B2*).[176] This is a copy made from *B1* in 1696. The title page reads: "Some Chapters touching the Law of Nature By the late Lord Cheif Justice Hale and copied from his own Writing. Lent to S^{r} Robert Southwell by his Grand Son Mathew Hale of Lincolns-Inn Esq^{r} 1693 And copied from the same Aug: 19. 1696." (*B2*, 1r).

3. Hargrave MS 485 (*B3*).[177] This copy is derivative of *B1* and *B2* and is written in a late-eighteenth century hand. The title page reads: "Treatise of the Nature of Lawes in Generall and touching the Law of nature. By Sir Mathew Hale" (*B3*, 1r).

Although scholars have long known of all three copies,[178] little attention has been given to the question of their relationship. Alan Cromartie included *B3* in his select bibliography of "most authoritative" copies of Hale manuscripts and as a result most subsequent scholars have drawn on this copy.[179] But this judgment is mistaken. Whereas the orthography of *B1* and *B2* is consistent with a late-seventeenth century dating, the orthography of B3 certainly postdates 1760. By comparison with *B1* and *B2*, the hand of *B3* uses initial capitals sparsely; *B3* rarely uses capitals for words other than proper nouns and the first letter of the sentence. As N.E. Osselton has demonstrated with respect to printed material, the early modern English practice of capitalizing the initial letter of common nouns steadily rose until it reached its zenith around 1750 (resembling modern German), when around 1760 there was a precipitous drop in this practice and by 1795 it

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176 Acquired by the British Museum as part of the Harleian collection in 1753. *A Catalogue of the Harleian Collection of Manuscripts, purchased by Authority of Parliament for the Use of the Publick, and preserved in the British Museum*, vol. 2 (London: Dryden Leach, 1759), no. 7159; *A Catalogue of the Harleian Manuscripts in the British Museum*, 4 vols. (London: The British Museum, 1808–1812), 3:518.

177 Acquired by the British Museum as part of the Hargrave collection in 1813. *A Catalogue of Manuscripts, Formerly in the Possession of Francis Hargrave, Esq., one of His Majesty's Counsel Learned in the Law, and Recorder of Liverpool. Now Deposited in the British Museum.* (London: G. Woodfall, 1818), 131.

178 James McMullen Rigg, "Hale, Sir Matthew," in *Dictionary of National Biography*, ed. Leslie Stephen and Sidney Lee, 63 vols. (London: Smith, Elder & Co., 1885–1900), 24:22.

179 Cromartie, *Hale*, 240–41.

was no longer in vogue.[180] In addition, eighteenth-century handwriting lagged behind the fashion of the printers,[181] as is illustrated by the persistence of initial capitals in the manuscript of the Declaration of Independence (1776) but a sharp decline of initial capitals in the U.S. Bill of Rights (1789). If we allow for such a delay in the change of handwriting style, *B3* should probably be dated sometime in the last quarter of the eighteenth century. Indeed, the practice of capitalization in *B3* is closer to the Bill of Rights than the Declaration. We should also observe that by the mid-1780s Francis Hargrave was hard at work collecting and editing Hale's manuscripts for publication,[182] so that, granting a late-eighteenth century date for *B3*, we can conjecture that Hargrave was involved in the production of this copy as part of his ultimately unsuccessful plan to publish a "complete edition" of Hale's legal manuscripts.[183]

While *B2* is obviously a copy of *B1*, the relation of *B3* to *B1* and *B2* requires further comment. *B3* is an eclectic edition based on both *B1* and *B2*. *B3*'s reliance on *B1* is clear from *B3*'s paragraph breaks, which closely follow *B1*. It is impossible that *B3* could have followed *B2* in this regard, since *B2*'s frequent paragraph breaks bear little resemblance to *B1*. *B3* also follows word sequences unique to either *B1* or *B2*, and in some cases supplies an omission in one manuscript with the help of the other. Consider the following passages from *B1*.

Passage 1:

> … there are certaine rights of Natural Law and Justice instituted by almighty God and obliging every Person of Mankind;

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[180] N. E. Osselton, "Spelling-Book Rules and the Capitalization of Nouns in the Seventeenth and Eighteenth Centuries," in *Historical and Editorial Studies in Medieval and Early Modern English*, ed. Mary-Jo Arn, Hanneke Wirtjes, and Hans Jansen (Groningen: Wolters-Noordhoff, 1985), 49–61, at 49–50.

[181] Osselton, "Spelling-Book Rules," 58–59.

[182] Francis Hargrave, Preface to *A Collection of Tracts Relative to the Law of England, from Manuscripts*, ed. Francis Hargrave, vol. 1 (Dublin: Lynch, 1787), i–v.

[183] Francis Hargrave, Preface to Sir Matthew Hale, *Jurisdiction of the Lords House, or Parliament, Considered according to Antient Records*, ed. Francis Hargrave (London: T. Cadell, Jun. and W. Davies, 1796), ii.

> For I do suppose it unquestionable that the originall Dominion and propriety of all things is in Almighty God; And that he hath given … (*B1*, 83v)

Passage 2:

> … as after the institution of Civil Government neither hath the institution of Civil Government or any Laws induced … (*B1*, 87v)

In Passage 1, *B2* (109r) omits the underlined portion, but *B3* (37r) includes both the same words and paragraph break. In Passage 2, *B2* (118r) omits the underlined portion, but in *B3* (40r) this underlined portion appears as an interlinear insertion. Whereas Passage 1 illustrates *B3*'s dependence on *B1* at one point, Passage 2 illustrates *B3*'s initial dependence on *B2*, with a subsequent emendation in light of *B1*. Thus *B3* draws on both *B1* and *B2* at different points, but apparently without privileging either as the preferred copy-text.

The choice of *B1* as the copy-text is straightforward. It is a complete and, presumably from the title page, a direct copy of the autograph. By contrast, both *B2* and *B3* contain numerous corruptions, which in *B3* sometimes result in a meaning far removed from *B1*. For example, the word "profection" in *B1* (52r) becomes "perfection" in *B2* (27v) and then in *B3* (10v) is copied as "protection" which in turn has a strike-through and is replaced with the interlinear insertion "promanation." Like *B2*, *B3* on occasion also makes substantive omissions. For example, the two lines from *B1*, "And certain Structures and Delineations of that Divine Exemplar drawn by the finger of God, upon the human Nature" (94v), are found in *B2* (135v) but omitted (by homeoarchy) from *B3* (46r). There is, however, a significant deficiency in *B1* in its present form: the pages of *B1* have been physically trimmed resulting in some loss of text on the outside margin for many folios.[184] In nearly all cases the loss is minimal, resulting in occasional loss of one or two missing letters or the occasional punctuation mark. On one page, however, *B1* (50r) includes multiple lines of inserted text in the margin which are now only partially visible. Thankfully, *B2* had access to the original untrimmed version of *B1*, so such lost text can be restored from *B2*. Since in most cases the loss of a letter or two in the margin of *B1* is easily recoverable from

[184] *B1*, fols. 67r–69r, 71r, 73r, 74r, 75r, 76r, 77r, 78r, 80v, 82r, 83r–88r, 90r, 92v–93r, 94r–96r, 97r, 98r–v, 99v–100v, 101v, 106r, 109r, 110r–v, 112v–113r, 115r, 121r–125r, 128r–130r, 131r, 138r, 139r, 140r, 141r, 142r, 145r–v.

the context and a collation with *B2* and *B3*, I have judged that it is unnecessary to note these cases in the apparatus, and therefore I have in most cases silently supplied such missing letters.

In preparation of this transcription, I have used digital reproductions. The copy-text *B1* is based on 300 dpi grayscale images taken directly of the original (not from existing microfilm) and provided by the British Library. The images are of sufficiently high quality that even faint hairline commas are visible upon close inspection.

Editorial Principles and Practices

In editing a manuscript significant to intellectual historians, I have sought to follow the general advice of Peter Nidditch and Michael Hunter, who through experience with their readership independently arrived at the conclusion that a compromise between paleographical fidelity (reproducing as exactly as possible the original) and readability is most beneficial for the reader.[185] Accordingly, I have aimed to reproduce the original spelling and punctuation as closely as possible while noting deletions, insertions, and emendations in the textual apparatus. Nearly all the insertions in *B1*, as evidenced by their later inclusion in *B2*, are prior to *B2*. Since these insertions were made at a time when the scribe of *B1* presumably had access to the autograph, they carry the presumption of continuity with the autograph. I have therefore incorporated the insertions from *B1* into the body of the text while noting their status as insertions in the apparatus.

Since *B1* is the closest witness to the autograph, I have sought to produce an edition based on *B1* as the copy-text with minimal emendation after consulting *B2* and *B3*. In most cases the copy-text is emended with respect to accidentals involving the addition of punctuation marks and the correction of words misspelled by the standards of the seventeenth century. In some cases I have made substantive emendations to words which I determined to be clearly erroneous based on parallel usage or context found in *B1*. For all emendations my first recourse has been to an option provided by *B2* or *B3*. I have found *B3* the most

[185] See "Appendix IV: The editorial method of Peter Nidditch," in John Locke, *Drafts for the Essay Concerning Human Understanding, and Other Philosophical Writings*, ed. Peter H. Nidditch and G. A. J. Rogers (Oxford: Clarendon Press, 1990), 294–95; and Michael Hunter, *Editing Early Modern Texts: An Introduction to Principles and Practice* (New York: Palgrave Macmillan, 2007), 79–80.

helpful in resolving problems in the copy-text. For example, in one place *B1* states that the state of war "is connatural to the State of Nature but accidentall a Disease & disorder" (86v). The passage is obviously meant to contrast "is connatural" with "but accidentall a Disease & disorder," but this can only make sense if Hale is denying that war is "connatural" to the state of nature. Accordingly, I have followed *B3* (39v) in emending the text to read "is not connatural."

Contractions, abbreviations, and ligatures have been silently modernized and expanded. The thorn (y), long "s," "fs" (= ss), "ff" (= F), "ij" (= ii), u/v, i/j, y/ÿ, have all been modernized, and the ligatures æ and œ rendered as "ae" and "oe." For example, y^{e}, w^{ch}, governm^{t}, and co$\bar{m}$on appear as "the," "which," "government," and "common." I have retained the use of "&" (= and) and "&c." (= etc.). Italics have been added for Latin words and biblical citations. Punctuation is original unless otherwise noted in the apparatus, with one exception: the use of periods for numerical lists in *B1* is inconsistent, so I have normalized such lists with silently added periods for the sake of consistency and readability.

I have also attempted to retain original capitalization since capitals were used to indicate emphasis or especially remarkable words in the seventeenth century.[186] However, the hand of *B1* uses large or uppercase forms for some letters indiscriminately (notably letters a, c, e, n, o, and s), which makes the intended capital difficult to distinguish from the intended lowercase letter. In such uncertain cases, although the choice of capitalization is admittedly subjective, I have tried to approximate contemporary late-seventeenth century usage. We know that authors of this period typically reserved the initial capital for specific or concrete substantive nouns and occasional adjectives, whereas adverbs, adjectives, prepositions, articles, and nouns of greater generality (e.g., "thing," "view") typically appeared without the initial capital.[187] I have also tried to approximate usage by example through keyword searches of Hale's *Primitive Origination of Mankind* (1677) and other digitized works in the public domain (ca. 1670–1700).

Editorial brackets are used principally for Latin translations and clear biblical allusions or citations. Latin phrases are translated with the exception of technical terms still commonly used in modern English (e.g., *de facto*) or those which are clear from the explanation provided by Hale in the text. In exceptional cases

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[186] Osselton, "Spelling-Book Rules," 54.

[187] Osselton, "Spelling-Book Rules," 51, 55–56.

involving the addition of a phrase or sentence, the additional text is supplied in editorial brackets with an explanation in the apparatus. In order to facilitate the identification of material in longer chapters, I have taken the liberty of including in brackets subsection titles that are clearly intended by the organization of the text. All other comments relating to content are provided in notes separate from the textual apparatus.

The Apparatus

Substantive differences between the witnesses are noted in the apparatus, so in the absence of any references to *B2* or *B3* the reader should assume substantive agreement between the variants (with the exception of accidental differences in spelling and punctuation). The following symbols are used for the apparatus:

‹text›	Insertion in source text
~~text~~	Deletion in source text
italic	Foreign words; biblical citations
tex[?]	Partially illegible word
[?]	One totally illegible word
[? ?]	Multiple illegible words (? = one word)
[?text]	Editorial conjecture
[text]	Editorial insertion
lemma]	Textual note
em.	Editorial emendation of *B1*
om.	Omitted text in *B2* or *B3*
|	Separation of annotations
/	End of line
/fol. 41r/	Page breaks following folio numbers for *B1*

All emendations are noted in the textual apparatus by "*em.*" In cases of substantive emendation the apparatus supplies all three variants for comparison, while for corrections involving accidentals (e.g., spelling, punctuation marks) I have typically noted only the original text from *B1* in the apparatus. The typical

format for a textual note is "lemma]" followed by a comparison of variants.[188] Here are some examples taken from the text which illustrate this format:

> profection] perfection *B2* | ~~protection~~ ‹promanation› *B3*

Here where the word "profection" is found in the text, the copy-text *B1* has "profection"; *B2* has "perfection"; and *B3* has "protection" with a strike-through and in its place the insertion "promanation."

> and Earth.] *em.* | and Eearth. *B1* | and Earth. *B2* | *om. B3*

Here the words "and Earth." in the text have been emended from "and Eearth." in the copy-text *B1*. The variant *B2* has "and Earth." but both words are omitted in *B3*.

> neither … Government] *om. B2* | ‹Neither hath the institution of civil government› *B3*

Here the words in the text running from "neither" to "Government" are found in *B1* but are omitted in *B2*. The phrase "Neither hath the institution of civil government" is inserted at this place in *B3*.

> abridged] ~~a[?]ged~~ ‹abridged›

Here a partially illegible word "a[?]ged" with a strike-through has been replaced with the interlinear insertion "abridged" in the copy-text *B1*. The absence of *B2* and *B3* indicates substantive agreement with *B1*, so both *B2* and *B3* also have the word "abridged," although altered spelling, if present, would not be noted.

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[188] For the format of the apparatus I am indebted to the examples in John Locke, *An Essay Concerning Human Understanding*, ed. Peter Nidditch (Oxford: Clarendon Press, 1975); and Rhodri Lewis, *William Petty on the Order of Nature: An Unpublished Manuscript Treatise* (Tempe, AZ: Arizona Center for Medieval and Renaissance Studies, 2012).