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The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640

Richard J. Ross*

Between 1580 and 1640, memory became increasingly important in diverse areas of English legal culture: in education, in historical and antiquarian writing, in the bar's understanding of its social role, in the organization of legal literature, in political argument, in mediation between national courts and local remembered law, and in the

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I have modernized spelling, punctuation, and capitalization in all quotations from primary sources (including titles of works listed in the text and footnotes). I have consulted English legal manuscripts on microfilm or microfiche, except for works at Harvard Law Library's Rare Book Room, the University of Chicago's Special Collections, Yale's Beinecke Library, and the Free Library of Philadelphia, which I examined in person.
conceptualization of the ideal structure of legal knowledge. A "memorial culture" coalesced in early modern English law. It was a composite—in part self-conscious theorizing about recollection, in part a growing attention to the challenges of remembrance that spread as a byproduct of innovations in the profession's work and styles of argument and education. To English lawyers, memory became an intellectual keyword, a shelter, and a badge of guild identity no less than a subject of lawyerly manipulation and a repository of information. The centrality of memory to the thought and practices of this legal culture created forensic advantages and vulnerabilities for a profession at the center of political, jurisdictional, and dignitary conflicts. Sketching the causes, lineaments, uses, effects, and significance of memorial culture is the ambition of this Article.

One could construe the common law's frequent invocation of what had gone before—precedent, history, tradition—as an appeal to memory, which in some sense it was. But this Article pursues something more specific. It focuses on discussions of the mental faculty of memory, employment of metaphors of remembrance (including the description of the common law as an oral tradition), and changes in what lawyers remembered and how they did so. An English lawyer of, say, 1620 found lengthy discussions in educational manuals on the cultivation of memory, with digressions on its humorial and physiological foundations. Constructing and challenging lineages of local and constitutional customs extending back beyond memory into "immemorial" antiquity occupied his practice. So did discovering and assessing local remembered law. His colleagues complained that the recollection of precedents had worn away at a salutary reliance on "reason" and general principles. Through his participation in the burgeoning study of legal antiquarianism, he offered a distinct style of access into the national past and commanded a key route back into England's medieval and Saxon heritage. He imagined his lawbooks as extensions of porous memory.

1. Raymond Williams, *Keywords: A Vocabulary of Culture and Society*, rev. ed. (New York, 1983). Williams championed the historical study of "keywords." He explored the intellectual lineage—the rise, fall, and overlaying of meanings—of such terms as democracy, genius, liberty, pragmatic, romantic, and violence, to name a few. Ever in flux, keywords surprise their users, as much in their ascent and descent as in their proliferating implications. Williams quoted an eighteenth-century letter: "What... is the meaning of the word sentimental, so much in vogue among the polite...? Everything clever and agreeable is comprehended in that word... I am frequently astonished to hear such a one is a sentimental man; we were a sentimental party; I have been taking a sentimental walk." Williams, *Keywords*, 16. Following Williams's lead, Daniel Rodgers has inquired into the keywords of American politics, though putting the spotlight less on genealogy than on forensics. How were political concepts like utility or natural rights used—for what ends, with what appropriations, with what consequences? Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* (New York, 1987), esp. 3-16 (for Rodgers's methodological ambitions).
and strove to improve the movement of knowledge between remembrance and text. For this he compared pedagogic schemes, with their attendant philosophical justifications, competing in the “Method Wars” underway in late Renaissance Europe. Out of such disparate political, intellectual, pedagogical, and professional elements; out of lawbook design and constitutional argument, the appropriation of the logician Peter Ramus and classical tropes of recollection, the operation of *venire facias* writs and sewer commissions—out of all this crystallized memorial culture. It was a configuration of many pieces.

This Article explores and conjoins element after element to show their common participation in a whole. The relationship among them is associative more than chronological and causal (though, to be sure, timing and cause inform each of the topically organized parts). As we shall see, the effect of print on the learning exercises of the Inns of Court did not precede or cause immemorialist constitutional argument, which did not precede or cause the impact of Ramism or the Method Wars, which did not precede or cause local memory “brokering” or legal antiquarianism, and so on. To transpose this essentially synchronic approach to a visual image, memorial culture appears as a lattice. Sensibilities favoring “lumpers” over “splitters,” Julia Child over Martha Stewart, will feel most at home here.

Consider, by way of comparison, the concept of “standardization” in the early decades of the twentieth century. That was a time simultaneously bewitched and appalled by standardized industrial production; standardized labor routines; standardized, reproducible cultural products (films, phonographic records, advertising); standardized treatment of recruits during the Great War; standardization in the urban public schools; and so on. The experience of standardization in one realm (say, factory production) made standardization in other realms (say, education or entertainment) seem more natural, or more irritating. Men and women perceived themselves living through an Age of Standardization in a way their grandparents had not, and we, their grandchildren, no longer do, standardization having become our expectation.2 “Memory,” this Article contends, similarly organized

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2. This style of syncretism mixes seemingly unconnected bits of the past into a new and, one hopes, revealing pattern, the alluring ambiguity of the method serving as a heuristic and scholarly catalyst. This method does have its perils. An historian might chase merely phonetic associations. Imagine a paper claiming a cultural prominence for the concept “cold” in 1950s America, citing frequent references to “Cold War,” “cold cream,” “cold fronts,” and “cold coffee.” But the danger of abuse does not invalidate the core insight: that historical actors assumed affinities among the uses of a concept in different contexts, the deployment of the concept in one arena influencing its meaning elsewhere and changing the connotations and felt importance of the term. Legal cultures typically have such words of diverse and energizing meaning, identifying problems or challenges with multiple ramifications—perhaps “equality” and “efficiency” in recent decades, “legal science” and “class justice” a century ago.
diverse realms of thought and experience for the late-Elizabethan and early-Stuart lawyer.

One of this Article's key sources, Francis Bacon, advocated definition by negation, the clarification of what a thing is by the specification of what it is not. My study of memorial culture is not two things the reader might suspect. First, much recent intellectual history has explored how states and communities remember the past. What do monuments, textbooks, parades, anthems, and participants' stories recall, distort, and elide about a critical event—the Holocaust, the founding of the Massachusetts Bay Colony, the French Wars of Religion, Masada, the American Revolution? By contrast, this Article asks in what ways memory was central to legal culture, not how lawyers "memorialized" an important incident. Second, I do not explore the distinctive political and social structures and habits of mind that new forms of communication engender—as when writing pervades a formerly oral society, or print enters a mixed verbal and manuscript culture.

To be sure, the increasing influence of legal publishing plays an important role in my story. Between 1500 and 1700, lawyers relied on a combination of speech, manuscript, and print, with the latter growing in importance over the period. The years after 1590 saw a large increase in the number, variety, and accessibility of printed lawbooks. As print slowly began displacing oral tradition and recollection as a repository of the law in the latter sixteenth century, as legal knowledge moved from instantiation in distinguished persons to encapsulation in printed texts, the configuration of "memorial culture" began crystallizing partly in response. At the center of this

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Article lies this two-sided development: that memory's growing salience and complexity as a cultural discourse ran parallel to its diminishing importance as a carrier of legal knowledge, with print contributing to both parts of the process.

To perceive a memorial culture among early modern English lawyers is to contribute both to legal history and to the flourishing scholarship on the relation of communications and intellectual life in early modern Europe. Indeed, it is to revise both. Most legal historians assume that law moved from a largely oral system in Anglo-Saxon England, to the mixed oral and manuscript system of the Middle Ages, to the combined oral, manuscript, and print system of the early modern period, to the ascension of print, and finally toward the growing role of electronic media at the close of the twentieth century. This model assumes successive stages of legal communications, later ones working in tandem with and increasingly superseding earlier ones. Whether scholars focus on the social and political structures, or mentalities, engendered by distinctive forms of communication, or whether they probe the terms of interaction among different media, they have presupposed a forward movement along this axis. Yet the decline of memory and oral tradition as carriers of legal knowledge went hand in hand with, indeed provoked, the development of a cultural discourse of memory. These disparate trajectories suggest the methodological importance of separating for heuristic purposes the functional and cultural sides of forms of legal communications. Doing so complicates the commonly assumed forward movement of legal communications from anterior to later stages.

To the student of intellectual history, memorial culture might be written about, or written off, as an effervescence of theorizing about the fading oral tradition within the law. The phenomenon is familiar. As colonies revolt or are on the verge of independence, the metropolis erects Pharaonic administrative buildings, commissions

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monuments to empire builders, and links its imperial to its national identity. Hymns to the face-to-face community, and celebration of the nation as a "community of communities," are sung out at the perceived death of the community every thirty years or so. But memorial culture was no mere Indian summer, still less a eulogy. For it offers a new way to categorize early modern English legal culture.

To ask what was distinctive about Elizabethan and early-Stuart English legal culture is to reveal a number of answers, of storylines, proposed by scholars. Institutional and doctrinal historians have stressed the revivification of the sixteenth-century common law from late-medieval lassitude. The courts, engaging in intense competition for business, provided a host of new pleading fictions and remedies against the backdrop of a more active and commercialized land market, fiscal feudalism, severe inflation, and growing domestic and overseas trade. The common law reinforced, eliminated, and reshaped local prescriptive rights, particularly of property and governance. It provided the terrain on which Englishmen contested alternative conceptions of these rights. The decades around 1600 appear as a key period in the "rise of the bar," the socioeconomic and political ascent of the legal profession. The Whig interpretation of English constitutionalism held up the common law as "a barrier against absolutism," to borrow Charles McIlwain's most forthright phrasing. Defined jurisprudentially against Continental civil and canon law and extended historically into Saxon antiquity, the common


law fostered a sense of English distinctiveness and hence national identity.13 Turning from creation to containment, it deflected and domesticated challenges from civilians, Protestant Biblicists, and humanists; from populist or proto-Leveller critiques of the “Norman Yoke”; and from the critical rather than apologetic or illustrative uses of Continental philology and historicism.14

The construct of memorial culture offers another way to periodize English law by identifying an early modern “custodial moment.” To speak of a custodial moment is to identify a distinctive phase in the sensibility of legal culture that adds to, rather than supersedes, these other narratives. Custodianship has always been central to the precedent-based common law. Yet the increasing salience and theoretical sophistication of memory-talk in its various forms coupled with the growing awareness of legal mutability and loss attending late-Renaissance historicism changed custodianship. It became not only a necessity but an intellectual problematic. By the eighteenth century, an Enlightenment rhetoric of purifying law of inherited “barbarities” made guardianship of tradition a more contested stance. The early modern custodial moment stood between uncongenial late-medieval and Enlightenment periods. This argument, only hinted at here, will be developed in the concluding part of this Article.15


15. Peter Goodrich has also underscored the “custodial” ambitions of the early modern common law tradition, though our accounts differ significantly. To Goodrich, the common law’s self-conception as a “system of memories” suppressed a critical account of the changes and ambiguities of its real past, memory serving “as the means of forgetting.” The common law monographs and jurisprudential texts proliferating in the early seventeenth century were “signs” or “representations” of an underlying oral tradition, understandable only to its professional initiates. This purposely nonrevelatory writing, and its accompanying “apologetic and defensive” jurisprudence, arose in reaction to popular printed criticism of the law’s inaccessibility and deflected the systematizing ambitions of Continental philosophy and civilian jurisprudence. Goodrich, Languages of Law, esp. vii, 70-72, 87, 112. Goodrich’s argument recalls Richard Helgerson’s perception of the looming influence of Justinian’s Institutes and the civilian tradition of systematized ratio scripta upon Coke, Davies, Cowell, Fulbeck, Dodderidge, and other lawbook writers around 1600. Coke in particular produced “a writing against the written, a writing against the written, a writing against the written, and all that it stood for,” a writing that presupposed and maintained the primacy of oral tradition. Helgerson, Forms of Nationhood, 63-101, esp. 100.

My constructions of “memorial culture” and the “custodial moment” in jurisprudence build upon Goodrich’s and Helgerson’s work but ultimately describe different phenomena. First, Goodrich is interested in jurisprudence, the structure and ambitions of legal thought. I have pursued the relationship of lawyers to memory across a wide range of activities: antiquarian writing, constitutional politics, local memory brokering, styles of courtroom argument, legal
Part I of this Article explores the contours of memorial culture. Part II attends to a likely objection: Was memorial culture but a continuation of medieval practice? Beginning here and continuing for the rest of the Article, the distinctiveness of late-Elizabethan and early-Stuart memorial culture emerges through comparison to legal culture a century away on either side, around 1500 and around 1700. Part III inquires after the forensic advantages of emphasizing memory. Part IV develops the concept of a “custodial moment” and suggests the historiographical and jurisprudential implications of this Article.

I. THE LINEAMENTS OF MEMORIAL CULTURE: MEMORY IN ENGLISH LEGAL THOUGHT AND PRACTICE

Tracing the multifarious appearances and interrelationships of memory talk and practice in early modern English legal culture is akin to viewing the different facets of a gem. Not only does no one perspective allow sight of the whole, but no one facet is the logical place to begin. It is the very turning from facet to facet that suggests the connections and the complexity. But a starting point is necessary. John Davies’s depiction of lawyers as specialists in remembrance presents a point of entry into the role of memory in early modern legal culture and allows movement from one view of the problem to another, the task of Part I of this Article.

A. Lawyers as Remembrancers

The subtlety of logicians, the wisdom of philosophers, the words of poets, the memory of lawyers.

—Edward Waterhouse, *Fortescutus Illustratus* (1663)\(^{16}\)

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\(^{16}\) Edward Waterhouse, *Fortescutus Illustratus: or, Commentary on that Nervous Treatise De Laudibus Legum Angliae* (1663), 142. Waterhouse here recounted Cicero’s requirements for an orator in book one of *De Oratore*. 

education, and legal literature design as well as jurisprudence. I have taken legal thought as an element of the wider category of “legal culture.” Second, Goodrich keeps his focus on early modern jurisprudence. By contrast, I have tried to show the distinctiveness of Elizabethan and early Stuart memorial culture comparatively: first, by alluding to mnemonic practices outside the law; and second, by comparison to the late Middle Ages, the baseline for charting early modern developments. Third, Goodrich’s lawyers embraced a custodial relationship to law in opposition to a critical, interpretive, or historicist understanding of it. Their “insular tradition” was deadening; the ambition of their “legal dogmatics” was to repress challenges. By contrast, my construct of memorial culture highlights not only the suppressions possible in remembering but the creative forensics it empowered (as in assessing ancient constitution(s) and local memory brokering) and the disseminations of law that it encouraged (as in legal antiquarianism and the implied popular “interiorization” of a *lex non scripta*). For Goodrich, by contrast, the common law “tradition is one of decay; it exists not as an historical form but as the decaying sense of the institution, a mute pattern of emulation and of imitation.” Goodrich, *Languages of Law*, 68, viii.
The common law, wrote John Davies in the preface to his *Irish Reports* (1615), was a law “preserved in the memory of man,” its books “but comments or interpretations” upon an underlying tradition. In whose memory did this unwritten law reside? Davies gave two answers in some tension. As the “common custom of the realm . . . consisting in use and practice,” the common law “can be recorded and registered nowhere but in the memory of the people.” Yet the lawyers also “kept in memory the rules of the law.” For if no man knew the form of pleading or the course of proceeding in the law, what would become of the public justice in a short time? Or how should the benefit of the Law be derived and communicated unto the people? . . . Therefore though Jupiter . . . did first invent and give the law, yet was Mercury sent with that heavenly gift, to deliver it over unto mankind. So as it is manifest, that without the ministry of these Mercuries, . . . namely the learned professors thereof, there can be no use or application of the law, and consequently the law or justice it self cannot consist without them. 18

The legal profession was not only a teacher but an archive, retaining “in memory the best antiquities of our nation,” preserving “ancient customs and form of government.”

[Is not a worthy Professor of the Law a Star in the firmament of the Commonwealth? Is he not *lux in tenebris* wheresoever he dwells? Is not his house as it were an oracle, not only to a town or city, but to a whole country. 19

Davies’s preface displayed a double artfulness. First, he made legal remembering an honorable calling. It need not have been. Lawyers often treated mnemonics as a necessary craft of no particular nobility, a matter of repetition, proper diet, commonplacing, and organization. Critics of the profession saw its perishable “moth-eaten decrees” and “old prescriptions laid up in the trench/ of rusty time” as a sad counterpoint to the eternal law of love emanating from God. 20 The remembering lawyer fought against the oblivion of time, and all in the service of records of strife, preserved in “peddler’s French,” as the poet Roger Tisdale acidly put it. 21 But Davies’s barristers, weighed down with prescriptions and decrees, perhaps absent the moths,
became tutors and archives. Lawyers used to hearing themselves described as parasites and stokers of discord learned that popular knowledge of the law, indeed its very preservation, depended on their teaching it. While pleasant to hear, this was in some tension with Davies’s placement of the law “nowhere but in the memory of the people.” Yet it served a purpose, for by making lawyers “conduits” to the people instead of surveyors of a law generated by them, Davies deradicalized the latent populism of having a customary common law “recorded and registered” among the people. Finally, lauding lawyers as an archive of governmental antiquities gave them the interpretive privilege of custodianship, an important advantage as late-Elizabethan politics took an historical turn.

Second, Davies imagined remembering as a political and intellectual duty, an office or calling of the profession as well as a burden for the individual lawyer. From the Middle Ages through Davies’s day, of course, practitioners put great effort into remembering. Their mnemonic verses survive at the end of monographs. They entered Chaucer’s poetry in the person of a serjeant who knew every statute “pleyn by rote.”22 They collectively recalled the course of the royal courts, their “common erudition,” and a distinctive legal “reason.” Yet Davies conceived of lawyers as an order of remembrancers with social and political as well as professional responsibilities, custodians of civic history and wisdom as well as legal craft.23 They preserved a national customary law of popular birth, retained the “genius” or mores of a people legally expressed, and maintained antiquities as a route into national history (indeed, were themselves “oracles”). This broad understanding of a remembrancing profession plays little role in the work of leading jurisprudential writers from 1450 to 1550 such as John Fortescue, Christopher St. German, John Hales, Thomas Elyot, and Thomas Starkey. It was a rhetorical artifact of Elizabethan and early-Stuart legal culture.24


23. By “remembrancer” I do not mean the official attached to the City of London and the Exchequer. Rather, I mean a person or group that views the retaining and interpreting of memories as central to their jobs, identity, and social role.

24. These writers praised lawyers as educators, bridges between center and periphery, and mediators between disparate sources of law but not as remembrancers in the way Davies suggested. John Fortescue, De Laudibus Legum Angliae [In Praise of the Laws of England] [MS c.1468-71], ed. S.B. Chrimes (Cambridge, 1942); Christopher St. German, Doctor and Student; or, Dialogues Between a Doctor of Divinity, and A Student in the Laws of England [1523-31], ed. T.F.T. Plucknett and B.L. Barton, Selden Society, vol. 91 (London, 1974); John Hale’s, “Oration in Commendation of Laws” [MS c.1540], MS LC 14:32.1, Free Library of Philadelphia, Carson Collection; Thomas Elyot, The Book Named the Governour [1531], ed. R.C. Alston (London,
Why did it become popular and plausible, then? Three developments in English legal thought and practice, usually considered separately, combined to encourage Davies’s lawyers to imagine themselves a caste of remembrancers. In the decades between 1570 and 1640, lawyers increasingly investigated, assessed, and “brokered” local remembered law and served as intermediaries between these manor and parish recollections and the national tribunals in London. They were specialists in generating and contesting immemorial pedigrees within constitutional argument and in providing ancient ancestors for existing rules and institutions. And they participated as readers, writers, and documentary guardians in a politicized legal antiquarianism that reconstructed the past in a distinctive fashion.

1. Legal Antiquarianism: Styles and Routes of Access into the Past

There “is no study or learning so fit and necessary for a lawyer, as the study of antiquities,” wrote the barrister William Burton in his *Description of Leicestershire* (1622). The importance of antiquarianism within late-Elizabethan and early-Stuart legal culture has been argued by two generations of historians of historiography, of political thought, and of law. A few reminders from that scholarship are in order before offering some fresh observations on the style of access into the past that legal antiquarianism offered, and on how, specifically, it figured lawyers as remembrancers.

During the sixteenth century, Tudor lawyers became more concerned with explaining the historical origins and development of the law. The late-fifteenth century bar perpetuated medieval fantasies in their yearbooks and Readings (Inns of Court lectures). Julius Caesar’s contemporaries, they said, heard common pleas at the Tower of London; Aeneas’s great-grandson Brutus established the Marshalsea as the first royal court; nay, the common law was as old as the created world. Thomas Littleton’s *Tenures* (1481) did not discuss...
how the law he so carefully recounted had come to be. Nor did Readings of the same period. \(^{28}\) By the opening of the seventeenth century, however, historical accounts of customs, laws, and institutions had become common features of legal lectures, treatises, and parliamentary and judicial arguments. They ranged from the densely argued tracts of John Selden to perfunctory three-paragraph leaps from Eden to Elizabeth. The humanist attention to original sources, etymology, anachronism, and the compilation and critical examination of records provided the foundation for this historical turn in legal as well as in political and religious writing. The fashionable image of antiquarian studies after the publication of William Camden’s \textit{Britannia} (1586) helped too, particularly among the \textit{au courant} gentry trained in humanist secondary schools who entered the Elizabethan Inns of Court. \(^{29}\)

Lawyers were disproportionately active among Elizabethan and early-Stuart antiquarian and historical writers. They produced town annals, county chorographies, and regnal histories. \(^{30}\) About thirty of the forty members of the London-based Society of Antiquaries spent time at the Inns of Court. \(^{31}\) Along with antiquaries, politicians, bureaucrats, and ambassadors, lawyers copied and abridged historical records, corresponded about documents of mutual concern, and made use of Robert Cotton’s unparalleled library of manuscripts. The “search of records and other exotic monuments of antiquity, being the most ravishing and satisfying part of human knowledge,” Simonds D’Ewes filled his diary with his pursuits of the Doomsday Book and Fleta, plea rolls and parliamentary journals. \(^{32}\) On “Thursday, the 4th day of September, in the afternoon, I first began studying records at the Tower of London,” he recalled of his 1623 baptism in parchment. \(^{33}\) In the archives of the Tower and the four treasuries at


\(^{33}\) Two years later he was slipping out of Common Pleas, when his interest flagged, to
Westminster, energetic keepers—several of them lawyers—organized and calendared the locked chests and bags thrown into corners to make the national records more accessible to researchers.\textsuperscript{34} After 1580, antiquarian studies became increasingly politicized. Jurisdictional conflicts among common law, ecclesiastical, and prerogative tribunals, the debate over the uneasy compromises in the Church of England, and tensions between parliamentary opponents of royal policies and the Crown all called forth antiquarian support for disputing positions. As F. Smith Fussner has observed, the “argument from records became the characteristic form of English political debate.”\textsuperscript{35}

The growing presence and political importance of legal antiquarianism naturally brought out the recollective calling of the bar. But beyond this general, if important, connection—perhaps overdetermined at a time when educators could hardly forebear citing the Ciceronian fusion of history with the life of memory—the specific methodological commitments of legal antiquarianism reinforced the emerging image of lawyers as remembrancers. “Antiquarian” studies defined themselves in relation and in opposition to “historical” writing as those categories were understood in the Renaissance.\textsuperscript{36} In common with other antiquarians, lawyers emphasized the unearthing and examination of records in the service of correcting and supplementing rather than reordering and polishing received historical accounts.\textsuperscript{37}

\textsuperscript{34} Thomas Powell, in the preface to \textit{The Repertory of Records}, by Arthur Agard (1631), offers a priceless glimpse at the state of the national records: “There is a little room adjoining to the same courts, wherein are three chests, in which are records placed, viz. the first chest next to the door, contains pleadings of \textit{quo warranto} . . . and \textit{placita corona}, and \textit{placita de iur.} . . .” “[I]n the second treasury, which is in the palace of Westminster locked with three locks, and containing one room or chamber, there are these records placed in presses of wainscot, viz. in a press on the right hand, in the middle, a black bag, entitled, ‘concerning the insurrection of Yorkshire,’ being within a bag entitled, ‘treasons.’” Ibid. On the reorganization of the national records during the reigns of Elizabeth and the early Stuarts, see McKisack, \textit{Medieval History}, ch. 4; R.B. Wernham, “The Public Records in the Sixteenth and Seventeenth Centuries,” in \textit{English Historical Scholarship in the Sixteenth and Seventeenth Centuries}, ed. Levi Fox (Oxford, 1956), 11-30; Fussner, \textit{Historical Revolution}, 33-34, 69-82.

\textsuperscript{35} Fussner, \textit{Historical Revolution}, 83. The debate over impositions in the 1610 parliament provides a good example of this phenomenon, especially the speeches by Hedley, Dodderidge, Hobart, James Whitelocke, and Heneage Finch. See ibid.; Levy, \textit{Tudor Historical Thought}, 165-66; Arthur B. Ferguson, \textit{Clio Unbound: Perceptions of the Social and Cultural Past in the English Renaissance} (Durham, N.C., 1979), 30-32.


\textsuperscript{37} William Lambard compared an antiquary digging in “old books hoarded up in corners” to a miner uncovering ore “within the bowels of the earth” for smelting into usable metal. He left the fashioning of the metal into crafts to the ingenuity of the antiquary’s readers. William Lambard, preface to \textit{A Perambulation of Kent}, 3d ed. [c.1596-1640] (Bath, 1970), v.
The historian's duty of offering rhetorically powerful moral lessons and analyses of exemplary conduct, inherited from classical forebears and models, was not part of the antiquary's calling. Concentrating on the commencement and early development of offices, institutions, and customs, they downplayed social and political roots and consequences.

The organizing characteristics that in combination distinguished legal antiquarianism, rather than the ones it shared with other antiquarian and historical studies, figured it as a special project or style of remembrance. These characteristics emerge through comparison to other kinds of antiquarianism and forms of access into the national past—chronicles, heraldry, genealogy, and church, regnal, and "politic" history. 38 To begin with, legal antiquarianism employed nonprovidential causation, in contrast to its ecclesiastical cousin. In support of the Church of England's polemical claims against its Catholic adversaries, scholars from Matthew Parker and John Foxe to James Ussher sifted through ecclesiastical antiquities to recover, or invent, a largely autonomous church in Romano-Britain and Saxon England developing with minimal guidance and less corruption from the pope. 39 Bishop James Ussher's *A Discourse of the Religion Anciently Professed by the Irish and British* (1623), for example, marshalled "records of the former ages" to witness that the British and Irish before the Norman Conquest maintained the essentially Augustinian theology that the present Church of England restored. 40 The ecclesiastical antiquities that Ussher carefully assembled illuminated, as so many irregularly spaced torches, the church traveling a path through time chosen by God. Working within the providential historical scheme laid out by John Foxe at the opening of *Acts and Monuments* [The Book of Martyrs] (1563), Ussher imagined the progress of Christianity as a movement through a series of divinely ordained stages from primitive purity through decay and papal contamination to Reformation and toward the Millennium. 41

In Britain as on the Continent, Ussher wrote, "corruptions did creep

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38. I have excluded foreign histories since I am concentrating on the English past.
39. In the paragraphs that follow, I treat ecclesiastical antiquarians who wrote on behalf of the Church of England rather than for Catholics, Puritans, or Separatists.
40. James Ussher, *A Discourse of the Religion Anciently Professed by the Irish and British* [1631; originally printed, 1623], in *The Whole Works of the Most Rev. James Ussher*, ed. Charles R. Elrington (Dublin, 1864), 4:235-381, esp. 238-39 ("[T]he religion professed by the ancient ... Christians in this land, was for substance the very same with that which now by public authority is maintained therein, against the foreign doctrine brought in thither in latter times by the bishop of Rome's followers. I speak of the more substantial points of doctrine, that are in controversy betwixt the Church of Rome and us at this day" such as predestination, grace, free will, works, justification, sanctification, purgatory, and the clergy's permission to marry).
in by little and little, before the devil was let loose to procure that seduction which prevailed so generally in these last times.”

Antiquities allowed a glimpse of the divine plan. And not only in church history. Providence also guided the events recounted in chronicles and humanist-inspired regnal histories. The victory of Henry VII that ended the War of the Roses was, in the estimation of Polydore Vergil, “an event of which foreknowledge had been possible.” Eight centuries before, an “apparition with a heavenly appearance” had predicted the ascension of the Tudor dynasty to Cadwallader, last king of the Britons.

Legal antiquarianism, by contrast, traced man’s doings rather than God’s. Legal antiquarians never explicitly denied God’s providential role in ordering history, so their studies, at some foundational level, were of “secondary causes.” Yet unlike ecclesiastical antiquarianism and church history and unlike the chronicles and political histories organized by reigns, God’s putative direction of affairs remained unconsidered, leaving charters, deeds, and monarchs alone on the surface of the page. The contentions of Jesus and Antichrist pressing church history forward did not drive the development of Kentish gavelkind or Cornish mining law in Lambard’s Perambulation and Camden’s Britannia; the hand of Providence that lifted Henry VII over Richard III at Bosworth field and the English fleet over the Spanish Armada did not shape the progress of Spelman’s admiralty jurisdiction or Coke’s copyhold tenure. Muting the providential underpinnings of legal development underscored its factitious character. The actors in legal antiquarianism—kings, parliaments, judges, lawmaking communities—were not borne along on a divine plan. The realm made its common custom, Kent its gavelkind, localities their borough-English and estover customs. To the legal antiquarian, God’s revealed law and His natural law stood as boundaries or as a distant font of original principles that were, in John Selden’s parlance, “limited” and defined by the positive laws communities adopted in the wide sphere of legal adiaphora.


One purpose of Protestant ecclesiastical antiquarianism and history was to open a window to an ancient moment of purity, shining in the primitive church tolerably visible in early British Christianity, that the present church could reclaim. In this mission, ecclesiastical antiquarianism and church history resembled the chronicles, the humanist-inspired regnal histories in the style of Polydore Vergil, and the “politic” histories concerned with tactical effectiveness in statesmanship rather than fidelity to the Christian virtues—for all strove to display *exempla* (whether religious, moral or political). Like classical historians, these various styles of writing about the past held up models of good and bad conduct, ideals to strive for, and obstacles to avoid.⁴⁷ Legal antiquarianism, by contrast, portrayed the normative rather than the aspirational. It told what Englishmen by law could or must do rather than what the virtuous, extraordinary, or elect person should strive to do. From Henry Spelman’s careful antiquarian demonstration that the English system of land tenures arose after the Conquest, for example, came a lesson, but not one with the godly aura of *imitatio Christi* or the grandeur of the hard course of virtù. Rather, one learned that knights-service tenure did not exist before the Conquest, so that present-day tenants in ancient demesne could not hold land by it; they held by socage tenure.⁴⁸

Because legal antiquarianism’s didactic agenda was normative rather than exemplary, because it used the origins and developments of an institution, custom, or practice to suggest its current scope and powers, it characteristically sought continuity in the subject under study. The hospitality of Abraham and the subtle politics of Rome could stand as lessons despite the passing away of those civilizations. But only the existence in the current polity of the peerage’s summons to Parliament or the Lord Chancellor’s office gave the early history of these topics a normative importance. Taking as his province the early traces of the still living (the Inns of Court, a country manor, the Star Chamber), the lawyer partly deflected the insinuations of irrelevance and pedantry whispered about antiquaries of the classical

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world, ancient Israel, and Britain and Romano-Britain, whose critics sniffed about them the scent of the ossuary. More than a millennium separated the classical world and ancient Israel from Renaissance England, and the upheavals of the Saxon conquest only allowed for a severely attenuated continuity from the present back into the (largely mythic) history of Britain.

The legal antiquarians’s disparate studies favored a recognizable plotline. The passage of a statute, formation of a court, or evolution of a custom in antiquity began a timeline that they pursued into the present. The first mention of a custom, office, or practice found in extant documents was taken as evidence of its birth or of an earlier, unrecorded genesis, its original purpose inferred from the records or from the intimations of etymology. The antiquarian worked from this point into the present, noting the existence and function of his subject in records widely and irregularly spaced in time, touching the stream of history intermittently like a stone skipping across the face of water. The whole concoction strongly emphasized continuity over discontinuity by linking origination to current function and by eschewing development in favor of the formal identity of the subject over time (“the” Marshall, “the” Court of Requests). The legal antiquarian in effect treated his subject as an ongoing “essence” with variable “accidents.” This was an easier task for him than for his ecclesiastical compatriot trying to establish the continuity of the English

49. Coke observed that in the dispute over the jurisdiction of the court of Marshalsea, the “true original institution and fountain itself lay somewhat deep and obscure, until it was brought out by antiquity, which has so manifested the true sense of the ancient acts of Parliament. . . . [A]nd therefore they are worthy of reprehension which condemn or neglect the study of antiquity (which is ever accompanied with dignity) as a withered and back-looking curiosity.” Edward Coke, preface to Reports, pt. 10 [1614] (London, 1826), xii-xiii. John Selden commented: “For, as on the one side, it cannot be doubted but that the too studious affectation of bare and sterile antiquity, which is nothing else but to be exceeding busy about nothing, may soon descend to a dotage; so on the other, the neglect or only vulgar regard of the fruitful and precious part of it, which gives necessary light to the present, in matter of state, law, history, and the understanding of good authors, is but preferring that kind of ignorant infancy, which our short life alone allows us, before the many ages of former experience and observation. . . .” John Selden, dedication to Robert Cotton in History of Tithes [1618], in The Works of John Selden (London, 1726), 3:1067.


national church with Saxon, British, patristic, and apostolic forebears. To trace the descent of the English church as a national church (an especially important task given the non-Scriptural, historicist elements of the Anglican via media) was to confront three challenges: the limitation on the autonomy of the national churches through their common pre-Reformation link to Rome; their shared descent from apostolic Christianity; and the ambiguity of the proper subject for study because of the threading of the transnational, invisible church of the elect within the visible churches organized by nation.\(^{52}\) The legal antiquarian, by contrast, faced no division between the common subject and the invisible fellowship of the law-worthy to fracture his focus. To the extent he considered the civil, canon, and trans-European feudal law, he characteristically treated them as influences upon the common law rather than as its parents or as the genus to its species. This facilitated his habit of taking slices of the common law and polity as distinguishable and internally unified essences with continuous identities from origins through the present.

Legal antiquarianism, whether organized geographically (as town memoirs and county studies) or by institution or office (concerning Parliament, the Court of Requests, the Star Chamber, or the Lord Chancellor), maintained a “public” rather than a familial or personal focus. The burgeoning genealogical studies of the latter sixteenth century, by contrast, plotted the descent of individuals and family groups. Heraldry traced lineages and honors for the select class of the armigerous.\(^{53}\) Styling legal antiquarianism “public” invites terminological imprecision. It suggests a greater practical and conceptual division of the “public” from the “private” in early modern England than the many imbrications of families, communities, churches, corporations and the state allowed. Conversely, were heraldic blazons and armor “private”? Henry Peacham advised young gentlemen to study them not only as “ornament,” but as a tool to assess the legitimacy of claimants to office and to discover the kin relationships of the nobility and local gentry that moved politics.\(^{54}\) Still, the notion of “public” retains heuristic value in suggesting why the antiquaries’ imagined or implied addressees exceeded their actual readership.

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52. In this more complicated fashion, ecclesiastical antiquarians and historians needed to demonstrate the continuity of the Church of England with apostolic and patristic forebears to rebut Catholic accusations that the Henrician Reformation had severed the national church’s descent from Jesus by offering up a new form of worship.


54. Peacham, Compleat Gentleman [1634], 154-61, esp. 160 (during the Wars of the Roses, “with which party in equity and conscience could I have sided, had I been ignorant of the descent and pedigree royal?”).
Legal antiquarians distributed their writings to a variety of limited groups. The Society of Antiquaries's manuscripts reached an exclusive coterie of lawyers, heralds, and churchmen; printed chorographies aimed at featured counties through a national book market. But beyond the actual readers lay, at least potentially, an audience as broad as the class “governed” by the antiquary’s subject, an audience defined less by the writer’s estimation of an “ideal” or “typical” reader than by the boundaries of the power exerted by his topic. The audience for genealogical or heraldic studies was curious about the subject; the audience for legal antiquarian tracts on Parliament or the Chancellor was governed by the subject. Herein lay the tacitly “public” nature of even antiquarian manuscript works circulated within restricted circles.

Nonprovidential, factitious legal development; tutelage of normative rather than exemplary conduct; continuity from origins to the present; an implicitly “public” focus—in combination, these organizing characteristics marked legal antiquarianism as an especially practical and, with no hint of paradox, especially “presentist” style of remembrancing that located readers politically and culturally. The political importance of legal antiquarianism, as historians often remind us, rested on the pronounced late-Elizabethan and early-Stuart tendency to take the antique form of a custom or institution as the measure of and as security for its contemporary successor. The purported Saxon Parliament vouched for its Jacobean descendant’s necessary role in the polity; the primeval Court of Requests shored up the barricades of its late-Elizabethan incarnation beleaguered by Writs of Prohibition; the medieval charter reinforced the shallowly rooted power of the parvenu manorial lord still dusty from the livery of seisen.\footnote{Sir Julius Caesar, \textit{The Ancient State Authoritie, and Proceedings of the Court of Requests}, ed. L.M. Hill (Cambridge, 1975); R.W. Southern, “Aspects of the European Tradition of History Writing: 4. The Sense of the Past,” \textit{Transactions of the Royal Historical Society} 23, 5th ser. (1973): 243-63. William Burton delighted in citing the royal grants initially founding ancient manors. William Burton, \textit{Description of Leicestershire} (1622).} Both Coke and John Davies entrusted the legal profession with educating the subject in his “ancient and undoubted patrimony” in the laws of England, of which “he had for some time by ignorance, false persuasion, or vain fear, been deceived or dispossessed.”\footnote{Coke, preface to \textit{Reports}, pt. 5 [1605], iv-v.} This was legal tutelage of a particular sort: tutelage as recovery, the extraction from antiquities of the “best inheritance that the subjects of this realm have,” but for “want of understanding of their own evidence, do want the true knowledge of their ancient birth-right.”\footnote{Ibid.} The contestation of customary property rights in the half century...
before the Revolution made antiquarian scholarship quite literally profitable, encouraging its cultivation. Sir Robert Cotton mined his library of antiquities for precedents to revive lapsed privileges and dues on his manors as part of a generational commitment to what Roger Manning has termed “fiscal seigneurialism.”

Conflicts over deforestation, fen drainage, mining projects, tax and rent increases, jurisdictional poaching, and enclosure were also fought on the terrain of prescriptive right. Appealing to antiquity was, of course, an ancient strategy. But the quantity of records and critical skills in their handling expected in a “proper” argument had greatly increased since the late Middle Ages, heightening the importance of legal antiquarianism as a scholarly project and forensic resource.

The historiographical attention given, understandably, to politics has overshadowed the cultural dimensions of legal antiquarianism. The early modern penchant for labeling custom a “second nature” strongly underscored law’s role as a constituent and carrier of culture as well as a regulator of society. Legal antiquarianism organized geographically (rather than by institution or office) suggested what it meant to be a Kentish gentleman, a townsman of Exeter, or a Cornish tin miner as a species of the genus Englishman. Rules of property and governance served as a strand of local identity. Readers from outside the featured geographical area did not stand aside as mere spectators, for they too acquired a sharper understanding of the customary foundations of their own local mores though comparison. In a preface addressed to the gentry of Kent in William Lambard’s *Perambulation of Kent*, “T.W.” hoped that the book might inspire in “the rest of the gentlemen of this realm” a better appreciation of the history and importance of “what things in their own countries are of greatest fame now.”

Institutional legal antiquarianism cultivated a national rather than local identity in the reader, though in a more diffuse way. Antiquarian studies of Parliament, of the Chancellor and the Marshall, of trade

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61. T.W., preface to *Perambulation*, by Lambard, x.
impositions, and *habeas corpus*, illuminated in pointillist fashion bits of the common law increasingly becoming a symbol of Englishness. In late-Elizabethan and early-Stuart England, the common law posed as a bulwark of English liberty against the foreign: against union with Scotland, against the absolutist rhetoric of the Scottish-born King James I, against the civil and ecclesiastical jurisdictions applying the trans-European civil law.\(^6\) To write and read legal antiquarianism was to participate in what Charles Gray has styled a “nativist revival” in late-Elizabethan culture and common law. It was to turn inward from the cosmopolitanism of Henrician humanism and Protestantism to dwell on English distinctiveness, apparent not only in legal antiquarianism but in studies of the Anglican *via media*, topography and chorography, navigation, and ancient British mythology.\(^6\)3

The organizing characteristics of legal antiquarianism—nonprovidential, normative rather than exemplary, continuous, and public—figured readers not merely as spectators satisfying a distant, and distanced, curiosity but as the heirs, the beneficiaries, or the dispossessed of the accounts. The antiquary’s recoveries helped define the legal and political expectations and cultural identity of his readers. The legal antiquarian was the remembrancer of these before he was the remembrancer of God, or of the king alone, or of the great or the saintly, or of an honored family, or of a civilization long passed away. Not merely the proliferation of legal antiquarianism, then, but the very form of access into the past it offered helped mark Davies’s lawyers as an order of remembrancers.

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At a more basic level, the historical turn itself in late-Elizabethan and early-Stuart intellectual life and political culture—that intensification of interest in, availability of, and credence toward record citation—reinforced the bar’s emerging role as remembrancers. To seek documentary access to the medieval and Saxon period was to work through legal sources: Lambard’s compilation of Saxon laws, parliamentary statutes and yearbook cases, treaties, Chancery writs and royal orders, deeds and charters, and the legal monographs of

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\(^6\)2. Apologists of the common law had long contrasted it favorably to caricatured, debased foreign rivals, such as John Fortescue’s dystopian France and the “Roman” law of the pope and Continental Catholic powers. In this fashion, the internationalism of civil and canon law, the foreignness of Scotland, and the purportedly Spanish, French, and Machiavellian credentials of absolutism served as a convenient foil for common lawyers’ elevation of their “municipal law” into the precious inheritance of free Englishmen.


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Glanvill, Bracton, Fleta, Britton, and Littleton. Legal records, of course, held no monopoly. Englishmen examined burgesses’ annals of town affairs, monks’ chronicles, epitaphs and inscriptions, the treatises, disquisitions, correspondence, histories, and sermons of the church, and, increasingly by the late sixteenth century, the physical evidence of coins, ruins, and roadways.64 But legal records played a leading role, particularly in constitutional and political history. And with varying degrees of self-regard, lawyers presented themselves as the preferred interpreters of these sources. Coke pointedly advised the “grave and learned writers of histories” to “meddle not with any point or secret of...the laws of this realm, before they confer with some learned in the profession.”65 John Selden’s recitation of precedents in Parliament against the Crown’s purported right to imprison on the king’s “special command” began with:

[A] general key for the opening and true apprehension of all... [precedents] of record; without which key, no man, unless he be versed in the entries and course of the King’s Bench, can possibly understand them.66

Irrespective of the purposes and conclusions for which Englishmen summoned legal records, their very strategic importance enhanced their professional custodians’ role as national remembrancers. This was as true when legal records afforded a glimpse of the ecclesiastical, political, linguistic, genealogical, heraldic, and military pasts as when they illuminated the “legal” past.

Lawyers displayed a certain testiness toward routes into the medieval and Saxon era that did not pass through their professional terrain—for instance, through monks’ chronicles. Disseminated by sixteenth-century printers feeding the market for history, chronicles offered an archive of documents otherwise inaccessible.67 Yet as lawyers drew on this resource, they also accused the monks of writing poor accounts of statecraft and worse of law, mistaking the details of legislation and government. Francis Bacon, Edward Coke and John

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64. On archaeological and numismatic evidence, see Stuart Piggott, “Antiquarian Thought in the Sixteenth and Seventeenth Centuries,” in English Historical Scholarship, 93-114.
66. See Selden’s speech against the decision in the Five Knights’ Case at a conference of the Lords and Commons, April 7, 1628, in Selden, Works, 3:1959.
Selden looked suspiciously at precedents and laws that passed through time outside of the “traditions” of the courts and the judges. “For it is a misfortune even of the best historians,” wrote Bacon, “that they do not dwell sufficiently upon laws and judicial acts; or if by chance they use some diligence therein, yet they differ greatly from the authentic reporters.”

William Lambard’s sketch of early parliamentary history in Archeion positively celebrated the thirteenth-century onset of parliamentary records that freed him from reliance on the chronicler Matthew Paris. The medieval chroniclers, however, were not only laymen but Catholics in orders who were susceptible to posthumous enlistment in the historiographical brigades of the Counter-Reformation. Legal records interpreted by Protestant lawyers proved safer tools of the post-Reformation invention of an English church historically subordinate to the Crown than did the chronicles with their inconvenient notations of papal authority. The Jesuit controversialist Robert Parsons mined the chronicles to attack Coke’s report of Caudrey’s Case as an anachronistic reading of the constitutional history of English ecclesiastical/crown relations preceding the Elizabethan Act to Restore to the Crown the Ancient Jurisdiction over the Estate Ecclesiastical. The “divinity and histories” that Parsons cited, Coke pronounced irrelevant (though not following his own advice). His was part of a larger lawyerly indictment of the chronicles for mistake and bias that demeaned them as a source for reconstructing the constitutional past, directing disputants instead to the strongest alternative source of evidence: to the records of the “municipal laws of England” and to their professional interpreters and remembrancers.
2. Assessing Immemorial Constitution(s) and Ancient Provenances

One of the political uses of legal antiquarianism deserves a closer look: the generation and dissolution of immemorial pedigrees. J.G.A. Pocock's seminal work, *The Ancient Constitution and the Feudal Law* (1957), placed at the center of Stuart historiography the "common law mind," the widespread belief percolating from Elizabethan and early-Stuart lawyers into the political nation that the common law was a body of custom that provided the foundation and lineaments of the constitution. The common law's ancient origins were unrecorded, unknown and hence "immemorial," and its existence continuous. In the political language of the ancient constitution that Pocock explored, a claim of immemorial origins deflected the royalist argument that a present king enjoyed a special privilege to amend or abolish customs, rights, and institutions that his predecessors in the past had summoned into existence or made effective by their imprantium. Building on its Elizabethan predecessor, the early-Stuart Parliaments cited this theory to constrain royal prerogative and to support their own purported liberties. Existence "before memory" also gave a presumption of validity to practices challenged in bureaucratic and interjurisdictional rivalries, a favorite argument of common lawyers. 72

Forty years of scholarship reacting to and criticizing Pocock has whittled away his overstated claims while endorsing the importance of the immemorial pedigree as a constitutional resource. Pocock portrayed the legal profession as the parent and carrier of a widely shared commitment to the ancient constitution and the immemorial law. The "common law mind" now appears less as Pocock's "mentalité" than as a position chosen from among alternatives, a political

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strategy, a "move." And the extent of opposition to the ancient constitution has become clearer, particularly to the extreme continuity asserted by Coke, Pocock's leading source, who imagined that the outlines, if not the details, of the law and constitution descended from the mists of Saxon or even British antiquity. The civilians John Cowell and Thomas Ridley, the Catholic controversialist Robert Parsons, the French legal humanists Bodin and Hotman, the historians Polydore Vergil and John Hayward, the medieval monk-chronicler Matthew Paris, and a bevy of high-royalist clerical critics believed that the Norman Conquest reconstituted the common law or, more radically, originated it. The "Bastard of Normandy came into England" and "gave the law, and took none, changed the laws, inverted the order of government," concluded Scotland's James VI five years before ascending the English throne as James I. Within the legal profession, John Selden and William Hakewill spoke for mainstream lawyers unwilling to assent to either Coke's excessive claims of continuity or the expansion of royal power that presumptively followed from grounding the constitution in the Norman Conquest. They elaborated Lambard's evolutionary picture of the law as slowly amalgamating Saxon, Danish, and Norman customs before and after the Conquest. Following Continental legal humanists, Crown servants Francis Bacon and Thomas Egerton undermined the supposed antiquity of English law by depicting it as developing over time in response to changing economic, social, and political conditions. "[A]ll human laws," wrote Egerton, "are but leges temporis."

73. Pocock decried his critics' employment of this "historiographical strategy typical of our times." Pocock, Ancient Constitution, 262. John Phillip Reid has offered the most thoroughgoing depiction of the ancient constitution as a "forensic" tactic, a "form of historical utilitarianism." Reid, "Ancient Constitution," esp. 166.

74. Coke did have his followers. References to a pre-Conquest common law appeared sporadically in early-Stuart Parliaments; as a sentence or two in such popular works as Michael Dalton, Country Justice (1622 ed.), 1; and John Stow, ed., Annales; or A General Chronicle of England (1631), 1037; and in monographs by George Saltern, Roger Owen, and Robert Hills. See George Saltern, Of the Ancient Laws of Great Britain (1605); Klein, "Ancient Constitution," 35-41 (discussing Owen and Hills).


The theory of an immemorial constitution inspired contrary antique traditions along with disagreement. In conflicts over jurisdiction and dignity, common lawyers claimed that their courts existed immemorially, unlike the ecclesiastical and prerogative courts and tribunals employing civil law. The civilians retorted that if their tribunals were not more ancient than the common law, perhaps the civil law itself was. Or they took the concept of “immemorial” in a looser sense to mean terribly old rather than without known origin. By that token, the civilian tribunals qualified. So did the royal prerogative, “more ancient than the customary law of the realm,” in the opinion of John Davies. And so did the pre-Reformation Catholic polity. Its roots began “with the first very planting of Christian religion in our country and continued for more than nine hundred years” before the interruption of Henry VIII, according to Jesuit Robert Parson’s counterhistory of its “antiquity, priority, universality, continuance, and succession.” George Saltern appropriated the immemorial constitution for royalist purposes. In support of James I’s proposed unification of English and Scottish law, Saltern found the headwaters of the two laws in a common British spring, their division beginning only in the reign of Henry III. Harnessed to a variety of political projects, and sometimes denied outright, the ancient constitution and immemorial law commanded scrutiny rather than assent.

This fracturing of Pocock’s mentalité of the “common law mind” heightened the importance of remembrancing to the early modern legal profession. Far more than Pocock’s consensus, the collision of rival historical trajectories of the law and the efforts of partisans to dispel or prove disputed immemorial pedigrees made memory a
terrain of conflict and a prize. Henry Spelman, whose depiction of the rise of feudalism after the Conquest challenged the continuities of the ancient constitution, ushered in his contrary periodization of English history with a methodological admonition: “When states are departed from their original constitution, and that original by tract of time worn out of memory; the succeeding ages viewing what is past by the present, conceive the former to have been like to that they live in; and framing thereupon erroneous propositions, do likewise make thereon erroneous inferences and conclusions.”

Robert Parsons became so dismayed at Coke’s citation of the pre-Reformation law of Catholic England to justify Jacobean persecution of priests that he dismissed the ancient constitution as an “idea Platonica... to cover and color” inconvenient changes like the break with Rome.

A telling jibe, it suggested how Coke’s specious continuities elevated the law from mutable history into Platonic idea, effacing memory in the guise of preserving it. For Parsons and Spelman, to recapture change was to liberate memory as, for Coke and the ancient constitutionalists, to establish continuity was to honor memory. The common lawyers, then, did not embrace the ancient constitution and the myth of their immemorial law as a shared historical account or political strategy so much as participate in a disputation about them, having taught the terms of the conversation to the political nation. The common lawyers were specialists in weaving immemorial lineages out of the threads of legal records and in tearing them apart.

Their skill in the process rather than their commitment to a conclusion figured them as constitutional remembrancers.

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82. Henry Spelman, “Of Parliaments” [MS c.1640], in Reliquiae Spelmannianae, 57.
83. Parsons, An Answer, 373-74.
84. John Selden’s History of Tithes (1618) demonstrated the destructive power of antiquities all too clearly to Anglican divine Richard Montagu. “[Y]ou shake, as much as possibly you can, the ground of the” church’s title to tithes, Montagu accused Selden, and “plead them out of possession beyond the memory of man.” You pretend that your history is “a mere narration of fact and nothing else,” yet the purpose is clear: a “non right, inferred from a non practice,” undermining the clergy “in their inheritance, by vouching prescription against our claim.” Richard Montagu, Diatribe upon the First Part of the Late History of Tithes (1621), 14, 18. For other instances, see Spelman, “Of Parliaments” and Parsons, “An Answer”; Bacon, Aphorisms 22-24, 27-28, 30, and 86, in De Augmentis, in Works, 5:92-94, 106 (Bacon’s rules for admitting and discarding “ancient examples”); William Hakewill, The Liberty of the Subject Against the Pretended Power of Impositions [MS 1610], (New York, 1979, originally published, 1641), 21-98 (Hakewill’s attack on the historical case for the royal privilege to lay trade duties); and Robert Holborne, argument in the Case of Ship Money (1637), in Thomas Bayly Howell, ed., Cobbett’s Complete Collection of State Trials (London, 1809), 3:1007-10 (critiquing the ancient lineage of ship money writs).
The great historiographical impact of Pocock's work has made it the place to begin thinking about the immemorial in English law. Yet the very intensity of historians' debates over the role of the ancient constitution in late-Tudor and early-Stuart political culture has implicitly overstated its prominence in legal culture. As the immemorial constitution was but one of a number of interlinked political languages, it was but one of several inspirations for the workaday lawyer to conjure aged lineages. The common law's requirement that proffered customs demonstrate existence "before memory" was another, related reason for chasing the immemorial (more on this later). But much talk of antiquity did not aim at satisfying this test or at affirming or contesting the ancient constitution. Or, at least, much of the talk also aimed at something more.

A digression on the "great antiquity" of water law began Robert Callis's 1622 Reading on Parliament's 1531 "Bill of Sewers." The Register of Writs and fourteenth-century royal commissions, Callis noted, contained orders to survey rivers and protective walls. Water law grew out of prerogative before Parliament legislated upon the subject. But legal regulation of water was more ancient than that. Callis cited William Camden's Britannia to remind readers that the sea had always borne in on England, requiring organized defense. Noah's flight to the Ark implied that the very "laws of God and nature" expected man to defend himself and his country from the water. John Manwood's treatise on the forest laws similarly extended his subject's provenance millennia into the past. The statutes, yearbook cases, and charters treated in the book only dated back a few centuries. But Manwood found antecedents in the Bible and classical antiquity by shifting his focus from the lineage of common law enactments to the lineage of function—the regulation of forests, for instance, which Queen Elizabeth and King Philip of Macedonia both undertook, if by different laws. The Psalms told that God laid claim to the bullocks running in the woods of King David's Israel, much as the King of England's timberlands sheltered his venison. Before Christ, Fuluius Herpinus invented warrens, and Philip of Macedonia hunted in his forests as did his mighty predecessors Esau and Nimrod.

What was the purpose of illustrating one's chosen law arcing backwards toward carefully selected glimpses of antiquity? The search for the immemorial common law behind the ancient constitution, by way of comparison, used a specific technique for a discernible political

85. Robert Callis, The Reading of the Famous and Learned Robert Callis, esq; Upon the Statute . . . of Sewers [MS 1622], 2d ed. (1686), 23-25.
end. It restrained the claims of the Crown and non-common law tribunals by setting them within an immemorial customary polity validity of which rested, ironically, on an absence: on a lack of historical evidence for origination through royal midwifery or command. Callis and Manwood lectured on statutes, charters, and yearbook cases, which derived their constitutional authorization from parliamentary, royal, and judicial consent, not from immemorial descent. These genealogists of *faux* antiquity did not use it to efface origin. What were they doing?

To begin with, the provision of classical and Biblical analogical ancestors helped demonstrate the consonance of English law with natural and divine law. This was one of the great ongoing legitimation projects of the common lawyers. English laws, Callis announced, “received their *primam essentiam* from the divine laws of the Almighty, and have fetched their pedigree from the law of nature.”

The law of water and forest regulation, taken as a branch of human positive law concerned with those problems, stood closer to the laws of God and nature further back in time. The passage of years had carried English law away from the divine infusion of “*primam essentiam*” and downward in the “pedigree” from the law of nature. Regression back through time, if only through the analogy of function, pointed to the harmony of English, divine, and natural law, as though the connection of rays emanating from a common source could best be shown by backing down toward the point of origin. The technique recurred in English legal writing. Told that the common law was not a science but “a skill consisting of many particulars,” the lawyer-dialogist in John Ferne’s *Blazon of Gentry* (1586) invoked the foundation of law in Eden. God gave law to Adam and Eve, tried them for eating of the apple, and heard Adam’s “feeble defense” casting blame upon the serpent. “Thus we borrow the form of pleading from Adam. And the antiquity of laws, from Paradise, which are both sacred and heavenly.” George Saltern traced the origins of English laws back to the founding of Britain by the Trojan Brutus. He treated the story skeptically, only to embrace a more ancient settlement by the children of Gomer (of *Genesis* 10:1-3), who spread through all Europe after the division of tongues at Babel. Gomer’s immediate progeny

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88. Selden, “Notes upon Sir John Fortescue,” in Fortescue, *De Laudibus Legum*, 17-20. This image was implicit in Selden’s understanding of positive law as a limitation or specification of the law of nature, the most ancient source of commands.
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had at the first the knowledge of God: it stands with reason, and with best warrant of authority, to think they were governed by such laws and institutions derived from the principles of the first age, that is from the law of God written in nature.91

Through the centuries they overlaid positive law upon the divine and natural rules of this "first age."

Manwood's portrayal of Philip of Macedonia and King David hunting and overseeing the woods also hinted at who should govern contemporary English forests. Classical and Biblical monarchies were an important font of analogy for the prerogatives of kingship. Did not ancient royal stewardship of the forests suggest a like power for the English Crown? Coke's treatment of the "Courts of the Forest" in his Fourth Institute (1644) labored to rebut that logic. He advised the reader "to beware to give credit to our new authors," naming Manwood in the margin note. "[W]e dare not fetch our kind of forest, as some do, from the holy history of scripture, for therein we find no such forests as we have." Instead, Coke characteristically linked contemporary English forests to their Saxon antecedents. An immemorial English forest law "allowed and bounded by the common laws" and declared by the Carta de Foresta governed them.92 Coke and Manwood, then, deployed antiquity to different ends—Coke to embed forest law in immemorial custom; Manwood to pry it out of this national story and place it in a transcultural one, complicating prescriptive logic by alluding to powers historically intrinsic to kingship.93

Finally, and most generally, the association of age with goodness and honor invited English lawyers to conjure hoary beginnings and predecessors. Legal prescription, the establishment of right through time, went hand in hand with the reassurance, enhancement of status, and presumption of honor that lengthy ancestry brought. Charles Calthrope argued that copyhold tenure predated the Conquest not only to provide the proper historical justification for royal court enforcement of "immemorial" manorial custom. He also found the "dignity and estimation of copyholders" in their antiquity.94

91. Ibid., C4v-D1r.
93. Manwood's technique, of course, was not limited to augmenting kingly powers. The civilian Thomas Ridley found the predecessors of Bishop's chancellors not only in England, but in Justinian's empire, back perhaps to the time of Constantine. Thomas Ridley, A View of the Civil and Ecclesiastical Law (1607), 103-04.
Burton’s *Description of Leicestershire* (1622) strained to find the earliest record of the surveyed manors, a common strategy of the county historians and chorographers. Coke’s *Complete Copyholder* admitted that copyholders evolved after the Conquest from villeins, “very meanly descended,” then added, “yet they come of an ancient house.” A common law jury accepted that a prebendary’s shepherd had immemorially separated his flock from the sheep of Thomas Earl of Suffolk. Upholding the judgment on other grounds, the Court of Common Pleas commented that the victorious flock could not have been kept “time out of mind from the sheep of the Earl of Suffolk, being but one man’s life.” The “prescription was senseless,” the court concluded. Perhaps it was senseless legally. But alongside or outside of the proof of legal prescription lay the quest for psychological prescription, the tilting of the terms or the ambiance of debate in one’s favor, the conversion of disdain into grudging consideration, of indifference into interest. The temptation to exaggerate the antiquity of claimed rights must have been strong in Elizabethan and early-Stuart England. So many social conflicts were fought on the terrain of prescriptive right between social unequals. The tincture of importance that antiquity brought was no less welcome to Burton’s manorial lords than to Coke’s copyholders. They shared the impulse that made lawyers find the inauguration of water regulation in Noah’s Ark and find warrens and royal forests before Christ. As advocates, writers of monographs, and interpreters of ancient documents, lawyers offered themselves as specialists in the evocation of antiquity in the service of dignity and in the pursuit of psychological as well as constitutional advantage.

3. “Brokering” Local Remembered Law: Lawyers as Intermediaries

Early modern jurisprudence distinguished the general customs of the realm (the common law proper) from the “particular customs” (such as the rules of copyholds and tithes) alive in boroughs, manors, and villages. Dominant opinion among Jacobean lawyers held that valid customs were ancient. The “memory of man runs not to the contrary” of a legally enforceable custom; not so, of a pretender. Since judges were presumed to know the common law, proof of the

immemoriality of its tenets was an intramural affair among the profession. The immemoriality of a particular custom, by contrast, needed to be specifically established by records or the testimony of witnesses unless the custom had been “of record known and approved” in a court.99 A particular custom resting on “immemorial” practice could be rebutted by written evidence dating as far back as the accession of Richard I in 1189, the common law’s line dividing too remote and hence unacceptable evidence from valid evidence within the “time of memory.”100

Written evidence from steward’s rolls, deeds, charters, bylaws, recorded customals, and other sources carried part of the burden of establishing particular customs—but only part. Remembered tradition was indispensable. Documents could not be found in many cases. When extant, they might only state the bare existence of a custom without setting forth the details of its operation, the very matter in doubt in a dispute. Lawyers and judges heard frequent allegations of forgery and understood that uncorroborated records misled.101 Even when documents were available, the Masters of the Court of Requests preferred the combination of oral testimony plus records to records alone.102 So did Lord Chancellor Thomas Egerton. Scrutinizing old

99. St. German, Doctor and Student, 71. Common law courts took notice of the law of the other royal courts as well as courts of general jurisdiction, such as the Court of Exchequer in Wales and the courts of the counties palatine. Lane’s Case, 2 Coke’s Reports 16, 16 (C.P., 1596); Broughton v. Randall, Coke’s Reports, Elizabeth 502, 503 (K.B., 1596); Worlich v. Massy, Coke’s Reports, James 67, 68 (K.B., 1605). The courts did not take cognizance of the customs and proceedings of inferior courts of limited jurisdiction. Day v. Savage, Hobart’s Reports 116, 117-120 (C.P., c.1615) (customs of the City of London need be established by jury rather than by certification of the mayor and aldermen if the City is an interested party). The validity of a copyhold custom “ought to be adjudged by the judges, and the truth of that by the jury, and when it is found true by a jury, and that it has such antiquity that exceeds the memory of man, then this obtains such privilege as the prerogative of a prince, and is part of law.” Rowles v. Mason, Brownlow’s Reports, 194 (C.P., 1612).

100. See Charles M. Gray, Copyhold, Equity, and the Common Law (Cambridge, 1963), 199-201, n. 18, for cases. This point was disputed. Copyhold customs “must be of such antiquity, that no man living doth know the contrary, either out of his own memory, or by any record or other proof.” A Commentary on the Tenures of Littleton; Written Prior to the Publication of Coke upon Littleton [MS c.1620], ed. Henry Cary (London, 1829), 166. To prove a manorial custom, “you must not show the beginning of it, that within time of memory the thing was not so. True, if the time had been long, and I cannot show when it had not been, that is time out of mind.” Robert Holborne, argument in the Case of Ship Money (1637), in Howell, ed., State Trials, 3:1009.

101. Fox, “Custom,” 102, 105, 96-97

documents in a dispute over manorial boundaries, he ordered the case to a jury, "and they to find as the contents of the manor had gone by usual reputation sixty years last, and not to have it paired, and defalked by such ancient deeds." Legal monographs discussing the proof of particular custom placed aged recollectors in central, not vestigial, roles. What "measure of time shall make a custom," asked Charles Calthrope in his Reading on the law of copyhold (1574). Some say seventy-six years, others one hundred, but "the true measure" is

that no man then in life, has not heard any thing, nor know any proof to the contrary. . . . If lands have been demised by copy by the space of 60 years, and yet there be some alive, that remem-ber the same occupied by indenture, this is not a good copyhold. . . . And if lands have been demised by copy but 40 years, and there is none alive that can remember the same to be otherwise demised, this is a good copyhold, for the number of years makes not the matter, but the memory of man. . . . But if any chance to be alive, that remember the contrary, then such prescription must give place to such proof.

John Cowell's Interpreter (1607) reported that common lawyers accepted a custom "if two or more [witnesses] can depose, that they heard their fathers say, that it was a custom all their time, and that their fathers heard their fathers also say, that it was likewise a custom in their time." Detractors of these remembering grandfathers thought their testimony only too persuasive to common law juries. In a 1621 parliamentary committee looking into a copyhold dispute, John Walter pronounced juries "apt to be swayed by such oaths and . . . less able to judge of the court rolls," so that "every Lord would be outsworn by his tenants and they would conspire to make new customs for their own advantage."

As the sixteenth gave way to the seventeenth century, lawyers increasingly needed to locate and prepare these witnesses of remem-bered local customary law. Both the common law courts and

104. Calthrope, Copyholder, 15-16. When Calthrope lists examples of particular customs, he sometimes includes a reference to witnesses, as in the following: "If the lord have used to have certain work days of his tenants, and that has not been used by the space of twenty years last past; yet that non-user is no discharge to the tenants, so that there be any in life that can remember the same." Ibid., 20-21.
106. Walter made this comment before the committee for the cause between Lady Stafford and her copyholders of the manor of Thornbury and Oldbury. See Wallace Notestein, Francis Helen Reif, and Hartley Simpson, eds., Commons Debates, 1621 (New Haven, 1935), 5:178-79. The copyholders "proved their customs for 60 years by witnesses not interested in the cause." The manorial court records were unavailable, remaining "with the Lord or his officers." "Brief of the Customary Tenants of Thornbury and Oldbury," in ibid., 7:185.
107. Lawyers also prepared witnesses of fact who testified to their memories. In the next few
national equitable tribunals (Chancery, Requests, Star Chamber, the equity side of Exchequer) that lawyers served were becoming more active in recruiting disputes from inferior jurisdictions. After hesitant beginnings in the 1550s and 1560s, copyhold cases began to flow into the common law courts in the 1570s as they offered writs of trespass to protect copyhold against manorial lords, expanding in the 1580s and 1590s as writs of ejectment also became available.\textsuperscript{108} Tithe cases, long heard in ecclesiastical tribunals, entered the royal courts in 1588 when common law judges began allowing plaintiffs to recover tithes using writs of debt.\textsuperscript{109} Faced with the hostility of ecclesiastical courts toward the restriction of tithing duties by custom, early-Stuart common law courts claimed exclusive jurisdiction to determine tithing customs and used writs of prohibition to steer cases away from church tribunals.\textsuperscript{110} Prohibitions also brought disputes over parish rates into the common law courts, requiring pleading of customs regulating church governance. The national equitable tribunals, which had been investigating, amending, and enforcing custom throughout the Tudor period, became far more active in the work by the end of the sixteenth century. The growing caseload of the equity side of Exchequer suggests the rapidity of the influx given that a large proportion of the docket involved disputes over customary rights, tithes, manorial boundaries, and common rights. The average number of bills filed jumped from 84 in the 1570s and 1580s to 334 in the 1590s.\textsuperscript{111}

The upsurge of national equitable work and the arrival of copyhold, tithe, and parish rate cases in the common law courts increased the number and diversified the range of particular customs that lawyers needed to prove. The picture on the common law side remains somewhat hazy because the scarcity of evidence about what happened at nisi prius trials before juries precludes a direct assessment. But inferential evidence suggests that particular customs played a greater role around 1600 than a century before. Fortescue, writing in the late paragraphs I will concentrate not on the continuity of fact witnessing but the growing importance of customary law witnessing to the late-Elizabethan and early-Stuart legal profession.

\textsuperscript{109} Richard H. Helmholtz, \textit{Roman Canon Law in Reformation England} (Cambridge, 1990), 93.
\textsuperscript{110} Ibid., 51, 95-96, 99-100, 176.
fifteenth century, barely mentioned them.\textsuperscript{112} Littleton in 1481 and St. German in 1530 gathered a corpus of examples repeated by later writers—customs of dower and inheritance (such as Kentish gavelkind and borough English) that amended common law norms, and the commercial customs of London and other towns.\textsuperscript{113} These frequently appeared in the early- to mid-sixteenth-century common law, which docket focused on trials of title to land, trespass against the King’s peace, and debt on an obligation.\textsuperscript{114} Recurrence increased the chance of notation in the records of the central courts or enshrinement in authoritative legal writings such as Littleton, eliminating the need to prove them anew in each trial.\textsuperscript{115}

Copyhold, tithe, and parish governance cases focused lawyers’ attention downward from familiar inheritance and commercial customs in counties and cities toward variegated and highly local particular customs. These cases called for microlevel investigations. The copyholders of one manor paid double rents every fourth year, those of another took so much wood for fuel and fences, those of another pastured no more than three beasts on the lord’s soil. Customary compositions of tithes created a variety of regimes not only between but within parishes: These five acres of pastureland paid a shilling to lift tithes, the neighboring meadow did not; custom valued a lamb at one penny here, four pennies a mile away.\textsuperscript{116} As for church governance: What was the customary procedure for electing the churchwardens of a given parish? Did a group of ratepayers have the customary right to support a chapel outside the parish?\textsuperscript{117} Law reports bear the mark of these questions. Comparing the Henrician, Marian, and early-Elizabethan reports of John Spelman and James Dyer to the late-Elizabethan and early-Stuart law reports of Edward Coke, Henry Yelverton, George Croke, and Henry Hobart reveals a heightened attention to finding particular customs and situating them within the broader common law framework.\textsuperscript{118} And

\begin{flushright}
\textsuperscript{112} Fortescue, \textit{De Laudibus Legum} [MS c.1468-71].
\textsuperscript{113} Thomas Littleton, \textit{Tenures} [original printing in French, 1481] (London, 1813); St. German, \textit{Doctor and Student}.
\textsuperscript{115} Two qualifications are in order. First, that the courts recognized a particular custom without pleading, such as gavelkind, still left open a range of subordinate incidents (such as its intersection with dower customs) that needed to be pleaded. \textit{Launder v. Brooks}, Croke’s \textit{Reports}, Charles 561, 562 (K.B., 1640). Second, that the courts recognized the meaning and effect of a particular custom, such as borough English, still left open in what localities it obtained.
\textsuperscript{117} I have drawn my examples of church governance cases from Gray, \textit{Prohibition}, 1:xliii-xliv.
\textsuperscript{118} Copyhold and tithe cases did not turn on particular customs alone. They mixed national principles drawn, respectively, from common law and canon law with local practices expressed.
\end{flushright}
the latter reports display a greater fussiness over venue and the proper “address” of *venire facias* writs summoning juries, perhaps driven, at least in part, by the mounting importance of witnesses proving local law.119 The more particular customs rather than the

in particular or “special” customs. Gray, *Copyhold*, ch. 3; Helmholz, *Roman Canon Law*, 8-9. And they established local customary, perhaps memorial, substantive law by invoking the common law’s procedural machinery.

119. This argument about venue is, I caution, speculative. The slow transformation of the medieval self-informing jury into a passive, fact-judging institution had, by the mid-sixteenth century, relaxed judges’ rigor about drawing jurors from the correct locality (hundred, parish, manor, vill). The yearbooks at the turn of the sixteenth century demonstrated, in the opinion of Charles Gray, a “growing acquiescence in the practical conclusion that where juries came from made little difference, since personal cognizance rarely figured in their verdicts anyhow.” Judges less expected jurors to be “direct cognizers” of fact. Charles Gray, “Domestic Venue,” 3-4 (unpublished MS 1997) (on file with author). John Baker has suggested that the jurors of this period seldom enjoyed personal knowledge of the disputes before them, citing Thomas More’s judgment in 1533 that “jurors were not to be regarded as witnesses, but as judges of fact.” Baker, *Spelman*, 109. A statute of 1585 reduced from six to two the number of “hundredors” (jurors from the hundred where the venue lay) necessary on the twelve man jury in personal actions. It implicitly recognized the fading role of the jury as bearer of private knowledge. 27 Eliz. ch. 6 (1585) revised 35 Hen. VIII ch. 6 (1543). The Henrician, Marian and early-Elizabethan reports of James Dyer typically (though not exclusively) treated venue at the level of the county rather than the manor, parish, or hundred. They asked which county should supply the jury and whether a jury drawn from one county could find facts or locate assets in another. See, for example, in Dyer’s *Reports*, the cases of *Gawen v. Husse and Gibbes*, 73 Eng. Rep. 48, 86, Dyer 39b (1538); Untitled, 73 Eng. Rep. 100, 100, Dyer 46a (1540); *Marilyn’s Case*, 73 Eng. Rep. 568, 568-69, Dyer 256b (1567); Untitled, 73 Eng. Rep. 594, 594, Dyer 267b (1567); Untitled, 73 Eng. Rep. 602, 602, Dyer 270b (1568); *Hare v. Butler*, 73 Eng. Rep. 604, 604-05, Dyer 271b (1568); *Fleyer v. Crouch*, 73 Eng. Rep. 636-637, Dyer 284a (1569).

Yet in the next two generations of reports after Dyer, those of the late-Elizabethan and early-Stuart period, disputes about the proper “address” for *venire facias* writs proliferate. Judges from around 1600 treated venue not only at the level of Dyer’s counties but at the level of the parish, vill, and manor. Their scrutiny intensified as it looked downward. Typical was the *Earl of Bedford’s Case*, Crok. Jac. 327, 327-28 (K.B., 1614). This intensely local superintendence of venue appears frequently in Croke’s late-Elizabethan and Jacobean reports, for instance: *Horseman v. Johnson*, Cro. Eliz. 260, 261 (K.B., 1591) (*venire facias* to one or two manors); *Bedell v. Stanborough*, Cro. Eliz. 538, 538 (Exchequer, 1596) (*venire facias* to parish or village); *Acton v. Barham*, Cro. Eliz. 620-621 (K.B., 1599) (effect of issuing *venire facias* to too many villis); *Wrey v. Vesper*, Cro. Jac. 263, 2633 (K.B., 1611) (*venire facias* to parish or vill); *Moore v. Goodgame*, Cro. Jac. 327, 327 (K.B., 1614) (which manor should properly serve as address for *venire facias*); *Symonds v. Burlow*, Cro. Jac. 404, 405 (K.B., 1614) (*venire facias* to a manor); *Vale v. Field*, Cro. Jac. 340, 340-41 (K.B., 1615) (*venire facias* to parish or vill); *Thorold v. Spight*, Cro. Jac. 676, 676 (C.P., 1624) (*venire facias* to parish or to subordinate place within parish); *Philips v. Slade*, Cro. Jac. 676, 676-77 (C.P., 1624) (*venire facias* must go to both manor of tithepayers and rectory of recipients); see generally Coke, *First Institute*, § 193, 125a-b. More examples can be found in the reports of Edward Coke and Henry Hobart.

As Coke and Dodderidge argued in the *Earl of Bedford’s Case*, the judges were trying to figure out which locality best knew the particular customs at issue. Copyhold, tithe, and parish
common law supplied the substantive law of disputes, the more the establishment of the existence and immemoriality of law moved to a witness-driven process instead of an intramural affair among lawyers and judges. As lawyers increasingly needed to round up, investigate, and present witnesses' recollections of custom, they became the brokers of actual local memory as well as of the "artificial" memory of records and professional convention.

Brokering took forms beyond advocacy. By the late sixteenth century, lawyers assessed remembered local law as judges, agents, and investigators. Their growing numbers made them available for a plethora of local offices, some newly created by the Tudor monarchy. Sitting on royal sewer commissions, they sifted through customs to assign responsibility for bridge and channel repairs. Chancery and the Court of Requests designated them to investigate local law under dedimus potestatem writs. They took over from laymen as manorial court stewards and city recorders and became more widely used as agents in the burgeoning land market. All these roles required interviews of witnesses to define communal and seigniorial customs. Lawyers negotiated those statements of manorial, parish, and trade custom proliferating around the turn of the seventeenth century, sometimes encapsulated in a private agreement, sometimes governance cases raising a multiplicity of particular customs in the courts may have elevated the importance of local jurors as "direct cognizers" of local law even as the ongoing decline of the self-informing jury eroded their importance as witnesses of fact. This is speculative, but it offers a reason for the revived concern at the turn of the seventeenth century over the localist credentials of the jury.

For a glimpse of this process under the aegis of a Chancery suit, see Welbore St. Clair Baddeley, A Cotswold Manor, Being the History of Painswick (London, 1907), 178-83 (during 1614 dispute over manorial customs of wardship, a Chancery commission appointed a master of Chancery and the counsel for both lord and tenants as a committee to examine records and witnesses).

For the sake of expository clarity, I have distinguished perhaps too sharply between the challenges of proving common law and local custom. The early modern common law impressed contemporaries and historians as an oral tradition or caste custom imperfectly reduced to texts, which it was, compared to modern common law or the civil law. But next to the customary law of the English manors and parishes, the common law overflowed with yearbooks, reports, commentaries, and monographs. Establishing the validity and antiquity of a point of common law required more textual than mnemonic detective work. Put another way, the balance between records and supporting tradition tilted in favor of text in the common law, in favor of memory in the parishes and manors.


Jones, Chancery, 240. 272; Hill, introduction to The Ancient State, xxxvii-xxxviii.

Though lawyers had served as stewards and recorders at the turn of the sixteenth century, the latter part of the century saw an increase both in the number of lawyers so employed and the percentage of these offices held by lawyers. E.W. Ives, The Common Lawyers of Pre-Reformation England: Thomas Kebell: A Case Study (Cambridge, 1983), 11-15; Brooks, Pettyfoggers, 114; Peter Clark, English Provincial Society from the Reformation to the Revolution: Religion, Politics and Society in Kent, 1500-1640 (Hassocks, Sussex, 1977), 281; Prest, Barristers, 240-46. See Day v. Savage, Henry Hobart, Reports (1641), 116, 119-20 (C.P., c.1615) for a depiction of the Recorder as the mouthpiece of his city's customs.
recorded in manorial courts or in equity tribunal examinations in perpetuam rei memoriam, sometimes enrolled in Chancery, Requests, or Exchequer under the auspices of a feigned or real lawsuit. 125

Sixteenth-century price inflation and the speedier turnover of manors in the vigorous Elizabethan land market increased the importance of ascertaining customary entry fines and leasing practices as well as produced a cadre of manorial lords unfamiliar with the rules on their own manors. 126 Lawyers, then, offered their services as evaluators of local customs and legal memories in their various roles as stewards and recorders, as agents in land sales, and as gatherers of evidence for real and feigned lawsuits. 127 These were not unprecedented roles, unknown to the medieval bar. But the Tudor and Stuart expansion of the numbers and local presence of lawyers, their recruitment into national commissions, their partial displacement of laymen in the work of assessing local customs, and the growing role of local customs as substantive rules in national tribunals all made the oversight and brokering of remembered law critical to the profession. Stuart lawyers served as intermediaries between manor and parish legal recollections and the national tribunals in London far more extensively and intensively than did their forbears of a century before.

As a result, lawyers’ work and the broad, overall trajectory of legal regulation moved at cross purposes. On the one hand, local customs were slowly receding in importance between the Middle Ages and the nineteenth century as a source of law. On the other hand, in contrast to this long-term trend, the proof of particular customs became more central to late-Elizabethan and early-Stuart lawyers. With this “jurisdictional” change in the site for contesting remembered law came a cultural change in the profession. The same generations of lawyers who took up this work also busied themselves generating or


126. I am indebted to Prof. Mark Kishlansky for suggesting this point.

127. To be sure, lawyers played these roles before the Elizabethan period. See Deborah Marsh, “‘I See by Sizt of Evidence’: Information Gathering in Late Medieval Cheshire,” in Courts, Counties, and the Capital in the Later Middle Ages, ed. Diana E.S. Dunn (New York, 1996), 71-92. My claim is about degree and extent: first, more lawyers were playing these roles, displacing laymen and locally trained “men of law”; and second, a greater share of the profession’s business involved brokering local customs and memories out in the counties, manors, and parishes and between the localities and the institutions of the national state (for example common law courts, Chancery, sewer commissions).
contesting immemorial pedigrees and participating as readers, writers, or documentary custodians in a politicized legal antiquarianism. Local memory brokering was part of a larger configuration. Long guardians of a professional tradition, lawyers emerged as Davies's order of remembrancers.

Meanwhile, the individual practitioner's responsibility to recall legal principles and authorities had not gone away. But between 1500 and 1620 it had changed. And the way it had changed deserves examination.

**B. How Print Decreased the Profession's Collective Memorial Burden While Increasing the Practitioner's Individual Burden**

> Concern yourself with much more than much reading;  
> Is he forgetting while he reads? then reading, he is negligent.  
> They know what they remember, what slips away is not useful,  
> Know that time was idle to those who forget.

—Common Pleas Judge John Croke, translation of Latin poem preceding Keilway's *Reports* (1602)  

> Here I present to your clear judgment's eye;  
> Which the law's knots and riddles both discern;  
> And to your rich and copious memory  
> Which never lost the thing it once did learn.

—John Davies, dedicatory verse presented to Edward Coke on a manuscript presentation copy of Davies's *Nosce Teipsum* (c.1598)  

Like their medieval predecessors, early modern common lawyers supported arguments with both authorities and the profession's distinctive "reason." But over the sixteenth century the balance began to tilt—away from general principles and toward case and monograph citations. Henrician lawyers relied on the collective "learning" of the bench and Inns of Court mixed with personal recollections of cases and allusions to the yearbooks, sometimes consisting of no more than a gesture to "*nos livres.*" Lacking a standardized corpus of texts free of the variations and silent redactions of manuscript transmission, and lacking a doctrine of binding precedent that made previous cases

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128. This poem followed Croke's preface to Keilway's *Reports* (1602; reprint 1688), b1v. It appeared in Latin: "Sit tibi cura magis multum, quam multa legendi/ Immemor anne legit? Negligit ipse legens./ Quae meminere sciunt, quod labitur utile non est;/ Nosce quod oblitis tempus inane fuit." I owe the translation to the generosity of Professor Daniel Klerman.

more than an index to past conventions, the Henrician lawyers’ "common erudition" was, in the judgment of E.W. Ives, "more a consensus of approach than a catalogue of specific rulings." Over the course of the sixteenth century, printing and changes in pleading and procedure increased the attractiveness of specific citation as a forensic strategy, increasing its status vis-à-vis general principles. Anthony Fitzherbert’s *Abridgment* (1514-1516) and its successors provided ready indices to the newly printed and standardized yearbooks, making it easier for practitioners to identify and cite cases. Where Thomas Littleton’s *Tenures* (1481) slighted particular authorities in favor of his signature “it is said that,” which purported to encapsulate professional opinion, Fitzherbert’s new *Natura Brevium* (1534) put the discussion of yearbooks in the foreground. He inaugurated a citation-heavy style of legal literature made heavier by John Perkins and William Staunford. The substitution of written for oral pleading and the use of procedural devices that isolated legal questions for consideration reoriented law reporting away from the tentative, exploratory pleas of the yearbooks toward the firmly decided legal points of the nominate reports. By the early seventeenth century, bouquets of citations adorned law reports, Readings, monographs, and legal arguments in royal courts and Parliament. The excesses of the new style provoked an exasperated aside from Coke:

The ancient order of arguments by our serjeants and apprentices of law at the bar is altogether altered. 1. They never cited any book, case, or authority in particular, as is holden in 40 E. 3. &c. but est tenus ou agree in n’r’e livres [it is held or agreed in our books]. . . . 2. Then was the citing general, but always true in the particular; and now the citing is particular, and the matter many times mistaken in general. 3. In those days few cases in law were cited, but very pithy and pertinent to the purpose; and those ever pinch most; and now in so long arguments with such a farrago of authorities, it cannot be but there is much refuse, which ever does weaken or lessen the weight of the argument.

130. As Ives comments, “But loose though it was, this common agreement was there and woe betide counsel who alleged un erudition without justification. . . . To minds familiar with stare decisis, such a general understanding and no more seems an invitation to uncertainty, but it was, in fact, a recipe for vitality. Authority lay in the collective mind of the profession, past and present.” Ives, *Common Lawyers*, 155-60, 161. See also Baker, *Spelman*, 161-62.


132. Coke, preface to *Reports*, pt. 10 [1614], xxi-xxii. Coke generally spoke warmly of “our
The rise of a precedent-centered style of legal argument has been a prominent theme in studies of the early modern profession. Yet historians have not discussed its contribution to the salience of memory talk. The growing number and diversity of printed and manuscript reports, abridgments, and monographs lay behind, indeed, made possible, Coke’s “farrago of authorities.” Text slowly gained on memory as the storehouse of the entire profession’s collective tradition, memory having borne more of Thomas Keeble’s and John Spelman’s “common erudition” than of Coke’s. Yet at the same time, the rise of what Coke termed “particular” citation around 1600 increased the strain on memory for the individual practitioner.

The advocates of 1520, as John Baker noted, used precedents in a “rather vague way,” their allusions countered by assertions of “other books to the contrary.” Now and then, dispute over the content of a case provoked a “memory contest” or a threat to leave and return with the relevant yearbooks. The memory contests in Coke’s world of a “farrago of authorities” had a different character. As the primary locus of authority in the profession slowly drifted from collective lore to lawbooks, from instantiation in distinguished persons to encapsulation in texts, advocates’ representation of common erudition became more vulnerable to the interrogation of particular citations. “The law speaks by record,” said John Selden, “and if these records remain, it will to posterity explain the law.” Preparation for argument increasingly required the identification, memorization,
and mental shepherding of a herd of precedents and authorities. The remembrance of the structure and erudition of the law, the challenge of 1500, did not fall away so much as become overlaid with the need to recall a multitude of particular sources relevant to this dispute, and then that, and then that.

These developments underlay the pained depiction of the common law as a heap of authorities burdening the lawyer’s memory, a trope far more popular in 1600 than a century, even a half century before. Abraham Fraunce complained that the law lay “confusedly scattered and utterly undigested” in “vast volumes.” The “cases are many in number which must be read, remembered, and applied, which cannot be compassed but by extreme diligence,” wrote William Fulbeck in his manual for law students, Direction, or Preparative to the Study of the Law (1600). Purveyors of advice like Fulbeck saw a good memory as an essential “innate” quality for the would-be lawyer. “And if memory be necessary for any science, surely to the profession of law, it is of weighty importance, which because it does pursue accidentia, and infinita, requires no help of nature so much as memory, for the understanding conveys the cases to the treasury, out of which it draws them. If the understanding be good, and the memory nought, a man shall be a lawyer today and none tomorrow.” Valorization of the lawyer’s memory in part reflected the changing shape of the “learning curve” between 1500 and 1600. Law students of all eras have needed to master principles, doctrines, cases, and intellectual mores. But as a legal culture heightens the value of specific citation of authorities over “common erudition” or professional “reason,” the burden of committing common law infinita to memory increasingly becomes a challenge faced at each argument rather than the initial phase of the novice’s acculturation.

The growing importance of the particular citation qualified as it provided a means to challenge the “oracular” status of legal luminaries. A.W.B. Simpson has likened the common law around 1500 to a caste custom pronounced by the judges, serjeants, and benchers who ran the Inns, self-validating in the sense that authority ultimately

136. Abraham Fraunce, The Lawyer’s Logic (1588), § 3.
137. William Fulbeck, Direction (1600), 35-36, see also 13 (“the law books are so huge, and large, and . . . there is such an ocean of reports, and such a perplexed confusion of opinions”); “Directions for the Orderly Reading of the law of England,” [MS c.1648], Rawlinson MS 207, fol. 263 Bodleian Library, Oxford. Works that reduced the law to order or “method” frequently made this point. See, e.g., Terry Kevin Shaller, “English Law and the Renaissance: The Common Law and Humanism in the Sixteenth Century” (Ph.D. diss., Harvard University, 1979) (discussing John Hamner’s “Le Title de Assise en parte: reduce au methode, et digeste per sections & subdivisions” [MS 1598]).
138. William Fulbeck, A Direction or a Preparative to the Study of the Law (1600), 117-18; Dodderidge, English Lawyer (1631), 12-23.
inherited in these collective eminences rather than in the texts that only imperfectly and incompletely captured professional tradition. The combination of law printing and the tilt toward precedent-centered over principle-centered argument weakened this gerontocratic control of legal knowledge. Lawyers finding an apposite precedent or record enjoyed for the moment the authority of what they cited rather than of who they were. This invited a characteristic seventeenth-century tactic not much in evidence before: the textual ambush. Bulstrode Whitelocke, for example, preferred records to "table talk" or "the discourses of others by hearsay only." He put his advice to good use in the Long Parliament at the expense of the voluble, error-prone William Prynne, correcting his quotations, "which Prynne's haughtiness could not bear." Conscience, H.L. Mencken caustically observed, is "an inner voice which warns us that someone may be looking." The more insistent the looking, the more active the province of conscience. So too in the province of memory. The "farrago of authorities" in the burgeoning printed lawbooks and reorganized national record centers became more valuable as argumentative resources as they became more readily available—and more readily checkable, promising opportunity and embarrassment.

The years between 1500 and 1640, then, did not see anything so simple as the retreat of a "mnemonic culture" before a "print culture." The receding of memory as a repository of collective legal tradition went hand in hand with its newly prominent role as an individual storehouse of short- to medium-term, highly particular legal authorities, with emphasis on the common law's infinita vexing memory, and with valorization of remembrance as the lawyer's professional duty.

Legal education and legal literature needed to take account of these new demands. But there are many ways to respond to a challenge. Schemes for organizing and remembering knowledge proliferated throughout early modern European intellectual life. As English lawyers wrestled with competing methods of recalling legal infinita, they made remembering a self-conscious theoretical pursuit in a way it had not been a century before.

139. I have drawn the idea of gerontocratic control from A.W.B. Simpson, "The Common Law and Legal Theory," in Legal Theory and Legal History: Essays on the Common Law (London, 1987), 359-82. My picture of legal authority instantiated in the collective lore of a stratified, gerontocratic caste is heavily indebted to this article.


141. Whitelocke, Diary, 590.

C. Legal Education and Legal Literature

1. Legal Training as Mnemonics: Bringing Art to the "Empiric" Memory

The lidger-book lies in the brain behinde,
Like Ianus' eye, which in his poll was set:
The lay-man's tables, the store-house of the mind,
Which does remember much, and much forget.

—John Davies, Nosce Teipsum (MS c.1598)143

[W]e shall the better address ourselves to the use of memory, when we do truly comprehend the kinds, causes, and nature of the same.

—John Dodderidge, The English Lawyer (1631)144

"The most delicate and frail part of our mind," King's Bench judge John Dodderidge called memory.145 Advice on reinforcing this rickety storehouse, organizing its contents, and improving memorization proliferated in late-Elizabethan and early-Stuart lawyers' jurisprudential and educational writing. After all, a lawyer with a poor memory, wrote William Phillips, "lays up his treasures into a bag with holes." Edward Coke, Francis Bacon, William Fulbeck, John Dodderidge, and Matthew Hale explained how the right mental countenance and program of reading encouraged memorization. Phillips brought together seventy years of their study tips in his Studii Legalis Ratio (1662).146

Phillips's mnemonic "do's" and "don'ts" give the flavor of this prescriptive writing. Study with "delight" to quicken the memory. A solid, constant mind prevents "vain fancies" from crowding out the law.147 Do not read haphazardly, too quickly, or too much at once. "[G]reedy appetites are not of the best digestion. A cursory and

143. John Davies, Nosce Teipsum [MS c.1598], in Works, 1:112.
144. dodderidge, The English Lawyer (1631), 14.
145. ibid., 17.
146. William Phillips, Studii Legalis Ratio; Or, Directions for the Study of the Law (1662), 14-15. For advice on remembering, see, for example, passages by Coke in the prefaces to his Reports, pt. 1 (1600) and pt. 6 (1607); id., First Institute, 70a-b, 249b, 394b; Francis Bacon, "Novum Organum," in Works, 4: 162-63; id., "A Discourse Touching Helps for the Intellectual Powers" [MS c.1596-1604], in Works, 7:101-03; Fulbeck, Direction (1600); Dodderidge, English Lawyer (1631), esp. 12-23; Hale, preface to Henry Rolle, Un Abridgment des Plusieurs Cases et Resolutions del Common Ley (1668), reprinted in Francis Hargrave, Collectanea Juridica (London, 1791), 1:263-82.
147. Let the minds of old men serve as a warning, "full of so many figures of things, which they have seen and heard, . . . that when they would bestow more therein, it . . . has no void place where to receive it." Phillips, Studii (1662), 55, and 51 (delight).
tumultuary reading does ever make a confused memory,” warned Phillips’s favorite quotable, Edward Coke. Record the law in commonplace books under well-chosen headings. Engage in conference with other students to clarify points in the understanding and thereby facilitate remembrance. Attend moots, Readings, and court sessions and “commit . . . the judgment thereof to writing, and not to trust slippery memory.” Meditate frequently upon the law. Call the “memory to account for those things committed to its charge some time before, and run it over again. . . . For upon the reading of a thing, to commit it to memory without any more ado, is not the way to fasten it so as to make it our own.” Pick the right reading strategy. Take up the yearbooks only after mastering recent case reporters, “as being the fittest to season our students memory withal.”

Order was critical, for the memory is tabula rasa, a plain table, and as blank paper, wherein nothing is written; and that it is most retentive of those figures that are first impressed thereon. Therefore it behoves our student to see that those first rudiments and opinions he obtrudes by the authority of the reporters upon his judgement and memory, be sound and wholesome principles, . . . And, says the Lord Coke, “For the most part, the latter judgments and resolutions are the surest, and therefore fittest to season him withal in the beginning, both for settling of his judgments, and retaining them in memory.”

The best time for this regimen of study? The morning, when the mind refreshed by sleep “is moistened with the vapors arising out of the stomach, and so made fitter and better disposed to receive” the law. For moisture “makes the brain pliable, and the figures are easily imprinted.”

Dodderidge devoted twelve pages of his educational manual, The English Lawyer (1631), to the physiological and psychological dimensions of remembrance. Set in the back of the skull, the faculty of memory required the proper balance of humors, moisture, and temperature in the brain. Unfortunately, different mental powers

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148. Ibid., 100; Coke, preface to Reports, pt. 6, xviii.
151. Ibid., 128.
152. Beware of studying after lunch. The fumes given off by the stomach digesting meat “cloud and overshadow the clearness of the brain.” Ibid., 191, 17, 193; accord Fulbeck, Direction (1600), 116-17.
153. Dodderidge, English Lawyer (1631). “Man’s body being composed of elemental qualities requires in the perfection thereof a temperature of humors, which also consists in the temperate disposition of heat and moisture, for . . . hereby it is made a more apt instrument and
required dissimilar balances of moisture and temperature. As William Phillips and Roger Coke elaborated, too sharp a wit and apprehension "rises out of a hot and dry brain, which is of a contrary temperature to judgment and memory." Dodderidge drew on Aquinas and Aristotle to describe the taxonomy of mental operations grouped within memory. People and animals alike possessed a "memory sensitive," which retained "things comprehended by the outward senses" such as a route between fields and a house. Humankind alone, possessing reason, enjoyed an "intellective memory" recalling "things conceived by the understanding and power of wit," for example, inheritance rights to fields and a house. Paraphrasing Aristotle’s *On Memory and Reminiscence*, Dodderidge found in the intellective memory two forms of recall. Memory (the *actus memorandi*) immediately summoned "the representation of things past, as if they were still present." Reminiscence (the *actus reminiscendi*) served as a "discourse of memory" bringing back a "thing in a manner lost and forgotten" by reaching for it through associations of time, place, or company with an object or event still remembered.

Lawyers thought themselves more greatly dependent on the memorial arts than their contemporaries in other intellectual fields. They kept in mind the "infinita" of settled disputes and potential conflicts. They lacked a focal text like Scripture or the *Corpus Iuris*. They stood as custodians over a knowledge that unlike science, medicine, astronomy, geography, and divinity did not exist in the universe before and apart from the perceiver but rather lived on through promulgation and recitation. Yet the content of Phillips’s and Dodderidge’s mnemonic advice was neither distinctive to the law nor new. The pedagogic, psychological, and physiological principles they recited pervaded early modern learned culture. Students of rhetoric

organ for the operation of the power of the soul, and so consequently of memory. Natural moisture must not abound as in children, whose memory is therefore in tender years most commonly not of the best. And again, natural moisture must not on the other side be almost in a manner exhausted, as in old men, whose memory is therefore worn, but it must hold the golden mean, for fluid things are apt to receive but cannot long retain any impression, by reason of overmuch moisture, which makes the impression loose, and at length utterly lost. And arid and dry things can receive no impression for want of moisture, the one receives but retains not, the other receives not at all. Wherefore as this golden mean must be preserved in the temperature of moisture, so must it be held indifferent between cold and heat." Ibid., 18-19.

154. Hence the conventional opposition of men "who are very dull and yet of vast memories, who remember all things, but can scarcely be ever made to discourse of and understand any thing, and of men that are too light and phantastical who only talk generally, without applying these generals to any particular." Phillips, *Studii*, 9-11. "The former sat like a barely-moving boat overladen with ballast; the latter flitted like a ship without ballast tossed by every puff of wind." Roger Coke, *Justice Vindicated from the False Focus Put upon It by Thomas White, Thomas Hobbes and Hugo Grotius* (1660), 3-4.

came upon them in Charles Butler's *Oratoriae Libri Duo* (1629); ministers encountered them in Richard Bernard's manual for apprentice divines, *The Faithful Shepherd* (1607). The poet Gabriel Harvey at Pembroke Hall, Cambridge, recorded them in the margin of a civilian legal text he was studying. In the middle to late sixteenth century, a young lawyer could have encountered them in the Scholastic commentaries and original classical sources that Phillips and Dodderidge relied upon: Aristotle, Pliny, Cicero, Galen, Quintilian, and Aquinas.156 Or he might have consulted intermediaries such as Thomas Wilson's *Art of Rhetoric* (1553), Peter La Primaudaye's *The French Academy* (English translation, 1586), or Guglielmo Gratarolo's *The Castle of Memory* (1573).157 By the early seventeenth century, lawbooks brought together this mnemonic learning. And herein lay the novelty—not in the substance but in the compilation.

Mnemonic principles began migrating into lawbooks from dialectic, rhetoric and medicine around 1600. They became more accessible, saving the student and practitioner the time and effort of research. Their importation into the works of Dodderidge, Fulbeck, Coke, and Bacon placed them within the law's own precincts, shielding them from the suspicion of philosophical learning lingering among the Inns. Their very repetition in different works and the citation of earlier authors' advice by later ones suggested the centrality of improving memory as a professional project. "Mainstreaming" we would call this today. Most important, the physiological and psychological learning that Dodderidge brought to bear suggested an ambition to tolerate "empiric" remembrancers no more than "empiric" conveyancers or pleaders. The rapid expansion of attorneys and solicitors by 1600 prompted barristers to proclaim loudly the inadequacies of "empiric" practitioners who knew the law's forms without its deeper principles.158 Learn the "kinds, causes, and nature" of memory, Dodderidge insisted, see beyond the surface to its "grounds"—its inner workings, its principles of management.159 The disparagement of the "empiric" remembrancer not only valorized the "art" of the barristers

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158. Francis Bacon, "The Advancement of Learning" (1605), *Works*, 3:270 (unfavorably contrasted the "empiric" to the deeply learned expert, in law, medicine, and statecraft).

against the “craft” of the attorneys and solicitors. It also underscored the years of patient accumulation of knowledge that legitimated the bar’s claims of interpretive power under the rubric of “artificial reason.” Both a pragmatic tool and an element of self-image, mnemonic precepts proliferated in lawbooks, forming another strand of memorial culture.

2. Legal Texts in Memorial Contexts: “Cycling,” the Method Wars, the Art of Memory, and the Golden Chain

[A law report] signifies a public relation, or a bringing again to memory cases judicially argued.

—Edward Coke, First Institute (1628)\(^{160}\)

Surely method is so convenient a thing in the study of the law, that without it neither can the understanding be well taught, nor the memory well directed. It is not enough to have a great heap of things that are to be read, unless the use or order and manner of reading them be well understood: ... so the student must have a care lest the order of his reading be confounded, lest the last things be handled in the first place, and these things which should be in the midst be put in the last place, which whosoever do, they cannot only not comprehend the things which they study, but utterly debilitate and weaken the strength of the memory.

—William Fulbeck, A Direction or a Preparative to the Study of the Law (1600)\(^{161}\)

Scholars of early modern and medieval intellectual life working under the rubric of the “history of the book” have criticized dichotomous oppositions of literacy to orality and text to memory, preferring instead to stress the complex intertwinnings of print, manuscript, memory and oral tradition.\(^{162}\) This approach can illuminate important aspects of legal culture. For while print was gradually becoming a more important carrier of legal tradition between 1500 and 1640, it remained imbricated with manuscript and oral tradition, even in texts that polemically declared the superiority of print to the “slippery storehouse of memory.” But the story was not one of simple continuity—the early modern survival of a classical

\(160. \) Edward Coke, First Institute, 293a.

\(161. \) Fulbeck, Direction (1600), 225-26.

and medieval habit of seeing text as a derivative, or reminder, of an original oral discourse extended through time by the artifice of writing.\textsuperscript{163} The advent of print and Continental agitation over pedagogical "method" prompted reflection upon the nexus between text and memory. Far from retreating in the face of print, memory became a subject of more intense and sophisticated theorizing.\textsuperscript{164}

The pervasive \textit{topos} of text as custodian of an originally oral discourse especially suited lawyers. Early modern law evolved out of and circulated through speech in moots and Readings, in professional conversations, and in verbal judicial rulings liable to "vanish with the breath that uttered them."\textsuperscript{165} Lawbooks preserved tradition from being "wasted and worn away with the worm of oblivion."\textsuperscript{166} But preserved for whom? Lawyers gave two answers that usually overlapped. First, books taught law to contemporaries and posterity unfamiliar with a rule or the system as a whole. Texts were teachers. Second, books recalled to lawyers what they knew or once knew, presupposing a living tradition already shared among the writer and readers. Texts were reminders.\textsuperscript{167}

It is striking to what extent lawyers stressed the mnemonic over the tutorial function of lawbooks, imagining them as embedded within a verbal and memorial context.\textsuperscript{168} When Francis Bacon advocated summarizing the law "under heads and titles," he warned: "But we must take care that while they make men ready in practice, they do not make them idlers in the science itself; for their business is to
facilitate the recollection of the law, not to teach it." Lawyers often styled a written citation to a written source a "remembrance." Coke defined a law report as a "public relation, or a bringing again to memory cases judicially argued." Indeed, memory both infused the creation and contested early modern case reports. Royal judges did not circulate written decisions but spoke their opinions aloud. Lacking transcripts, largely without shorthand skills (which became prevalent during the seventeenth century), reporters stood uncomfortably in the noisy courts taking sketchy notes slower than the judges spoke. As they composed their accounts of decisions hours or days later, they filled in the gaps from memory—their own or the relations of a colleague. To reassure readers, they boasted of assiduously cross-checking their recollections against those of other witnesses. Through the late eighteenth century, lawyers felt entitled to use oral tradition to supplement, even deny, case reports. They knew that reports bore only an imperfect

170. A few representative examples of this recurrent phenomena include: Edward Coke, Third Institute (1644), 73 ("But (as we remember) the first statute making a new felony that took away the benefit of clergy, was the Statute of 7 H. 7, concerning soldiers"); Thomas Ashe, preface to Epieikeia (1609) (after Ashe cited a host of legal writers in his discussion of equity, he added, "And here now I will make an end, being loth to abuse thy patience any further with needless or unnecessary repetition of that which is remembered by others that have written very lately of the same subject"); St. German, Doctor and Student, 73, 75; Thelwall, dedication to Le Digest (1579) iv; Coke, "Proeme," in Fourth Institute (1644), B1; id., Reports, pt. 3, xxv; Selden, "Notes on Fortescue's De Laudibus," 43, 49; Thomas Ashe, preface to Abridgement des ... Plowden (c.1600); id., Promptuaries ou Repertory Generall de les Annales (1614), 4; Dodderidge, English Lawyer (1631), 48, 171, 185, 193, 223, 226, 231, 232, 236, 238, 239, 262, 264.

The prevalence of remembrance as a shorthand for citation is a form of the "oral residue" in Tudor writing that Walter Ong noticed in literature and rhetoric, one of those habits of "expression tracing back to preliterate situations or practice, or deriving from the dominance of the oral as a medium, or indicating a reluctance or inability to dissociate the written medium from the spoken." Walter J. Ong, "Oral Residue in Tudor Prose Style," in Rhetoric, Romance and Technology: Studies in the Interaction of Expression and Culture (Ithaca, 1971), esp. 25-26; Woolf, "Speech, Text, and Time," 159-93 (discusses blending of sight and sound metaphors in Elizabethan writing).

171. Coke, First Institute, 293a.


174. Well into the eighteenth century, lawyers invoked manuscripts or their memories to amend or overturn printed lawbooks, particularly reporters. Shaw v. Weigh (K.B., 1715), in Fortescue, Reports, 77-78, and Backhouse v. Wells (K.B., 1703), in ibid., 135, provide represen-
correspondence to what past courts did. Reports arose from idiosyncratic notes and existed in multiple conflicting versions. Though given more credence than memorial tradition, written and even printed reports were continuous with it, rather than its displacement.

Early modern lawbooks imagined themselves as but the tip of an iceberg. The printed page rested upon and pointed to a mass of implicit knowledge and experience. In the Aristotelian terminology favored by King's Bench Justice John Dodderidge, the lawbook prompted the mental operation of recollection through association of "time, place, [and] company" (actus reminiscendi). The printed word pulled tradition into remembrance as "the several links of a chain draw and depend one upon another." To understand lawbooks as the visible links of a chain reaching down into a shared professional erudition is to suggest why lawyers so frequently styled them remembrancers or promptuaries, a usage that fell out of fashion between the eighteenth and nineteenth centuries. The apologetic fiction that the common law was the common custom of the realm known to Englishmen in outline and to lawyer-oracles in detail helped make plausible the treatment of lawbooks as prompts despite the large gaps in the actual knowledge of readers.

In the late-sixteenth and early-seventeenth centuries, the better construction of Dodderidge's "chain" between text and memory became a central problem in legal education and in the design of legal literature. Sixteenth-century humanist educators inspired in lawyers no less than divines and art faculties the ambition to reduce knowledge to "method," to devise cogent, brief arrangements under clear rules. Borrowing from the pedagogical reforms of Continental legal humanists, English lawyers sought to "methodize" their
notoriously disordered craft, widely perceived as a ramshackle mass of particulars.\textsuperscript{177} The topical rhetorics and logics proliferating in Renaissance schools offered lawyers several services. Written for the jurist Trebatius, Cicero's \textit{Topica} showed lawyers how to "invent" arguments about a legal problem by drawing it through a series of topics (\textit{topoi}) or places (\textit{loci}) in the mind, prompting associations.\textsuperscript{178} The converse of this skill of "genesis" was "analysis," where topics dissolved a case, oration or treatise to reveal the logical relations

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177. Terry Kevin Shaller, "English Law and the Renaissance: The Common Law and Humanism in the Sixteenth Century" (Ph.D. diss., Harvard University, 1979). Terry Shaller has distinguished between the pedagogical and historicist/philological wings of Continental legal humanism. The former advocated commonplacing, topical logic, and "method" in the service of clearer, more effective teaching of the law. The latter hoped to purge the \textit{Corpus juris} of textual corruptions, demonstrate the origination of different parts of the \textit{Corpus juris} in different stages of Roman history, and trace the interplay of Roman, feudal and customary law in European legal history. The pedagogical reforms of Continental legal humanists exercised an important, and growing, influence on English legal literature and education from about the second third of the sixteenth century, particularly their application to legal study of a revived topical tradition. The impact of Continental philological and historicist approaches to law came later and touched the sixteenth century, particularly their application to legal study of a revived topical tradition. 

178. "It is easy to find things that are hidden if the hiding place is pointed out and marked," wrote Cicero. "Similarly if we wish to track down some argument we ought to know the places or topics: for that is the name given by Aristotle to the 'regions,' as it were, from which arguments are drawn." Cicero, \textit{Topics}, 2:6-8. The "circumstances closely connected" with the subject under consideration, similarity, differences, species, subclasses, contradictions, causes, effects, and other topics, help us generate arguments "by a rational system without wandering about." Cicero, \textit{Topics}, 3:11, 1:2.
\end{quote}
obtaining among the parts.\textsuperscript{179} Most important, for my purposes, the topical tradition provided mechanisms for retaining and transmitting English law—most prominently, commonplacing and "method."

"Commonplaces"—topics or "places" applicable not only to a single subject but to any subject (such as genus and species)—fulfilled two important functions in humanist pedagogy.\textsuperscript{180} Used to invent arguments, they served, in Walter Ong's coinage, as "analytic commonplaces." By contrast, "cumulative commonplaces" compiled quotations on important subjects (loyalty, duty, friendship) under headings.\textsuperscript{181} These became a centerpiece of Renaissance education in the form of commonplace books.\textsuperscript{182} Lawyers urged students and practitioners to fill commonplace books with collections of legal points and authorities arrayed under alphabetical headings (account, burglary, novel disseisin, and so on). The secret of a good commonplace lay in the choice of proper headings. One had to know when to select narrow or broad ones, when to divide or conflate, so as to organize best the law's mass of specifics.\textsuperscript{183} This intense concern with finding the right headings for containing particulars also characterized legal treatises from the mid-sixteenth century on

\textsuperscript{179} William Fulbeck's \textit{Direction} (1600) demonstrated the process of "analysis" (breaking down). It placed on the dissection table part of the celebrated description of fee simple land tenure offered in Thomas Littleton's \textit{Tenures} (1481). Fee simple, Littleton wrote, was a lawful or pure inheritance that, among its incidents, could descend down generations but not ascend. According to Fulbeck's analysis, fee simple stood as a species of the genus "inheritance," a genus that also contained fee tail. "Pure" and "lawful" constituted differences between fee simple and alternative tenures, thereby isolating the species for definition. "Pure" reminds us that a fee simple was an inheritance without limitation, distinguishing it from the restrictions of the fee tail. "Lawful" meant "rightful" and excluded fee simples by disseisin. To note that a fee simple may descend but not ascend was to identify an adjunct or property internal (or necessary) to the tenure. The point of this "analysis" was to express in the vocabulary of the topics (genus, species, adjuncts) the logical relationships latent in Littleton's definition. Fulbeck, \textit{Direction} (1600), 229-33. See also Fulbeck's analysis of the \textit{Prior of Merton's Case}. Ibid., 239-52. On the theory and practice of analysis and genesis, see Shaller, "English Law," 63-65, 180-89, 192-94.

\textsuperscript{180} Unlike a "common" place, a "particular" place yielded arguments only about a given subject such as physics, ethics, or geometry. Richard Sorabji, \textit{Aristotle on Memory} (London, 1972), 29.

\textsuperscript{181} Walter J. Ong, \textit{Orality and Literacy: The Technologizing of the Word} (New York, 1982), 110-11; id., "Oral Residue," 36-38. Francis Bacon made a similar distinction, dividing "invention" into "preparation" (essentially Ong's cumulative commonplaces of stored-up arguments) and "suggestion," the marks or places that "excite our mind to return and produce such knowledge as it has formerly collected." Francis Bacon, \textit{Advancement of Learning} (1605), in \textit{Works}, 3:389-91.

\textsuperscript{182} Renaissance educators did not invent commonplacing. Medieval scholars regarded the written commonplace as an expression of their image of the trained memory—a structured and inventoried set of "bins" into which one put information. Carruthers, \textit{Book of Memory}, 33-34, 174-76. The humanists, however, elevated it to a central place in their pedagogy, and the form proliferated.

\textsuperscript{183} For but one example among many, see "Commonplace Book" [MS c.1600], MS G R29.31, Yale University, Beinecke Library, Law School Deposit. The author not only broke the book into "divisions," but gave each section a division number, so that the first heading was "division 1," the second "division 2," and so on. He placed a \textit{tabula divisionis} at the front of the work.
Treatise writers translated the humanist aspiration for "reduction to method" into a call for "apt division," using wholes and parts, genuses and species, causes and effects, and other topics to accurately map the law in the service of effective teaching and retention. However much they differed in detail, the so-called "methodical" treatises after 1550 offered variants of the same formula: defining terms, selecting organizing classes, and breaking them into subclasses ready to receive particulars.

The impact of Renaissance humanism and the topical tradition on early modern lawbooks has been an abiding concern of the last generation of legal historians. I wish to explore the subject from a different vantage point, asking how humanist pedagogical reforms reoriented the relationship of legal text and memory after 1530. To begin with, what was new? Renaissance lawyers viewed topical legal literature as reminders to participants in an ongoing oral tradition and as written safeguards of otherwise fleeting remembered law. But did not medieval legal literature do likewise? Bracton, Fleta, and the


Much early modern English legal literature bore a structural similarity to the commonplace. It employed headings (which might be a topic, a proposition of law or a maxim) followed by a list of authorities, sometimes huddled in groups defined by the source from which they were cribbed ("Nota que Dyer ..."), sometimes one following the other disjointedly. See, e.g., John Kitchin, Le Court Leet et Court Baron (1581) (part II on the court baron); Richard Crompton, L'Autorite et Jurisdiction des Courts (1594); Bacon, "Maxims" [MS 1597], in Works, 7:313-87; Ashe, Promptuaries (1614); A Manual, or Analecta. Being a Compensious Collection Out of Such as Have Treated of the Office of Justices of the Peace (1641); Edmund Wingate, Statuta Pacis; or, Perfect Table of All the Statutes Which Concern the Office of a Justice of Peace ... Faithfully Collected, and Alphabetically Digested Under Apt Titles (1644); John Clayton, Topics in the Laws of England (1646); William Style, Regestrum Practicale: or, the Practical Register (1657).

185. I have borrowed the image of "mapping" from Shaller, "English Law," 63, 173, 344. "Apt division" is from Fulbeck, Direction (1600), 106. William Staunford, for example, urged lawyers to adopt the titles of Fitzherbert's Abridgment as organizing categories that, through careful division, could yield "certain principles, rules and grounds" able to "digest," "order" and "dispose" the myriad points of English law. William Staunford, An Exposition of the King's Prerogative Collected Out of the Great Abridgement of Justice Fitzherbert [MS 1548] (1567), Aviv.

author of "Glanvill," after all, hoped their treatises would preserve law through writing "to posterity forever." The "scholar" in the Dialogue of the Exchequer (MS c.1179) implored the "master" to put his learning in writing "lest it should die with you." E.W. Ives has aptly described the yearbooks of the fifteenth and early sixteenth centuries as "extensions of the memory of the legal profession," enabling lawyers and judges to "move readily from memory to reports and back again, without distinction." Even the topical organization of Renaissance legal literature had antecedents in the latter Middle Ages. Lawyers made commonplaces and abridgments in the fifteenth century. Littleton's Tenures (1481) and Readings on statutes employed divisions for expository clarity.

What, then, was distinctive about Renaissance legal literature? Scale, theory, and ambition to reform mnemonic design. Champions of topical organization saluted their predecessors—in particular, Littleton and Bracton. But works of "apt division" were rare amid the larger bulk of "unmethodical" late-medieval yearbooks, writ commentaries, and pleading primers. Renaissance lawyers used topical organization on a far greater scale, making central and routine what had been exceptional and episodic. More importantly, they set out to facilitate the flow of legal information between text and memory (in both directions). To some extent, of course, all lawbooks commit knowledge to memory, rely on memory to flesh out what the text discusses. But Renaissance lawyers consciously designed topical legal literature to do those things and praised it for achieving those ends. Improving the process became an important challenge in the legal culture, and bettering memory a recommendation for lawbook design.

These were among the stated benefits of "apt division" and of "genesis" and "analysis." Topical organization, it was said, created

189. Numerous legal writers linked organization under "certain heads" and method to better remembrance. A partial list includes: Fulbeck, Direction (1600), 106, 225-26, 116 ("[It is good for him [the student] to have great care of preserving and continuing his memory, and therefore it is a profitable course under titles to digest the cases of the law"); Ashe, "Observations," in Promptuaries (1614) ("First, peruse the general titles of the book, and endeavor to have them always in memory: so shall you through their variety the sooner attain to the thing you desire."); Dodderidge, English Lawyer (1631), 20 (to improve memory, use and keep a method and "analyze the matter with all his parts and incidents which we do desire to remember"); John Clayton, dedication to Topicks in the Laws of England (1646) (Clayton recorded maxims "in the most familiar way of our books' expression, which is in various languages," for this "brings what we have read in our books quickest to our apprehensions"); Shepherd, Touchstone (1648), A4.
an outline map capable of receiving new information into an expandable structure suitable for absorption into memory. Well-chosen "heads" (or categories) also inspired the recollection necessary for building arguments. A general "analytic" commonplace such as genus or cause served, in the words of the logician Thomas Wilson, as a "resting corner of an argument, or else a mark which gives warning to our memory what we may speak probably, either in one part, or the other, upon all causes that fall in question." The "heads" of legal literature played this role. In this sense, these "heads," "grounds," "generals," and "divisions" that collated authorities for ready use in commonplaces, abridgments, and methodical treatises were also topics of invention, providing a set of categories (names of writs and crimes, listings of courts, types of actions and processes, principles and maxims) to pull on Dodderidge's chain of recollection. As Francis Bacon observed, topics of invention do not discover the new so much as "recover or resummon that which we already know. . . . So as, to speak truly, it is no invention, but a remembrance or suggestion, with an application." Bacon characteristically thought about how to make them better remembrancers. He refused to "digest" his book of maxims into a "certain method or order . . . through coherence and relation into other rules," because "delivering of knowledge in distinct and disjointed aphorisms, does leave the wit of man more free to turn and toss, and make use of that which is so delivered to more several purposes and applications." According to its proponents, then, topical legal literature enriched and sped the "cycling" of knowledge between text and memory, serving as a more effective transmission belt than the yearbooks, writ

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190. Edmund Wingate's "Advertisement" in The Body of the Common Law, 3d ed. (n.d., after 1655) boasted that a student who treasures up "in his memory the common places of law held forth in these tables, together with their coherence and dependance one upon another, may be thereby furnished in all the general and necessary titles of law, whereunto he may aptly refer any case he meets with, especially having also before hand, by perusing the treatise at large, acquainted himself with the definitions, distributions, affections, rules, and examples, respectively belonging to each several title." For a representative use of "heads" as the markers on an outline map, see T.W., The Clerk of Assize, Judges-Marshall and Cryer: Being the True Manner and Form of the Proceedings at the Assizes (1660). T.W. presupposed that local officials had forgotten the proper style of assizes during the interregnum and needed instruction. After pages of step-by-step instruction in how to run an assize—the cryer says such and such, the jury stands here—the manual notes on page 31: "And many other things may happen in execution of this business which time and observation will make perfect. In the mean time you must take these as the heads."


commentaries, and pleading primers.\textsuperscript{194} It introduced into legal literature a mnemonic technology better than the ad hoc techniques of the latter Middle Ages. This technology turned serendipity into system.\textsuperscript{195}

Alongside its practical legacy in lawbook organization, the topical tradition and the educational reforms of Continental legal humanism brought into English legal thought conflicts over the best pedagogical method. The changing pool of students recruited into the Elizabethan and early-Stuart Inns, increasingly drawn from humanist-influenced grammar schools and the universities, were ready to stage their sedate and derivative local version of the "Method Wars" raging in European intellectual life.\textsuperscript{196} These students had been exposed to debates over the relative advantages of syllogistic and topical logics, of Aristotle and his Renaissance competitors, such as the French logician Peter Ramus.\textsuperscript{197} The firm commitment of jurisprudential writers to methodical organizational by the latter sixteenth century raised the stakes.\textsuperscript{198} A minor rivulet of Ramism militant flowed
within the ecumenical mainstream of “methodical” lawyers pursuing the dominant system of legal classification: definition of a term or area of law (often with a brief glance at etymology), followed by division and subdivision into component elements.199 This general program required selection among competing organizational strategies. A “man can hardly tell which to choose,” wrote William Fulbeck, arching his eyebrows.200 When breaking a legal category

and apologized for its absence. See, e.g., Ferdinand Pulton, preface to Abstract of Penal Statutes (1579), Aii; Thelwall, preface to Le Digest des Briefes (1579), iv; Lambard, Eirenarcha [1581], Aiiv; Dalton, Country Justice (1622 ed.), [4] and [9]; Coke, First Institute (1628), 235b; id., preface to Reports, pt. 1 [1600], xxix; id., preface to Reports, pt. 4 [1604], iv, x-xi; Dodderidge, English Lawyer (1631), 20, 190, 258; Clayton, Topics (1646); “Directions” (MS c.1648), fol. 245; Hawke, preface to Grounds (1657), A3; Phillips, preface to Principles of Law, (1661), A2-A3; id., Studii, 2d ed. (1667), 32-37, 124. Even the Jesuit controversialist Robert Parsons’s program for returning England to Catholicism discussed the advantages of bringing method to law. Robert Parsons, Memorial for the Intended Reformation of England, printed as The Jesuit’s Memorial for the Intended Reformation of England Under the First Popish Prince [1596] (London, 1690), 242-43.


Turning from advertising to substance, jurisprudential writers provided samples of their ideal methods in operation. Fraunce provided elaborate Ramist logical epitomes for a selection of Virgil, the Earl of Northumberland’s Case in Plowden’s Reports, and a section of Staunford’s Plea of the Crown’s Logic (1588), 120r-151r. Lawyer’s Logic demonstrated on the Prior of Merton’s Case his method of “analysis,” the breaking down of cases and fields of law into subordinate propositions through the use of topical logic. Fulbeck, Direction (1600), 235-52. John Dodderidge presented a twenty-five page miniature treatise on “arbitrment” as a model of how topical logic could elucidate the “causes and consequences” of a title of law. He explored its definition and description; etymology; material, formal, efficient and final causes; genus; effects; consequents; and so on. Dodderidge, English Lawyer (1631), 166-90.

199. Ramists enjoyed elevating their master over rivals, sometimes with a polemical, proselytizing edge. Ramus’s translator, Roland MacIlmaine, boasted that the “natural method . . . is able to bring more profit . . . than . . . study in Plato and Aristotle.” Roland MacIlmaine, “Epistle to the Reader,” in The Logic of the Most Excellent Philosopher P. Ramus, Martyr [1574] (New York, 1969), 14. Abraham Fraunce lauded Ramist dialectic over commonplacing, preferring the “law to be rather logically ordered, than by alphabetical breviaries torn and dismembered.” Abraham Fraunce, The Lawyer’s Logic (1588), 119b. The “loathsome tossing of an A.B.C. abridgment” brought ad hoc incoherence. Id., 57a-b. But Fraunce’s style of Ramism militant made little headway. Legal writers preferred a less truculent methodological syncretism. They fused Ramist with Aristotelian logic as a supplement to, rather than replacement of, commonplacing. Lawyers here followed the dominant tendency among English logicians between 1590 and 1640, which was to combine Ramist and scholastic elements. Howell, Logic and Rhetoric, 282-85.

200. Fulbeck, Direction (1600), 221.
into subcategories, should one split it into two parts, following Ramus's preference for bipartite division, or choose as many divisions as seem convenient? When using topics of invention to explain the nature and incidents of a legal category through "genesis" (as in Dodderidge's work-up of "arbitration"), should one follow Ramus and begin with the efficient cause or follow Aristotle and begin with matter and form? When should one reason from universals to singulars, and when the reverse? When abandon method altogether and display knowledge in aphorisms?

But to call these merely "organizational strategies" is to underplay their importance. Behind the topical tradition stood the reputations of humanist educators such as Erasmus, Rudolph Agricola, Philip Melancthon, and Peter Ramus, and behind them the authority of Cicero, Galen, Plato, and Aristotle. To assemble a legal commonplace or study a methodical treatise was to invoke implicitly the intellectual authority of these luminaries by way of the philosophical justifications for humanist pedagogy. This added to Renaissance English legal literature a theoretical tinge absent in the yearbooks, writ commentaries and pleading manuals of a more local, insular intellectual tradition. Selecting between different methodologies invited lawyers to compare the merits of Aristotle and Ramus, Plato and Cicero, positioning them, however obliquely, in the European "Method Wars." Ramus, murdered in France's Saint Bartholomew's Day massacre and a favorite of Reformed divines, appealed disproportionately to Puritans. Aristotle, as a symbol of medieval intellectual life, inspired the allegiance of traditionalists and Protestant "church papists." Enthusiasm for François Hotman and Jean Bodin revealed sympathy for a liberal course of legal study drawing on logic, rhetoric, philology, and history and against the suspicious remnant in the Inns of Court.

201. Dodderidge, English Lawyer (1631), 95; Fulbeck, Direction (1600), 235. Bacon attacked Ramus's "one and only method" for slicing knowledge into ill-fitting dichotomies that "force it out of its natural shape." Bacon, translation of "De Augmentis," in Works, 4:448.

202. Dodderidge, English Lawyer (1631), 181.

203. Fulbeck, Direction (1600), 222-23.

204. Aphorisms, Francis Bacon wrote, "representing a knowledge broken, do invite men to inquire farther; whereas methods, carrying the show of a total, do secure men, as if they were at furthest." Bacon, Advancement of Learning (1605), in Works, 3:403-05; id., "Maxims" (MS 1597), in ibid., 7:321. Bacon rejected the search for the "right" method preoccupying many sixteenth-century humanists in favor of assessing the relative advantages of competing methods in different contexts. See id., "De Augmentis," in ibid., 4:448-52; Lisa Jardine, Francis Bacon: Discovery and the Art of Discourse (Cambridge, 1974), esp. 5-15.

allegiances and made legal pedagogy more theoretically self-conscious than had been true a century before amid the yearbooks and writ commentaries.

In particular, debates over method implicated mnemonics. Ramists treated the very assembling and arrangement ("collocation") of a field of knowledge as a form of memory training. Their epitomes were "classifications-for-recall," Walter Ong has observed, "so that working with them [was] of itself working with a memory device."206 Ramists styled their master's "method" as the "best art of memory."207 In boasting so confidently of the mnemonic benefits of their classification system, the Ramists were like every other Renaissance peddler of method, only more so.208 If better methods helped memory more than middling ones, the quests for the superior method and for the superior mnemonic went hand in hand. In the interest of superior remembering, Fraunce championed Ramist method over Aristotelian logic and commonplacing. Dodderidge and Fulbeck favored organizing law from general principles down toward particulars rather than the reverse.209 "Method" did not only signify a template for organizing knowledge. It also referred to the prosaic details of learning law—what books to read in which order, how to assemble commonplaces. Here, too, givers of advice praised their programs of study for strengthening memory. The search for the best method, then, prompted and also depended upon comparative judgments about mnemonics.

Lawyers' rejection of the "Art of Memory" offers a glimpse of how this search proceeded. A technique of classical rhetoricians set out by Cicero, Quintilian, and the anonymous author of the Ad Herennium, the Art taught its adepts to commit to memory a series of "places," essentially bounded mental spaces such as the rooms of a house. These "places" received "images" encoding in visual shorthand the speech, argument, or information to be recalled. The images served as "forms, marks or simulacra." Rhetoricians recommended using active images of unusual beauty, deformity, humor, prurience, or

206. Ong, Ramus, 213.
207. Ong further noted that memory, "which had commonly been a... separate part of rhetoric," was absorbed by the "dialectic or logic in the 'method' which will grow out of the Ramist topical apparatus." Ong, Ramus, 213, and 184, 194, 280; see also Howell, Logic and Rhetoric, 148.
208. On the connection of method and memory, see Kelley, Human Measure, 209; Gilbert, Method, 66, 142.
209. Dodderidge, English Lawyer (1631), 20.
whimsy, as these stuck in the mind better.\textsuperscript{210} Suppose one needed to invent images to remind oneself of the operations of “invention” and “disposition” in topical logic. A “hunter pursuing a hare” and “an apothecary arranging his boxes” would do, suggested Francis Bacon.\textsuperscript{211} By moving through the places in sequence, viewing the images as prompts to recollection, the practitioner of the Art remembered what he needed in the right order.

Advocates and merchants of the Art identified lawyers as a natural constituency and clientele.\textsuperscript{212} Tutors taught it in London, home of the Inns of Court. George Buc listed both mnemonic and legal training in his survey of the varieties of learning offered in that city.\textsuperscript{213} Yet lawyers shared the growing Elizabethan and early-Stuart distaste for the Art. This was a legacy of Erasmus's skepticism about it, which informed later humanist thought, overlaid with denunciations

\textsuperscript{210} Frances A. Yates, \textit{The Art of Memory} (Chicago, 1966), 2-10. The anonymous author of the rhetorical work \textit{Ad Herennium} explained that “the places are very much like wax tablets or papyrus, the images like the letters, the arrangement and disposition of the images like the script, and the delivery is like the reading.” Ibid., 6-7 (quoting \textit{Ad Herennium}).

\textsuperscript{211} Francis Bacon, translation of bk. 5 of \textit{De Augmentis}, in \textit{Works}, 4:437. The English rhetorician Thomas Wilson gave this example of the Art: “My friend, whom I took ever to be an honest man, is accused of theft, of advoutry [e.g. adultery], of riot, of manslaughter, and of treason. If I would keep these words in my remembrance and rehearse them in order as they were spoken, I must appoint five places, the which I had need to have so perfectly in my memory as could be possible. As for example, I will make these in my chamber: a door, a window, a press, a bedstead, and a chimney. Now in the door I will set Cacus the thief, or some such notable varlet. In the window I will place Venus. In the press I will put Apitius, that famous glutton. In the bedstead I will set Richard the Third, King of England, or some like notable murderer. In the chimney I will place the blacksmith [Robert Smyth, leader of the 1549 rebellion], or some other notable traitor. That if one repeat these places and these images twice or thrice together, no doubt though he have but a mean memory, he shall carry away the words rehearsed with ease.” Thomas Wilson, \textit{The Art of Rhetoric} [1560] (University Park, Pa., 1994), 238, 300.

\textsuperscript{212} William Fulwood, the translator of Guglielmo Gratarolo's \textit{The Castle of Memory} (1573), thought lawyers could benefit from the Art, as he explained in a doggerel introduction:

\begin{quote}
How can the Judge just judgement geeve 
except hee call to minde 
The matters hanging diversly, 
the truth therby to finde? 
How can the Lawyer pleade his cause, 
before the Justice seat: 
If hee his clients matters shall 
at any time forget? 
\end{quote}


Another verse of Fulwood's memorable poetry reminds us:

\begin{quote}
What profits it most worthy things 
to see, or else to heare: 
If that the same come in the one, 
and out at the other eare? 
\end{quote}

\textit{Ibid.}

Depiction of a "repository" designed to hold the mnemonic "places" and "images" used in the Art of Memory. John Willis, "Memonicon, Or, the Art of Memory" (London, 1661), 55.
by Ramist and Protestant educators put off by its seeming uselessness and affinity for salacious and grotesque images. "Barren and burdensome," said the lawyers against the Art, "little less than dangerous and destructive to natural memory," clumsy, convoluted, inferior to care, repetition, and method as mnemonics; and even if successful, only an "ostentation prodigious" for remembering piles of names and verses instead of helping with business. It was unfortunate for the Art's reception that its central value to classical rhetoricians, organizing lengthy oratorical setpieces, meant little to common lawyers, generally speaking briefly and "on the sudden" in response to opponents' arguments. The Art's association with mnemonic tricks did not help. Cyrus saluting all the soldiers of his army by name, Seneca repeating two thousand names in the same order as spoken to him: These earned the attention of legal education manuals down into the eighteenth century but at the cost of presenting the Art as a form of legerdemain on the wrong side of the divide between the "vain" effects of rhetoric and the solid, if homely, matter of the law. The migration of the Art over the sixteenth century out of the mainline of humanist thought toward Hermetic and occult borderlands further marked it as peripheral to a legal profession still ambivalent about syllogisms and Aristotelian causes and categories.

But if the Art of Memory found few friends in the bar, lawyers seized on the mnemonic advantages of another classical inheritance: the "golden chain" of learning. The image of a "chain" had figured


217. As Yates explained, "Renaissance Hermetic man believes that he has divine powers; he can form a magic memory through which he grasps the world, reflecting the divine macrocosm in the microcosm of his divine mens." Yates, *Art of Memory*, 172.
since classical antiquity in two metaphors for organizing learning that early modern lawyers combined. The rhetorician Quintilian described the places and images of the Art of Memory as "linked one to another like dancers hand in hand, and there can be no mistake since they join what precedes to what follows." As Mary Carruthers observed, "the language that describes the formation of associations as 'hooking' material to other things leads to a metaphor of recollecting as fishing; as one pulls up one’s line, all the fish on one’s hooks come with it." Fishing and dancing share the notion of linkage commonly conveyed through the metaphor of the "chain" of memory, most prominently in the active process of Aristotelian "recollection," where one association pulled upwards the next in the search for half-buried knowledge. Dodderidge used this image, as did Coke.

Lawyers also invoked the "golden chain" of Homer that connected the various arts and sciences "horizontally" with each other and "vertically" with the divine mind. "The partitions of knowledge," Francis Bacon observed in the _Advancement of Learning_ (1605), are like branches of a tree that meet in a stem, which has a dimension and quantity of entireness and continuance, before it come to discontinue and break itself into arms and boughs; therefore it is good, before we enter into the former distribution, to erect and constitute one universal science, by the name of _Philosophia Prima_, primitive or summary philosophy.

Taken at its highest cosmological level of abstraction, the golden chain preserved divinely ordered and mutually dependent harmony among the arts, as the closely related concept of the "great chain of being" did for the angels and corporeal creatures in God’s plenitude of creation. All things "above and below, formed one system,"

219. Ibid.
220. Dodderidge, _English Lawyer_, 16.
221. Coke, _First Institute_ (1628), 394b.
222. Bacon, _Advancement of Learning_ (1605), in _Works_, 3:346. See also Robert McRae, "The Unity of the Sciences: Bacon, Descartes, Leibniz," in _Roots of Scientific Thought: A Cultural Perspective_, ed. Philip P. Weiner and Aaron Noland (New York, 1957), 390-97. James VI of Scotland (later James I of England) commented: "But since all Arts and sciences are linked every one with other, their greatest principles agreeing in one (which moved the poets to fain the nine muses to be all sisters) study them, that out of their harmony, ye may suck the knowledge of all faculties." James VI, _Basilikon Doron_ [1599], in _Political Works_, 39.
223. In book eight of the _Iliad_, Zeus forbad the gods from interfering in the Trojan War, daring them to pit their strength against his by pulling on a golden chain. Through successive reinterpretations, the golden chain came to mean, according to the fifth-century Neoplatonist Macrobius, "a connection of parts, from the Supreme God down to the last dregs of things, mutually linked together and without a break. And this is Homer's golden chain, which God, he says, bade hang down from heaven to earth." Arthur O. Lovejoy, _The Great Chain of Being_ (Cambridge, Mass., 1936), 63 (quoting Macrobius). See also Emery E. George, _Hölderlin and
argued a favorite text of Bacon and other lawyers, Cicero's *De Oratore*, "and were linked together in strict union by one and the same power, . . . for there is no order of things which can either of itself, if forcibly separated from the rest, preserve a permanent existence, or without which the rest can maintain their power and eternal duration." To Christians, God was Cicero's "one and the same power." Being the "God of order, not of confusion," wrote Dodderidge, He

continued the innumerable variety of particular things under certain specials; those specials under generals, and those generals again under causes more general, linking and conjoining one thing to another, as by a chain, even until we ascend unto himself, the first, chief and principal cause of all good things. And this is what which Plato out of Homer, was wont to call Jupiter's golden chain.

Dodderidge's invocation of legal "method"—particulars arranged under specials, specials under generals—suggests how lawyers used the golden chain to assuage anxieties loose in their profession. Was the common law a disorganized heap of writs, cases, and pleading tricks, a thing of shreds and patches, as unfriendly clients, civilians, university scholars, and divines claimed? No, for like any other body of knowledge, it stood connected to the other arts and sciences, and thence to God. The principles of the law grew out of the "root, and fountain of other . . . sciences," wrote Michael Hawke. All sciences were "the issue of one womb descending from the same intellect, and are by nature so linked and chained together."
Was the common law burdensome to remember, as its students and critics alike remarked? Yes, but the “horizontal” and “vertical” order that the golden chain imposed, latent in the law’s structure, helped. Dodderidge made the golden chain the author of method and coherence, and these of remembrance. The lawyer-Ramists made his implicit strategy explicit, quick to see the mnemonic advantages of a unifying structure in the golden chain as in their distinctive “method.” Edmund Wingate’s *Maxims of Reason* (1658) viewed prudent and just laws as

*radii* and *effluxes* from the eternal wisdom, having their exemplar cause and bright *idea* in God himself. The mediate author of these is human reason, . . . and that attempts may be made without danger, to discover how the vast multitude of cases, . . . are all accountable and reducible to some few theses, which . . . govern and resolve the subordinate miscellany of queries, and may serve for a clue and conduct, through the labyrinth of that perplexed variety, saving us the labor of charging our memories with every particular.

Lawyers fused the cosmological and mnemonic senses of “chain” imagery. They characteristically found in a principle of cosmological and disciplinary organization an *aide mémoire*.

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mutual dependence of the “chain of sciences,” lawyers might become “perfect in some one title of the law, . . . ready and subtle, but not deep or sufficient, no not in that subject which they do particularly attend, because of that consent which it has with the rest, . . . Nevertheless I that hold it for a great impediment toward the advancement and further invention of knowledge, that particular arts and sciences have been disincorporated from general knowledge, do not understand one and the same thing which Cicero’s discourse and the note and conceit of the Grecians in their word Circle Learning do intend.” Francis Bacon, *Valerius Terminus* [MS 1603], in *Works*, 3:228-29.

228. Edmund Wingate, *Maxims of Reason* (1658), A4. Abraham Fraunce told the profession that “method” was “an ordering of divers axioms already invented,” akin to Plato’s “vinculum artis” and to “Homer’s golden chain, whereby things are sweetly united and knit so together.” Fraunce, *Lawyer’s Logic* (1588), 114v. See also Henry Finch, *Law or a Discourse Thereof* (1627), 2 (law “carries with it, and has as it were inclosed in the name and nature of it,” those three Ramist laws of *lex veritatis, lex justitiae, and lex sapientiae*, the “golden chain of all good learning.”). The Puritan divine William Perkins praised Ramist method over the syllogism as a mnemonic, as “the golden chain by the comprehension of which the unlimited material of things will be thus conquered, so that one thing follows most easily from other things.” William Perkins [G.P. Cantabrigiense], *Libellus De Memoria Verissimaque Bene Recordandi Scientia* (1584), ch. 4 (I have relied on a translation by Vincent Dinoso). Frances Yates argued that Ramus’s affinity for the “golden chain” derived from his ambition to capture in his epitomes the “natural” dialectical order of the arts, and of the mind. He “extols his true natural dialectic as a kind of Neoplatonic mystery, a way of return to the light of the divine *mens* from the shadows.” Yates, *Art of Memory*, 240, 234.
Comparison to our own day and to the Middle Ages highlights important features of the relationship between texts and memory in early modern law. From today’s perspective looking backward, lawyers’ embedding books in an underlying memorial context and figuring them as reminders of knowledge already shared by the author and readers appears distinctive. This habit of thought began fading slowly in the mid-seventeenth century. By the late-eighteenth century, the coparticipation of text and memory in an intertwined system of retaining knowledge gave way as books eclipsed oral tradition as the normatively primary repository of law. Of course, lawyers in 1800 tried to reconcile books and remembered lore as they did two centuries before and do today. But in moments of conflict where priorities had to be announced, books, particularly printed ones, trumped contrary oral tradition as they had not in 1600, when remembered law was supplementary rather than subordinate and interstitial. Memory declined into an appendage holding the lawyer’s working legal knowledge that came from text, or when put into text ascended to a higher level of legitimacy.

From the perspective of the late-Middle Ages looking forward, the rise of the topical tradition and “method” made the relationship of lawbooks to memory more philosophically self-conscious, linking it to the intellectual foundations and disputes of humanist pedagogy. It introduced a determination to improve “cycling” between text and memory. It invited lawyers to make comparative judgments about methods, and hence mnemonics, that signaled philosophical and disciplinary allegiances (as with Ramism and the Art of Memory). It helped lawyers see the mnemonic potential of the golden chain. As the relationship of lawbooks and memory became more theoretically charged, memory emerged as an increasingly complicated and intellectually rich problematic in early modern legal culture.

II. WAS THE MEMORIAL CULTURE OF 1600 A CONTINUATION OF MEDIEVAL PRACTICE? THE PROBLEM OF SPECIOUS NOVELTY

The “memorial culture” of the common law around 1600 was not a discrete phenomenon—an institution, a doctrine, or an idea (the “great chain of being”). It resembled a bundle of filaments. It was made of intertwined but distinguishable strands in the legal culture—in legal literature and legal education, in “brokering” of custom and constitutional argument, in antiquarian writing, the Method Wars, and professional self-definition. Before exploring its implications in the next Part, an objection suggests itself: Was this memorial culture new? This Article has seen it as a fresh intellectual configuration (in part incorporating ancient pieces). Perhaps, though, it lingered as the
fading remnants of a medieval oral and mnemonic world, wilting in the shadow of print. Or perhaps it stood for little more than a familiar litany of classical and medieval mnemonic tricks and clichés. Decay or continuity—either challenges the presupposition behind the rubric of memorial culture that problems of memory achieved a growing salience and theoretical self-consciousness for Elizabethan and early-Stuart lawyers.

Give the devil's advocate the privilege of speaking first. The rubric of "memorial culture," he argues, somewhat overgrandly describes a medieval legacy that early modern lawyers belatedly wrote down and sometimes printed. Medieval lawyers commonly imagined learning and invention as a form of remembrance and looked upon their books as aides mémoire. They cited cases and statutes from memory. They composed mnemonic verses, which survive in notebooks. The law, Church, and universities of the Middle Ages, each mixing writing and oral tradition, taught similar recollective techniques of classical provenance. Keep the mind free of distraction, instructed the Roman orator Quintilian, maintain a good diet and untroubled digestion, break down long texts into manageable bits, judiciously divide and arrange subjects so that "the whole concatenation of the parts" appears "manifestly coherent" and can be recalled through association, meditate and meditate again. Good advice, said the medieval Scholastics Thomas Aquinas and Isidore of Seville in manuscript. Good advice, echoed Edward Coke, William Fulbeck, Francis Bacon, and John Dodderidge in print. The dependence of memory on bodily humors, the Aristotelian distinction between memory and recollection, and the scrutiny of the Art of Memory occupied Thomas Aquinas, Albertus Magnus, and medieval medical

229. See, e.g., Bracton, On the Laws, 2:19; Hall, ed., Treatise on the Laws, 3; Fitz Nigel, prologue to Dialogus, 5; Ives, "Later Year Books," 69-71. Fritz Kern interpreted medieval charters, folk-rights and privately produced lawbooks as in effect epitomes "surrounded by and subordinate to the living legal sense of the community, or the law transmitted by word of mouth, . . . never more than a fragment of the whole law which lives exclusively in the breast or conscience of the community." Fritz Kern, Kingship and Law in the Middle Ages [1914-1919], ed. S.B. Chrimes (Westport, Conn., 1985), 158.

230. Baker, ed. Catalogue, xxvi-xxix; id., occasional notations on selected manuscripts in English Legal Manuscripts.

writers as it did John Dodderidge and Francis Bacon.\(^{232}\) The proliferation of advice and asides about memory in early modern printed lawbooks suggests no heightened attention to the theme. Renaissance writers and printers commonly mined inherited medieval ideas and motifs for salable material. More copies and kinds of \textit{ars memorativa} circulated in Shakespeare's day than in Chaucer's; more Jacobean Englishmen saw visual representations of Dante's cosmology than did Dante's contemporaries.\(^{233}\) Far from representing a fresh intellectual configuration, the elements of memorial culture migrated from medieval lawyers' conversations into the jurisprudential and pedagogical works of Coke, Bacon, Fulbeck, Finch, and Dodderidge. Not the mnemonic techniques and metaphors they elaborated but the books themselves, and the printing that spread and preserved them, were new. The construction of a distinctive early modern memorial culture rests on an insupportable claim of novelty, an illusion of the sources. Or so the advocate would say.

To be sure, much descended from the Middle Ages—but not unchanged and not necessarily from lawyers. Did the Scholastics' Christianized Art of Memory and engagement with Aristotle's, Cicero's, and Quintilian's mnemotechnics influence the insular medieval Inns of Court? With the exception of Littleton's \textit{Tenures} (1481), legal literature of the fourteenth through the early sixteenth century shows few traces of the Scholastic techniques of division, association, and dialectic. Lawyers jotted down mnemonics about their disorganized learning rather than crafting their lawbooks into "aptly-divided" remembrancers, the late-Renaissance ambition. As Part I of this Article observed, Continental pedagogic debates brought a new philosophical tinge to legal pedagogy. And elements of the memorial culture of 1600 lacked meaningful medieval antecedents—the bar, as a collective, styling itself a national remembrancer, the assessment of immemorial constitutional pedigrees, and the "brokered" of local remembered law.

Further, and perhaps stronger, evidence comes from Jacobean lawyers' zeal to find mnemonic advantages and to fret over the elusiveness of recollection where their late-medieval predecessors, more deeply reliant on oral tradition, did not. This reverses the pattern one would expect to see if the early-Stuart profession inherited a continuous or fading memorial culture. The golden chain's


\(^{233}\) Eisenstein, \textit{Printing Press}, 79 ("[M]any medieval world pictures were duplicated more rapidly during the first century of printing than they had been during the so-called middle ages"); ibid., 125 ("Although books on the memory arts multiplied after printing, the need to rely on these arts decreased.").
guarantee of divinely ordained harmony in the arts, for example, becomes an anchor of memory, its original purposes overlaid, mnemonicized, so to speak. So, too, with maxims. What purposes did legal maxims serve? Lawyers cast these “nondisputable” principles as the skeleton of the law, the foundation to the law’s superstructure, the root to its tree. Maxims gave order to cases, Readings, and “common erudition,” which “elaborated” upon them as Hebrew words grew out of a limited stock of anterior linguistic roots; they tested legal authorities for validity, as a touchstone; they suggested the law’s final and efficient causes. By the 1630s, maxims took on another office. Their “prime use,” as Michael Hawke explained in his *Grounds of the Laws of England* (1657), is

the confirmation of our memory . . . for by the observation of these grounds, he [the reader] will be instructed to remember the reason of them, by which he shall resolve all doubts of like degree, as if he had remembered the express cases from which the same reason and ground is reduced; so as by their brevity they strengthen us, and corroborate the memory.

Law’s “reason,” its foundation and justification, underwent a similar metamorphosis or mnemonicization. To Thomas Littleton in 1481, reason underlay the “certainty and knowledge of the law.” By Coke’s time, reason, the “life of the law,” had also become a handmaiden to memory:

[T]hough a man can tell the law, yet if he know not the reason thereof, he shall soon forget his superficial knowledge, but when he finds the right reason of the law, and so brings it to his natural reason . . . . this knowledge will long remain with him.
Reason and maxims traced a path that the legal culture as a whole traversed over the sixteenth century. The jurisprudential writings and lawbook prefaces of such late-fifteenth-century and early-sixteenth-century figures as John Fortescue, Thomas Littleton, Christopher St. German, Thomas Starkey, John Hales, and John Rastell focused on the difficulties of ascertaining and learning the evasive common law. Lacking the authoritative pronouncement that characterized leges for the civilian and Scholastic, never compiled in a code or authoritative Corpus Iuris, complexly intertwined with natural, revealed, customary, civil and ecclesiastical laws—how was the unwritten common law to be known? “It already is,” was the apologetic answer. Christopher St. German’s doctor of divinity in the first dialogue of Doctor and Student (1523) asked this fellow dialogist, the student of the common laws, how lawyers could prove the existence of general customs and maxims. Not deducible from reason alone, general customs and maxims “may as lightly be denied as affirmed unless there be some statute or other sufficient authority to approve them.” But they are “openly known” through common use, the student replied, so “it needs not to have any law written thereof. For what needs it to have any law written that the eldest son shall inherit his father, or that all the daughters shall inherit together as one heir?”

The statutory compiler Ferdinand Pulton recommended publishing and declaiming aloud Parliamentary Acts, because they were new or easily overlooked interventions into a law otherwise accessible, at least potentially, to ordinary persons. The governors of England have always intended that “those laws which the finger of God has written in the heart of man, or nature infused into him upon his first creation, or reason, the only cognizance of mankind instilled into his breast, or which the ancient maxims and customs of the realm, the very ground of all our common laws have instructed him, be not to any Englishman having the clear use of synderesis, wholly unknown.”

Most of these authors, though, were less interested in asserting that the law was already understood and accessible than in advancing a

the reason of the law so to our own reason, ... as we can neither lose it, ... and will direct us (the learning of the law is so chained together) in many other cases. But if by your study and industry you make not the reason of the law your own, it is not possible for you long to retain it in your memory.”); Fulbeck, Direction (1600), 11, 13 (“[T]here is nothing in the law which may not be reduced unto some universal theorem, which may easily be conceived and remembered, because it is general”); Dodderidge, English Lawyer (1631), 19, 240, 268 (“Every particular case has his several circumstance. Circumstances are singular, and hardly retain in memory. ... Wherefore when the case is out of memory, and the circumstances thereof quite forgot, the reason yet remains, and is had in memory.”); Phillips, Studii (1667 ed.), 140, 181 92.

238. St. German, Doctor and Student (1523), 69-71.
239. Ferdinand Pulton, preface to An Abstract of all the Penal Statutes (1560) (1579), Aii-Aiii.
program for making it so. Fortescue’s maxims and general principles offered a thumbnail sketch of the law’s architecture as Littleton’s “reasons and arguments” marked out for the profession the surest road to “certainty.” St. German insisted that only familiarity with the common law’s multiple, intertwined “grounds” of reason, custom, maxims and statutes opened it to understanding. Thomas Starkey advanced a humanist program of codification and replacement of “barbarous” law French by purified French or Latin. John Hales and early law printers like John Rastell called for ordering and distributing the law “in writing, to the intent the people might know what they ought to do and not hang in one man or in few learned men’s heads.”

In their effort to promulgate and bring order to an elusive common law, whether in a critical, apologetic or pedagogic spirit, these writers paid little attention to the problems of remembering the law that so afflicted their successors. By the standards of Coke and Davies, Finch and Bacon, Fraunce and Dodderidge, Fulbeck and Wingate, their jurisprudence seems remarkably uncurious about remembrance—and in a legal culture only lightly sprinkled with print.

The first volume of Coke’s immensely influential *Reports* (1600) opens with a pronouncement, rehearsed in a 1581 dedication to his patron Lord Buckhurst, that suggests the turn in legal culture this Article has set out to analyze:

> Nothing is or can be so fixed in mind, or fastened in memory, but in short time is or may be loosened out of the one, and by little and little quite lost out of the other . . . . I have often observed, that for want of a true and certain report, the case that has been adjudged standing upon the rack of many running reports (especially of such as understood not the state of the question) has been so diversely drawn out, as many times the true parts of the case have been disordered and disjointed, and most commonly the right reason and rule of the judges utterly mistaken. Hereout have sprung many absurd and strange opinions. . . . Therefore . . . I allow not of those that make memory their storehouse, for at their greatest need they shall want of their store. 241

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240. Littleton, epilogue to *Tenures* [1481], 319; John Hale[ss], “Oration in Commendation of Laws” (c.1540); on the early law printers’ campaign for popular legal knowledge, see Ross, “Commoning of the Common Law”; John Rastell, preface to *Expositiones Terminorum Legum Anglorum* (c.1525). Thomas Elyot stands as a partial exception to this generalization. Elyot noted that lawyers in the Inns of Court employed memory, a part of the art of rhetoric, to recall their pleas at mootings. Elyot, *Book Named the Governor* (1531), 66.

241. Coke, preface to *Reports*, pt. 1 [1600], xv-xvii; id., Letter Dedicatory to Lord Buckhurst [MS 1581], MS Misc. 361, Lincoln’s Inn.
Let Coke's quotation revive in the reader's attention the evidence so far presented in this Article describing the lineaments of the law's memorial culture around 1600. The point of this Part was to show that it was not always there. If legal culture became "mnemonicized" over the latter sixteenth century, why did it happen? And with what political and intellectual consequences?

III. WHY EMPHASIZE MEMORY? GREATER BURDENS, CHANGING EXPECTATIONS, AND FORENSIC ADVANTAGES

Again, our memory, register of sense,  
And mould of arts, as mother of induction,  
Corrupted with disguis'd intelligence,  
Can yield no images for man's instruction:  
But—from stained wombs—abortive birth  
Of strange opinions, to confound the earth.  
—Fulke Greville, "A Treatise of Humane Learning" (1633) 242

Lawyers around 1600 may have emphasized memory for a practical reason: they had more to remember. John Baker has described in rich detail how sixteenth-century procedural innovations fed an increasing stream of "points of law" to a Tudor bench newly willing to decide rather than defer them. 243 Parliament's growing statutory production and the common law's expansion into manorial, commercial, and tithe disputes increased the burden by century's end and increased it in a legal culture encouraging and expecting the citation of particular authorities alongside general principles and "reason."

Yet this can be only the beginning of an explanation. For legal cultures identify and define as well as respond to practicalities. They treat the assuaging of anxiety, the preservation of dignity, and the appropriation of advantageous intellectual and political terrain as matters of great practicality. The growing pile of things to remember was but one reason for the prominence of memory talk in the profession, one influence on its form and ambitions.

Consider, for example, William Lambard's description of judicial records as "memorials" that bear witness to proceedings. A straightforward enough definition this was, identifying the practical use of records—and then Lambard added:

The Latin men use recordor when they will signify, to keep in mind, or to remember, in which sense the poet [Virgil] said, Si rite audita recordor [if I recall what I heard rightly].

Was this a hard-to-resist humanist adornment drawn from Lambard’s literary commonplace book? Perhaps, but Abraham Fraunce repeated it in a similar context, as did John Dodderidge and Edward Coke decades later. This suggests that Virgil’s Aeneid provided more than decoration.

Aeneas’s father spoke the quoted line when recounting the voyage of the Trojan race from their birthplace on Crete to found Troy. Later defeated by the Greeks, the Trojans laid the groundwork for Rome, according to that city’s mythology. The nations of early modern Europe told parallel stories tracing their origins to Aeneas’s band of exiles. The English variant, given canonical expression in the twelfth century by Geoffrey of Monmouth and still very much alive in early modern England, held that Aeneas’s great-grandson Brutus settled Britain. Like his great-grandfather Aeneas and his distant ancestors, the builders of Troy, Brutus sailed on a journey of foundation. He gave laws in Greek to the ancient Britons, inaugurating an unbroken stream that flowed into the common law, the records of which were at the heart of legal memory. These records were a national resource, like Aeneas’s father recalling rightly the early history of a people. The extended memory of legal records and their professional interpreters stood, by analogy, where Aeneas’s father had stood in the Trojan world of oral tradition and oracle. Never directly stated by Lambard, allusion and etymology (record from recordor) hinted at the lawyers’ elevated role in the politics of national remembrance.

Lambard’s interweaving of prosaic definition (records remember things) with politically charged historical referents demonstrates that the profession’s intense discussion of memory around 1600 was a

244. Lambard, Eirenarcha (1581), bk. 1, ch. 13:70; Virgil, Aeneid, 3:107.
245. Fraunce, Lawyer’s Logic (1588), 64b; Dodderidge, English Lawyer (1631), 72-73; Coke, Third Institute (1644), 71a.
cultural discourse as well as a straightforward response to the problem of remembering a growing, more highly particularized law. A cultural discourse—but as answer to what? The related concepts of memory, oral tradition, and unwrittenness thrust upon the bar a set of intellectual difficulties and political embarrassments requiring containment or deflection. They also promised forensic advantages. The interplay of these contestations engendered a cultural discourse of memory and directed its ambitions.

Begin with the variety of ways in which memory and unwrittenness became more anomalous and irksome categories by the early seventeenth century. Even had the burden of remembering the law been no worse in 1600 than 1500, the changing expectations of late-Elizabethan lawyers would have inclined them to regard memorial and oral transmission as less a given than a problem. A growing percentage of matriculants to the Elizabethan Inns of Court first attended the universities. Schooled in dialectic, taught to cherish clear definition and organization, imbued with the Ciceronian call to reduce law to an art, they arrived to confront with dismay a rudely arrayed heap of almost infinite particulars. Sir Henry Spelman recalled that upon his admission to Lincoln's Inn in 1598, “I found a foreign language, a barbarous dialect, an uncouth method, a mass which was not only large, but which was to be continually borne on the shoulders; and I confess that my heart sank within me." The contending pedagogic methods informing lawbook design and study techniques made disorder and forgetfulness their foe, underscoring the centrality of remembrance as they provided ways of improving it. Civilians and university dialecticians unfavorably compared the disarray of the common law to the greater system of their own disciplines at a time when the Method Wars had firmly linked system to mnemonic advantage.

These intellectual currents flowed through the profession as printed lawbooks were slowly displacing the oral and aural learning exercises of the Inns. Though the Tudor system of case-putting, mootings, and Readings did not decline sharply until after the Restoration, printed books were claiming a greater share of students’ attention by the early seventeenth century. The orally and mnemonically attuned

247. On the Ciceronian call, see Gilbert, Method, 95-96.
248. Prest, Inns of Court, 142 (quoting Spelman).
249. Ibid., 124-36; David Lemmings, Gentlemen and Barristers: The Inns of Court and the English Bar, 1680-1730 (New York, 1990), 75-109; Holdsworth, A History of English Law, 6:481-83; Mirow, “Readings on Wills in the Inns of Court, 1552-1631,” 27 (arguing that around 1600, Inns of Court readers "perhaps modified the aim of their readings and began to produce readings to be read by their audience rather than heard.... A manuscript of Sherfield's 1624 reading of over 150 folios even includes an index. This post-1600 type of reading was seemingly produced for written or printed transmission, rather than oral instruction, and no doubt had an
learning exercises assumed not just the legitimacy but the centrality of memory as a source and carrier of law. As students gradually withdrew into printed instruction, they received less implicit education in the normality of remembered law and more in the primacy of text. Printed lawbooks that justified their existence by attacking "slippery memory, which seldom yields a certain reckoning," drove the lesson home.250 By the early seventeenth century, as the press was redistributing law between a published foreground and a manuscript and oral background, lawyers routinely alluded to the assumed prominence of printed law, whether or not they approved of the phenomenon. "Ancient terms or years, after the example of Littleton," wrote Coke, "are to be cited and vouched for confirmation of the law, albeit they were never printed."251 Early modern legal publishing did not discredit remembered law or break the intertwined printed, manuscript, and oral system of conveying the common law. But as it allowed the gradual withdrawal of students from collective oral and mnemonic instruction and promoted the elevation of printed law to a hierarchically superior position, it began the long process of marking oral tradition and remembered law as peripheral, anomalous, and problematic.

Publishing also undermined the profession's ability to prune law and legal interpretations by desuetude, cultivated forgetting, and social pressure. As anthropologists and historians have argued, writing fixes law in place in a way that oral traditions do not. Oral legal systems undergo, in the words of Jack Goody and Ian Watt, a "structural amnesia," a "homeostatic process of forgetting or transforming those parts of the tradition that cease to be either necessary or relevant."252 Building on the insights of Goody and Fritz Kern, M.T. Clanchy observes that the remembered law of eleventh century England was

flexible and up to date, because no ancient custom could be proved to be older than the memory of the oldest living wise man. There was no conflict between past and present, between

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250. Coke, preface to Reports, pt. 1, xxv.
251. Coke, First Institute (1628), 249b.
252. Goody and Watt, "The Consequences of Literacy," 67, 30, 57. In oral societies, the adjustment of legal norms in response to internal or external forces "is imperceptible because norms have only a verbal, an oral existence, so that rules that are no longer applicable tend to slip out of the memory store." Goody, The Logic of Writing, 139; see also ibid., 136-37.
ancient precedents and present practice. Customary law "quietly passes over obsolete laws, which sink into oblivion, and die peacefully, but the law itself remains young, always in the belief that it is old." Written records, on the other hand, do not die peacefully, as they retain a half-life in archives and can be resurrected to inform, impress or mystify future generations.253

The thickening of printed instruction in the Inns of Court around 1600 appears, at first glance, as another surge forward in the process Clanchy identified. While this was true, the full impact of printing only becomes clear when one keeps in mind its influence on the social organization of learning in the Inns of Court. In 1500, novices depended greatly on senior practitioners, who as a group carried the law within themselves, owning manuscripts and embodying oral tradition. Instruction in tradition by oral and aural methods constrained unorthodox legal interpretations. The teenaged matriculants in the Inns faced correction in discussion from older men who controlled promotion, dispensed smiles and frowns, and pronounced on the promise of newcomers.254 Novices lacked the countervailing textual authority to oppose an instructor's experience, presumptive command of "common erudition," and psychological pressure.

By 1600, printed lawbooks allowed a greater measure of individual and small-group study. Books opened up a space for the cultivation of innovative or "deviant" interpretations. One could appeal to them against an instructor's opinions and stares of disapproval. As Elizabeth Eisenstein has observed of scientific training, print placed before students a greater diversity of materials, highlighting contradictions and suggesting new lines of analysis. Unlike manuscript transmission, which allowed for redaction and pruning of texts during each round of copying, legal publishing put out standardized texts that remained "fixed." These were cheaper, more widely available, and accessible through markets rather than through patrons' selective lending.255 More thoroughly than manuscript, print undermined the

255. Anthropologists and historians have argued that the movement from oral to written to printed transmission of knowledge increases awareness of contradiction and anomaly. According to Jack Goody, "contradiction takes on a different dimension when the text is available as an instrument of comparison. This is because contradictions become 'obvious' and 'exact' when placed side by side. . . ." Goody, Logic of Writing, 163; Goody and Watt, "Consequences of Literacy," 48-49. J.H. Baker noted that "the existence of printed books . . . drove some of the readers to forsake sound common learning and indulge in the flights of fancy for which Coke was to castigate them." Baker, "The Inns of Court," 282. On the importance of print "fixing" text, and on the relatively greater intellectual independence that apprentices enjoyed in print rather than oral/chirographic pedagogical regimes, see Eisenstein, Printing Press, 101-02, 113-24,
“structural amnesia” that had continually consigned bits of law to the forgotten. Francis Bacon implicitly recognized this dynamic in proposing that the press supply the remedy to the ill it helped create. Bacon advised reprinting records, charters, yearbooks and judicial decisions, leaving out obsolete law, frivolous questions, repetitious points, and antinomies. Overruled cases “season the wits of students in a contrary sense of law. . . . [I]dle queries, which are but seminaries of doubts and uncertainties, . . . were better to die than to be put into the books.”

In sum, then, the students of 1600, in comparison to their predecessors of a century before, could develop or learn about a greater range of doctrines and interpretation while experiencing fewer informational and psychological constraints and less intensive early acculturation into orthodoxy. Did this tilt toward invention over constraint, this development of a more expansive, ragged, and disharmonious tradition to be remembered, contribute to the anxiety about recalling the law?

Even more directly, a variety of critiques of “tradition” in early modern England put pressure on a law taught “by tradition as well as by books.” The Protestant assault on Catholic Tradition in the name of Scripture was the most potent and analogically disturbing of these, particularly since lawyers uncomfortably often were figured as ersatz “papists.” The priest-controversialist “N.S.” prefaced his anti-Protestant tract *Pseudo-Scripturist* (1623) with a dedication to the judges of England. Considered “objectively” (as Marxists used that word, for the purpose of ideological transposition), the common lawyers’ interpretive commitments appeared “Catholic.” Did not lawyers acknowledge the impossibility of a self-defining and complete law, as Catholics did for Scripture, and so insist on the necessity of an “external” interpreter and a corpus of unwritten traditions? Did not lawyers restrict the prerogative of judging to publicly appointed experts rather than open it to “every private man,” however convinced of his “revealing spirit”? Did not lawyers know that the laws cannot “prove themselves” but require a professional tradition to identify them?

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257. Though far afield in subject matter, Robert Cover’s “Foreword: Nomos and Narrative,” *Harvard Law Review* 97 (1983): 4-68, has helped me think about this problem. To borrow Cover’s vocabulary, the social and technological changes in legal education between 1500 and 1640 fostered the profession’s “jurisgenerative” capabilities while eroding its countervailing “jurispathic” restraints.


The hermeneutical fellowship that N.S. found between the priest and the judge no doubt horrified the bar—and not simply out of anti-"papist" prejudice. The association of legal and Catholic tradition invited the redirection of Protestant tropes of denunciation. Like Catholics, lawyers manipulated tradition to support whatever positions they fancied, charged James I. Papists “allege scriptures and will interpret the same. The Judges allege statutes and reserve the exposition thereof to themselves.” Both Catholic and legal tradition decayed over time, a weakness of “unwritten” knowledge (“unwritten” here signifying not the purely oral but the absence of an authoritative textual expression like Scripture or a code). “What hazard the truth is in when it passes through the hands of report,” wrote Richard Hooker:

how maimed and deformed it becomes . . . . How miserable had the state of the Church of God been long ere this, if wanting the sacred Scripture, we had no record of his Laws but only the memory of man receiving the same by report and relation from his predecessors?

Yet if suspicion of oral tradition began in religious polemic, it did not end there. As D.R. Woolf, Adam Fox, and Andy Wood have shown, seventeenth-century antiquaries, heralds, judges, and historians together became increasingly suspicious of remembered knowledge. By 1700, Woolf concludes, the written record had “elbowed oral tradition aside, marginalizing it as an acceptable historical source.” Members of the Royal Society read in their Transactions a “mathematical” estimation of the rate of decay of oral transmis-


tion. Matthew Hale’s post-Restoration *History of the Common Law* hastened to insist that *leges non scriptae* were not only oral, or communicated . . . merely by word. For all those laws have their several monuments in writing, . . . and without which they would soon lose all kind of certainty.

The common law was a tradition because it was “unwritten,” a *lex non scripta*, in contrast to the “written” laws of statute, Scripture, codes, the *Corpus Iuris Civilis*, and the *Corpus Iuris Canonici*. This designation compromised the forensic position of lawyers. Soon after the crystallization of the royal courts, the twelfth-century author of “Glanvill” appeared troubled by the distinction between written and unwritten laws made by Justinian’s *Institutes*. “Although the laws of England are not written, it does not seem absurd to call them laws . . . for this also is a law, that ‘what pleases the prince has the force of law.’ For if, merely for lack of writing, they were not deemed to be laws, then surely writing would seem to supply to written laws a force of greater authority than either the justice of him who decrees them or the reason of him who establishes them.” Glanvill’s worry grew more pressing after the Reformation set England’s customary *lex non scripta* against Rome’s canon law and the written civil law of Catholic rivals France and Spain. The polemics disputing who enjoyed the “better” law put pressure on the common law’s point of vulnerability: being unwritten, was it as dignified? “Our law,” complained Thomas Williams in a 1558 Reading, “has been by some persons of late days vilified and condemned, in regard that it is not a certain law digested into great volumes, like the civil Law, nor used in any other country.”

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263. [A member of the Royal Society], “A Calculation of the Credibility of Human Testimony,” *Philosophical Transactions of the Royal Society* 21 (1699): 359-65, esp. 364 (“And therefore if oral tradition . . . be supposed to be credible, after twenty years, at 19/20ths of certainty, or but 9/10ths, or 4/6ths; a written tradition may be well imagined to continue, by the joint copies that may be taken of it . . . during the space of a 100, if not 200 years; and to be then credible at 100/101ths of certainty, . . . It is plain that written tradition, if preserved but by a single succession of copies, will not lose half of its full certainty, until seventy times a hundred (if not two hundred) years are past; that is, seven thousand, if not fourteen thousand years.”).


265. Common lawyers, civilians and canonists alike drew on a wide variety of texts as well as on professional convention. The contrast between an “unwritten”common law and the variety of written legal systems mattered less in day-to-day transmission of law than in political and ideological scuffles over legitimation and dignity.


Yelverton paused to pout: though the common law "be not written as the laws of the Romans were, yet are they not inferior to theirs."269 But more was at stake than sinking into a lower stratum in the taxonomy of European legal systems. Citing Glanvill's tepid defense of the common law's honor—"it does not seem absurd to call them laws"—Chancellor Ellesmere suspected that the debate itself weakened "the ground and principles of all government." It threatened to overthrow the law, he puffed, and then added more reasonably, "or at least to cast an aspersion upon it, as though it were weak and uncertain."270

Dignity aside, could a lex non scripta do its work as well as a lex scripta, for instance, set boundaries around power? Aristotle had asked whether a polis should trust to written law or to the discretion of a wise magistrate.271 Early modern jurisprudes and divines who came out for written law pointed to its very "writtenness" as important in restraining the will and whims of rulers, an emphasis encouraged by sixteenth-century Continental apologists for the "written reason" of Roman law against its local and customary rivals. A written law, they said, was a stable and certain law—more easily found than the natural law, whose dictates original sin obscured; public, shared, and less variant than custom and men's "reason"; susceptible to far slower degeneration over time than oral law. Had not the Romans' Twelve Tables dampened their troubles? Had not Solon's laws brought peace to factious Athens? But as a lex non scripta, the common law might prove a weaker bulwark against overbearing rulers, a fear that its widely perceived uncertainty in private law adjudication only encouraged. By the early seventeenth century, these suspicions gained strength as the Stuart kings prevailed on the great test cases of impositions, imprisonment (the Five Knights' Case), and ship money.272 Disappointed royalists, meanwhile, turned

The anonymous author of "The Origin of the Laws of England" [MS late sixteenth century], Harleian MS 4317, fol. 2v, British Library, assured his readers that the laws of England were written.

272. Hale[s], "Oration in Commendation of Laws" (c.1540); Fulbeck, Direction (1600), 15-20; Bulstrode, preface to Reports, pt. 3 (1659); Henry Bullinger, "Of the Office of the Magistrate" (1559), in The Decades of Henry Bullinger, ed. Thomas Harding, Parker Society Publications 7 (Cambridge, 1849), 341-42; Gerald Strauss, Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany (Princeton, 1986), 34-35, 69, 92; James Q. Whitman, The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change (Princeton, 1990), 28; Conrad Russell, Parliaments and English Politics, 1621-1629 (Oxford,
the *topos* against perceived common law obstructionism. The judges, complained Archbishop William Laud,

> have liberty to retain more in *scrinio pectoris* than is fitting; and which come a little too near that “arbitrary government” so much . . . found fault with: whereas there is no kingdom . . . that has a settled government, but it has also a text, or a *corpus juris* of the laws written, save England.\(^{273}\)

*Lex non scripta* appeared retrograde as well as ineffectual given the prevalence of evolutionary stories tracing the progress of law from oral to written stages. The different versions of these narratives agreed in their terminus: writing. Lord Chancellor Ellesmere argued in *Calvin’s Case* that the common law and civil law had moved along a similar path away from oral usages. Born in customs whose “force does not begin or hang suspended from writing,” they generated books that encapsulated, but did not authorize or empower, the foundational usages. Solidification in text brought convenience and “constancy in memory.” Ellesmere minimized the honor that writing supposedly won the *lex scripta* by highlighting, or inventing, a common developmental trajectory with England’s *lex non scripta*. John Fortescue described princes transforming customs and the law of nature into “something of the nature of statutes” through written promulgation. Henry Spelman thought that the reception of Christianity prompted early European kingdoms using oral law to put their constitutions into writing. All three accounts assumed that progressive legal evolution aimed at the written. Even more troubling, Ellesmere’s and especially Spelman’s observations rested on a Continental legal humanist tenet that they did not adopt but implicitly called to mind: that the movement from unwritten custom to written law represented growth from barbarism toward civility.\(^{274}\)

King’s Bench Justice John Dodderidge assumed a trajectory toward the written text in legal literature. He portrayed law reports as gradually superseding the “natural reason” more important in the early days of the common law. The “artificial” reason of the law was “but the imitation of nature,” a distillation over time of the “natural” deductions from “causes, effects, parts, consequents, mischiefs, and


inconveniences.” Natural reason played a continuing, if diminishing, role in the interstices of the thickening tradition of artificial reason recorded in case reporters.\textsuperscript{275}

The revelation of divine law to Moses provided the central model of writing capturing part of an anterior unwritten law. The Elizabethan poet and courtier Lodowick Lloyd thought Scripture “a short repetition, and compendious catalogue, expounding unto us the law of nature” and the moral law.\textsuperscript{276} Coke, characteristically finding predecessors through misrepresentation, called Judge Moses “the first reporter of law.”\textsuperscript{277} The theologian Richard Hooker supposed that the long-lived early patriarchs who walked close to God lived by His moral law, passed down by oral tradition. God “often [put] them in mind of that whereof it behooved them to be specially mindful.” Their short-lived descendants needed “means more durable to preserve the laws of God from oblivion and corruption”—the revealed Scripture.\textsuperscript{278} The Fall from Eden stood ultimately responsible for the mind’s porousness, besotting the memory along with the other faculties in the corruption of original sin. The Fall recurred continually in legal writing as elsewhere, sometimes with great disproportion between “Adam’s trespass” and its quotidian effects. William West invoked postlapsarian forgetfulness as the reason for bills, notes, indentures, legal instruments, and, ultimately, for his formulary, Symboleography.\textsuperscript{279} Protestant celebration of Scripture over wavering tradition only fed this habit of praising records, whether prosaic forms or the Old Testament itself, as a defense against the slipperiness of fallen memory.

In all three of these stories, \textit{lex non scripta} (whether custom, “natural reason,” or the moral law) remained a legitimate body of law. In none was it extinguished. But it was anterior. All three were stories of movement, tracing a developmental trajectory from the unwritten to the written that cast \textit{lex non scripta} as antique, incompletely accessible (as in the natural and moral law), or progressively superseded.

\textsuperscript{275} Doddridge, \textit{English Lawyer} (1631), 261.
\textsuperscript{276} Lodowick Lloyd, \textit{Conference of Divers Laws} (1602), 3.
\textsuperscript{277} Coke, preface to \textit{Reports}, pt. 6, xv.
\textsuperscript{278} Hooker, \textit{Of the Laws} (1594), 1:264-65.
\textsuperscript{279} Before the Fall, memory was “a strong and sure castle.” Now it has become untrustworthy, a “silly ruinous cottage so foresaken and rent in pieces with wind and tempests, that it has now neither whole door, window, wall nor roof left.” William West, \textit{Symboleography}, bk. 1, sec. 1.
The deficiencies of unwritten law; the attacks on tradition; print's disruption of "structural amnesia," of the containment of tradition through acculturation, and of the normalization of mnemonic transmission through the learning exercises; and the rising expectations entering the Inns from the universities and the Method Wars: All heightened sensitivity to remembrance by figuring memory as problematic. But the concept of memory also became more salient because of the political, intellectual, and forensic advantages it brought the profession.

The cluster of meanings surrounding lex non scripta—unwritten, oral, and memorial—did lawyers important services. As with so much else in the multivalent, chameleon-like early modern common law, the unwritten and the memorial assumed not an absolute but a relational importance, apparent only in reference to a particular problem or forensic challenge. Most obvious to the modern reader on account of its perpetuation in jurisprudence was the valorization of unwritten, judge-made common law over statute and code. Henry VIII's Parliaments underscored the power of statutes to achieve fundamental legal and constitutional change. The break from Rome, the construction of a legally autonomous church polity, and the Statutes of Wills and Uses stood out as the most notable examples. The post-Reformation statute's proven ability to cut through broad swatches of common law doctrine tempted critics and reformers to try. Lawyers devised strategies to contain the newly powerful and prestigious Parliamentary Act. They followed Continental civilians in elaborating maxims of statutory construction that restrained through interpreting: affirmative statutes do not destroy common custom; statutes in derogation of the common law should be strictly construed. And they praised unwritten, judge-made common law over the written laws of statute, code, royal proclamation, and civilian Corpus Iuris through a series of flattering dichotomies. "Written" law was more accessible to the layman, seemingly more "certain" but rigid and clumsy in regulating the unexpected case, reflecting the wisdom of only one generation or drafter. Unwritten judge-made or customary law was more difficult to locate but flexible, ever adjusting core principles to new social and legal challenges, focused on the particular, embodying

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280. Indeed, as contemporaries often remarked, the meaning of "common law" was itself relational. Depending on one's forensic needs, it might mean the law of the royal courts (as against the law of the prerogative tribunals, the church, the manors, and so forth); or judge-made law (as against statute or code); or the common customs of the realm (as against the particular customs of localities, corporations, and associations); or the law of England (as against the law of France or Spain).

the collective wisdom of the many generations who had purified it. For the next four hundred years, variants of these oppositions echoed through common law apologetics, revived by threats of unpalatable reform through statute, codification, or proclamation.

Most of the perceived advantages of unwrittenness, however, long ago fell out of common law jurisprudence, concerned as they were with early modern disputes. The unwrittenness of the common law, for instance, helped support the myth of an immemorial English constitution. The appearance of French as a language of the law two centuries after the Norman Conquest raised awkward questions for the immemorialist position. Did not the advent of French suggest that the Conqueror imposed Norman laws on England or, at the very least, that the Conquest marked a decisive discontinuity in English legal history? The unwrittenness of the common law offered a way around this difficulty. Unlike a lex scripta, the central texts of lex non scripta did not constitute the law so much as reflect an underlying tradition. The lex non scripta existed "beneath" or "behind" the form and language of its textual expression, allowing it to pose more easily as continuous, without discernible origin, speaking successively to the outside world in Saxon, Latin, French, and then English.

Critics of common law provisions or the system as a whole tried to show inconsistency with the natural law or popular mores as a strategy of delegitimation. How head off the tactic? The very unwrittenness of the common law invited its Elizabethan apologists to play up its role as the general custom of the realm over its role as the custom of the royal courts. Sifted over the centuries, its "inconvenient" provisions discarded, the common law as general custom answered the needs and "genius" of the English people in the way a written statute, code, or proclamation embodying the wisdom of one generation or one promulgator never could. The natural law was another lex non scripta, and John Davies used its unwrittenness to suggest alignment with the common law. Like William Fulbeck before him and John Brydall after, he identified the common law as "common custom of the realm . . . recorded and registered nowhere but in the memory of the people." The natural law derived its authority


284. Davies, Works, 2:252; Fulbeck, Direction (1600), 173; A Brief Discourse, Declaring and Approving the Necessary and Inviolable Maintenance of the Laudable Customs of London (1584), 3-7; John Selden, Ad Fletam Dissertatio (1647), ed. D. Ogg (Cambridge, 1925), 165 (the common law was "immemorially fitted to the genius of the nation").

285. Davies, Works, 2:252; Fulbeck, Direction (1600), 173 ("the bare memory of man is the
and rules from God rather than an authoritative text, residing "only in the heart of man." Davids deemphasized the jurisprudential commonplace about the disparate origins of natural and common law (in God, and in custom or judicial interpretation, respectively) in order to underscore their common habitation in "unwritten" repositories (memory and the heart, respectively). Their mutual status as lex non scripta supported Davids's otherwise unproven conclusion that the common law came "nearest to the law of nature, which is the root and touchstone of all good laws."

Unwrittenness served as not only a jurisprudential bridge linking common and natural law, but as a temporal bridge, connecting England's legal system to Sparta's. Borrowing a hint from the civilians' Institutes and from Plutarch's life of Lycurgus, lawyers identified Sparta as the model of unwritten law, in contrast to the Athenian devotion to written law. To partisans of lex scripta's superiority over lex non scripta, common lawyers might retort: were there not equally dignified historical exempla for both systems? Indeed, through Henry Spelman's fantasy that the Saxons descended from a Spartan colony, Lycurgus's lex non scripta became not only a model for, but an ancestor of, the common law. By invoking Lycurgus, common lawyers implicitly claimed for their own lex non scripta the virtues that unwrittenness were thought to have given the Spartan laws: a sparseness that avoided overelaboration and prolixity; and stability over time, understood as resistance to innovation (meaning degeneration).
The appropriation of Sparta also directed attention to why Lycurgus insisted on maintaining an unwritten law: to compel citizens to know it by heart, the better to inculcate virtue and obedience. Memorizing law did not simply retain information, an alternative to reading it in a public posting or searching for it in texts. Memorizing had a deeper meaning. It suggested the taking of law into a person’s spirit, an interiorization, which political writers termed the cornerstone of obedience and orderly living. God’s finger wrote the natural law on the hearts of men and women. But how was positive law to be internalized? Chapter 11 of Deuteronomy provided the repeatedly invoked archetype of legal pædeia: Write the law on the doorposts and the gates to lay it up “in your heart and in your soul,” teach it “when thou sittest in thine house, and when thou walkest by the way, when thou liest down, and when thou risest up.” The statutory compiler Ferdinand Pulton invoked Deuteronomy to favor publishing laws and reading them aloud at assizes, quarter sessions, and leets; concurrent methods to “imprint [them] into our memory.” The clergyman Thomas Sutton charged judges, and by extension subjects, with the responsibility of Israelite magistrates: that law, “once written in tables of stone,” be “firmly and plainly written in the fleshly tables of your hearts.” The very dependence on memory and oral tradition implied by the unwrittenness of common law promised, on the precedent of Lycurgus’s Sparta, a greater measure of valued interiorization than a lex scripta. “It was a common saying,” Christopher Yelverton told Gray’s Inn as he left to become Queen’s Serjeant, “that the Athenians were always writing of


293. Thomas Sutton, Jethro’s Counsel to Moses: Or, a Direction for Magistrates. A Sermon preached at St. Savior’s in Southwarke, March 5, 1621 before the honorable judges (London, 1631), 27.

294. Michael Warner has written insightfully of how New England Puritans hoped that print might internalize values and ideas among readers. Warner, The Letters of the Republic, 19-23. Internalization stood as an ideal not only for New England Puritan printing (the focus of Warner’s fine work), it also appeared in early modern discussions of religious edification, familial and political loyalty, and civic and legal education, whether the transmission of knowledge proceeded through print, manuscript, or oral media. Printing offered a newly attractive method of securing an ancient dream variously expressed as the “digestion” of ideas into the body, writing upon the heart, or the joining of the message with the soul.
laws, but they never kept any, but the Lacedaemonians never writ
laws, but always kept them."

Within the confines of the legal guild, the problem of transmitting
law was less one of political and moral inculcation than personal
mnemonics. If they wished, lawyers could draw the lesson from
Lycurgus and from Plato’s Phaedrus that writing weakened
remembrance.296 Star Chamber attorney William Hudson, for
example, transposed Plato’s attack from writing to print in the course
of criticizing legal publication. The common lawyers of the past, he
wrote, refrained from publishing their arguments and meditations,
honoring “one of Lycurgus’ maxims, or their ancestors’ Druids’
prescripts, mandare memoriae, et disciplinae potius quam scriptis [it is
better to commit to memory and training than to writings].”297 In
practice, lawyers did not often disparage print or writing as an
inevitable incursion upon memory. But Lycurgus and Plato’s Phaedrus
stood as reproaches to be answered and as topoi to be invoked against
unpalatable legal literature. Perhaps the figuring of commonplaces,
abridgments, and case reporting as aides mémoires (as prompts rather
than substitutes for memory) combined with the depiction of English
law as a whole as lex non scripta, muted Plato’s challenge, familiar to
all educated Englishmen.

The widely perceived distinctions and defects of the law—equality
and liberty, expense and prejudice—have a magnetic force in legal
cultures. They attract projects and twist debating points. One connects
one’s own proposed changes or arguments to the law’s regnant values
and ties one’s opponents’ schemes to law’s leading vices. Around
1600, uncertainty was such a magnet. Reformers and critics repeatedly
accused the common law of uncertainty, “the principal and most just
challenge that is made to it,” admitted Francis Bacon.298 Memory
was pulled into the debate over certainty in three different ways. First,
the law’s lamentable uncertainty supposedly caused unsteady
recollection. By “reason of the confusion in the [law’s] particulars,
there being no dependency of one case upon another,” wrote the
anonymous author of “Directions for the Orderly Reading of the
Law,” “it cannot but disheart[en] the understanding, overharry the

295. Yelverton, Farewell Address, 22-23.
296. Plato, Phaedrus, 275a.
297. Hudson, “Star Chamber,” 2:1. Following Caesar, Englishmen believed Druids to be the
judges and teachers of law in the oral society of the ancient Britons, their learning never put into
writing. See, e.g., Julius Caesar, “De Bello Gallico” and Other Commentaries, bk. 6, §§ 13-14,
the Diversity of Names of this Island,” in Hearne, ed., Curious Discourses, 1:90-91; id., “Mr.
Jones His Answers to Mr. Tate’s Questions,” in ibid., 1:128-29; Selden, “Notes upon Fortescue’s
memory, and leave confused and indeterminate knowledge of the subject matter." Second, reversing the causal arrows, an overburdened memory fostered belief in the uncertainty of law. Third, the porousness of memory opened space for, depending on perspective, errors, fancies and alternative legal understandings. John Manwood hoped his printed treatise would “revive in memory” the forest laws. In their absence, “for want of the knowledge of these laws, many fond opinions of unlearned men, mere vanities and conceits, are taken and holden for law.”

This conventional association of memory with uncertainty allowed “methodizers” and authors of published lawbooks to represent and justify their works as mere responses to the weaknesses of memory. Depicting printed lawbooks as the extension and solidification of memory by technological artifice disguised their forensic and political interventions. This especially appealed to men like Manwood and Coke who were interested in overwriting competing traditions. To further the Crown’s revival of its forest jurisdiction, Manwood set the “ancient and learned prerogative laws” against the “vanities and conceits” of “unlearned men.” One is unsure whether the ruthless Coke delighted more in excising the words of his jurisprudential enemies or his brother judges from the Reports, published “for the help of . . . memory.”

Representing lawbooks as a salve to the uncertainty of memory reduced the figurative gap between print and oral discourse. It

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299. “Directions for the Orderly Reading of the Law” [MS c.1648], Rawlinson MS C207, fol. 263, Bodleian Library.
300. “To adhere therefore and wholly to respect particular cases, without any observation of the general rules and reasons, and to charge the memory with infinite singularities, is utterly to confound the same, a labor of unspeakable toil and wherein we shall never free us from confusion, but engender in our selves, that wrong opinion which many have (amiss) entertained, that there is nothing certain in our laws.” Dodderidge, English Lawyer (1631), 260.
301. Manwood, Laws of the Forest, [5]-[6]
303. Ibid., xxvi-xxvii, xxviii-xxix. Opponents as diverse as Chancellor Ellesmere, Francis Bacon and the Jesuit controversialist Robert Parsons attacked Coke’s disingenuousness. See Knafla, Tracts of Ellesmere, 128-29, 148-49.
deflected attacks in the name of living speech over written or printed [read “dead”] letter, a trope familiar from Christian theology, Plato’s *Phaedrus*, and common lawyers’ celebration of courtroom testimony over mute documentary evidence (the civilians’ specialty). 305

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The importance of memory and “unwrittenness,” which distinguished the common law from the various kinds of *lex scripta*, was an ideological posture as well as an acknowledgment of the lack of an authoritative corpus. The need of common lawyers to justify not only the content but the dignity of their law against the slurs of royalists, civilians, university scholars, country gentry, merchants, and divines, meant that *lex scripta* and *lex non scripta*, writing and oral/memorial tradition, opposed each other as ideal-typical constructs in debate as they worked together in practice. Unorganized, unfindable, uncertain, unsteady, primitive: These charges battered the unwritten common law. Defense of this *lex non scripta* proceeded through loud proclamation of its contrary virtues of flexibility, particularistic precision, rationality in harmony with divine and natural law, and “copiousness,” that analogic richness latent in its core principles. 306

Lawyers also came to appreciate the cultural work that unwrittenness, oral tradition, and memory did, often through connotation and indirectly: as a bridge to the natural law, the Spartans, and the Druids; as a predicate for interiorization; as a helpmeet to the ancient constitution; as an allusion to Plato and the living image of discourse; and as an *apologia* for falsely modest printed lawbooks pushing unwelcome law out of mind. A remembered law had its advantages.

IV. CONCLUSION: LAWYERS, COMMUNICATIONS, AND THE CUSTODIAL MOMENT

Although many of the topics in this Article have been singly explored by historians—Ramism and “methodical” treatises, immemorialist political argument and tithe litigation, antiquarianism and the Art of Memory—their shared participation in memorial culture, taken as a configuration, is novel. But it was precisely their


interwoven within a configuration that revises our understanding of the history of communications and of English legal culture.

First, the simultaneous decline of memory as a carrier of knowledge alongside its growing salience and complexity within a memorial culture of many parts challenges the "stage theory" of legal communications.307 The disparate trajectories of memory did not move along a single axis through a series of stages, from oral tradition to writing, print, and electronics. The years around 1600 cannot be described under a single rubric capturing a linear process, such as the "decline of the oral" or "the advent of print culture." Indeed, print played a particularly complicated double role, at once slowly superseding memory while helping engender memorial culture.308

Second, the roles and programs implicit in each strand of memorial culture drew strength from the other strands. Lawyers could more easily pose as manufacturers of immemorialist pedigrees in constitutional argument when they also engaged in local memory brokering and envisioned legal literature and legal education in such strongly mnemonic terms. The enhanced theoretical attention devoted to memory in legal education made more sense when barristers presented themselves as national political remembrancers, stressed their expertise in assessing remembered customs in tithe and copyhold disputes, and valorized cultivated memory of law as a distinction between themselves and their attorney and solicitor rivals.

Indeed, memorial culture laid the groundwork for the peculiar calling of Anglo-American lawyers that Tocqueville classically described, so familiar that one does not inquire after its history: The bar upholds "the traditionary fabric" while adapting it "to the changes that time operates in society," all the while disclaiming "any desire for innovation."309 English medieval lawyers before 1530 were doing this in practice. But their jurisprudential self-understanding—specialists in the course of the royal courts and in a professional "common erudition" and "reason"—allowed little room for its ideological expression as a social and political role. By the eve of the Revolution, the bar's emergence as a remembrancing order, its local memory "brokering," the embrace by some of its members of legal humanist historicist sensibility (Egerton's "leges temporis"), and the denial of

307. See the introduction to this Article for some representative scholarly examples.
308. Recall that print reoriented legal education to make memory a problematic category, particularly as its increasing scale and diversity around 1600 began to make it appear not only a supplement but a plausible alternative to oral and chirographic transmission. The press made available a standardized corpus of authorities and finding aids that fostered a citation-specific style of legal argument, increasing the individual lawyer's mnemonic burden as it relieved the profession of some of its collective memorial work. It also disseminated the "raw materials" of legal antiquarianism and legal-historical political argument.
significant change by others spinning immemorial pedigrees: All these elements of memorial culture prepared the way for the profession’s public embrace of its role as a mediator between memory/tradition and present exigencies. Memorial culture did not invent the bar’s superintendence of traditionalism in the service of change so much as it engendered consciousness of the process as a distinctive and worthy public calling, a consciousness that rested upon the bar’s articulated commitment to the sustenance and manipulation of memory.

Third, and most importantly, the construct of memorial culture offers a new storyline to organize early modern English legal history by identifying a “custodial moment” in jurisprudence. This moment was particular to a time and place, to English common lawyers in the Elizabethan and early-Stuart years. Continental jurists trained in Roman law, by contrast, appealed to the “written reason” of the Corpus Iuris to set aside customs, earning suspicion as centralizers and agents of autocracy, as “modernizers.” Theirs was not a legal culture emphasizing its custodial credentials. Continental civilians did not legitimate their law by upholding its customary origins, or put themselves forward as experts in brokering local remembered law and assessing immemorial constitution(s), or invent praise for a partly oral legal tradition not reducible to books. Nor was memorial culture the complicated, multivalent construct this Article depicts, intrinsic to lawyering in England’s precedental system, spanning the latter Middle Ages as well as the eighteenth century.

For all the importance of memory as a carrier of law before the middle sixteenth century, the conditions that gave rise to memorial culture had yet to arise or to press hard. Before then, the profession had only begun to confront humanist agitation over “method,” the multiple educational and forensic ramifications of printing, immemorialist political argument and politicized legal antiquarianism, and local memory brokering. Sustained jurisdictional and disciplinary conflict emerged in the latter sixteenth century as the common law cut back on prerogative, ecclesiastical, and civilian tribunals under the banner of immemorial right and flattered itself as a national civic tutor, an alternative tradition of learning beside the universities and the church. The Elizabethan years also saw the spread of an “historicist” sensibility that unflattened time as it ascribed the existence of institutions and doctrines to interests and “conveniences” as well

310. The introduction to this Article collects some of the storylines used to organize early modern English legal history and cites representative scholars participating in each.
as antiquity and "reason." Together these developments fostered a custodial moment in legal culture. It grew out of an enhanced attention to legal mutability, contingency, and loss (sometimes expressed through its extreme effacement in immemorialist argument); a realization of print's challenges to memory's service as a repository; a confidence that memory lay at the heart of European intellectual life and politics (in the Method Wars and the historicist turn of customary constitutionalism); a participation in the assessment and deployment of remembered law, particularly in its variegated local forms; and an enjoyment of the political and dignitary advantages won by constituting the bar as a remembrancing order. In other words, the valorization of custody arose out of an enhanced awareness of its advantages—and its negations.

After the Revolution, and more expeditiously in the eighteenth century, the conditions supporting memorial culture faded. The Elizabethan and early-Stuart lawyers' leadership of antiquarian studies passed to the church and the universities after the Restoration. The declining usefulness of antiquarianism in political and religious legitimation drove it to the margins of intellectual life by the middle of the eighteenth century. The ancient constitution traced a similar arc. At once central and contested in pre-Revolutionary political argument, it receded in importance after the Restoration and particularly after the Glorious Revolution. The moments when ancient constitutionalism flared up with particular vigor—as in the Whig rebuttal to Robert Brady in the 1680s and in Lord Bollingbroke's attacks on Robert Walpole in the 1720s—should not obscure that the ancient constitution had come to occupy less space on the palette of political argument. The "decay of genetic theories of politics and of fundamental law," R.J. Smith has observed, "meant that the historical debate on the English Constitution tended to decline from one of right to one of illustration." Appeals to social contract, natural right, civic virtue, "convenience," interest, and a post-Glorious Revolution "modern constitution" did not require lawyers to formulate and dissolve immemorial pedigrees, lessening the value of

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the profession's power to distill historical narratives out of legal records.316

By 1800, "method," at least in the law, was no longer an academic battlefield for the followers of Ramus, Aristotle, and Plato. The dissipation of legal Ramism undermined interest in displaying a "natural order" of knowledge in the universe and the mind as the key to superior mnemonics. Legal method settled into a synonym for subdivision and lightly theorized "good organization."317 The close imbrication of lawbooks and memory captured in the image of "cycling" broke down in the eighteenth century. Lawbooks represented themselves less as promptuaries for an underlying legal tradition than as the primary repositories of law, an intermediate step on the way to a positivist constriction of law to statutes and cases officially promulgated through text. Maxim compilations did not boast of their mnemonic advantages as their seventeenth-century forebears so insistently had.318 Legal educators continued to recommend commonplacing but largely abandoned the physiological and psychological explorations of remembrance of John Dodderidge, William Fulbeck, Francis Bacon, Edward Coke, and William Philips.319


318. For the seventeenth-century "mnemonicization" of maxims, see my discussion in Part II of Hawke, Grounds of the Laws of England (1657); Wingate, Maxims of Reason (1658); Clayton, Topics in the Laws of England (1646); Phillipps, The Principles of Law Reduced to Practice (1661). For the eighteenth century, see Richard Francis, Maxims of Equity (1727): The Grounds and Rudiments of Law and Equity, Alphabetically Digested: Containing a Collection of Rules and Maxims (London, 1749); Thomas Branche, Principe Legis et Aequitatis (1753).

319. These authors are discussed in Subsection I.C.1. The eighteenth-century tradition of legal educational advice abandoned mnemonic pointers, retained commonplacing and subdivision without the philosophical accoutrements of Elizabethan and Jacobean Method, and was concerned above all with providing reading lists. Examples include Roger North, "Discourse on the Study of the Laws" [MS c.1700-1730], in Hoeflich, Gladsome Light, 15-33; Thomas Wood, "Some Thoughts Concerning the Study of the Laws of England in the Two Universities (1708), in ibid., 34-53; Thomas Reeve, "Lord Chief Justice Reeve to His Nephew Containing Instructions for the Study of the Law," [MS c.1730], in Collectanea Juridica, 1:79-81; Lord Ashburton, "Letter to a Gentleman of the Inner Temple, with Directions for the Study of the Law" [MS 1779], in A Treatise on the Study of the Law . . . Written by . . . Lords Mansfield, Ashburton,
Eighteenth-century jurisprudence offered a less congenial home to custodial rhetoric. The dread of innovation in laws, a potent political commonplace around 1600, invited pious intonation of continuity as a strategy of reassurance. Coke's boldest rulings crept forward behind a mask of string citations and newly coined ancient Latin maxims. When possible, advocates of law reform within the bar acknowledged dominant prejudices by casting their programs as modest responses to necessity—purging, restoring, or recompiling rather than innovating and preserving ongoing traditions. Bacon defended his "Proposition Touching Amendment of Laws" (MS 1616) as "rather matter of order and explanation than of alteration." The laws grow diseased with age, wrote Matthew Hale; they need "due husbandry," or they "will die of themselves, like trees that want pruning," choking with ivy.

Eighteenth-century legal culture evidenced greater comfort about innovation. To reflect glory on the "present happy Establishment," a "new Magna Carta may be formed (or, at least, the old one largely improved)," implored Christopher Tancred when offering a potpourri of modest substantive and procedural amendments. Historical narratives and reform programs committed to "legal modernization" became more prominent in the century after the English Revolution. The prescriptive implications of evolutionary theories of legal development supported this modernizing confidence. A strand of seventeenth-century jurisprudence, represented most notably by Thomas Egerton, Henry Spelman, John Selden, and Matthew Hale, viewed current English law as an historical product, the result of incremental but continuous change. Selden and Hale famously likened English law to the Argonauts' ship: the same at the end of their...

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320. The "entire body and substance of law shall remain, only discharged of idle and unprofitable and hurtful matter." Bacon, "Proposition Touching Amendment of Laws" [MS c.1616], in *Works*, 13:66-67.

321. Though Hale recognized the need to reform the laws themselves, and not just "abuses" and "excrescences," his overall tenor was cautious. Let "nothing be altered that is a foundation or principal integral of the law; for these . . . ought not to be touched, lest the whole fabric should be endangered." Amendment of laws "is a choice and tender business" to be undertaken "warily." Matthew Hale, "Considerations Touching the Amendment or Alteration of Laws" [MS c.1660], in *A Collection of Tracts Relative to the Law of England* ed. Francis Hargrave (1787), 249-89, esp. 253, 266-69, 272.


voyage as at the beginning, "though there remained little of the old materials but the chine and ribs of it." Though varying in their political agendas, these seventeenth-century writers charted how English law had come to be what it was. Eighteenth-century evolutionary theorists, in particular the Scots Lord Kames, David Hume, and Adam Smith, brought to the fore a related issue: Based on the course of historical development, what was law becoming and, by inference, how should one advance it? They identified four economic stages—hunting, herding, agriculture, and commerce—through which societies evolved, each with correlate legal systems. Like Montesquieu's *Spirit of the Laws*, which greatly influenced them, they reinforced curiosity about how legal systems responded to economics, religion, and popular manners, redirecting interest from the historical mapping of legal traditions to the explanation of form and evolution. This subordinated recollection to causation.

Descriptive in charting sociolegal progress over millennia, their vision was implicitly prescriptive as well. For it placed a grand historical narrative at the service of law reform understood as the elimination of the obsolete and rude. In focusing on legal adjustment to socioeconomic change, it undermined the value of tradition as authority. In moralized Enlightenment rhetoric, reform purged law of inherited "barbarities" in the pursuit of "refinement" and "civilization." In functionalist terminology, reform closed lags between law and the mores and interests of England's latest stage as a "commercial society," most noticeably in Lord Mansfield's refashioning of the common law to accommodate merchant practice. Where early-seventeenth-century critiques of custom viewed it as an obstacle to religious and moral reformation, mid-eighteenth-century ones cast it and its auxiliary, memory, as allies of anachronism. Impatient reformers could tar memory as an antitype to "improvement" and "modernization." Reading the rule in *Shelley's*}


325. They did not see law emerging from immutable divine and natural commands or immemorial custom.

326. J.W. Burrow, *A Liberal Descent: Victorian Historians and the English Past* (Cambridge, 1981), 23 (quoting John Millar's *An Historical View of the English Government from the Settlement of the Saxons in Britain to the Revolution of 1688* (1812), 4:305: "The blind respect and reverence paid to ancient institutions has given place to a desire of examining their uses . . . . The fashion of scrutinizing public measures according to their utility has now become very universal.").
Case restrictively as a lamentable "clog" to the free movement of property requisite in a "commercial country," King's Bench Justice Willes observed: "[I]f the law could invariably adhere in all cases to the technical expressions," it "would become a mere matter of memory instead of being a system of judgment and reason."\(^\text{327}\) Willes's language suggests how memory could be put down as an antithesis to reason as well as to modernization. The Elizabethan methodizers had hoped to introduce system and dialectic into legal mnemonics, to enlist reason in the improvement of remembrance. William Jones's *An Essay on the Law of Bailments* (1781) suggests the new spirit:

\[ [I]f law be a science, . . . it must be founded on principle, and claim an exalted rank in the empire of reason; but, if it be merely an unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened, and he will be the greatest lawyer, who has the strongest . . . memory.\(^\text{328}\)

Custodianship of the law became a more contested ideological stance in this jurisprudential climate.

The custodial moment in jurisprudence, then, was an in-between stage, resting on political, educational, and intellectual foundations peculiar to Elizabethan and early-Stuart England. Committed to preservation, it was not preserved through the eighteenth century. Engaging time beyond memory, it was not immemorial.

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