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LEGAL HUMANISM AND LAW-AS-INTEGRITY

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I. INTRODUCTION

ACCORDING to Ronald Dworkin, all judges are by necessity philosophers, and no judge is a better philosopher than Hercules. This superhuman jurist understands that law's empire embraces not just decisions about rights made in the past, but also rights implicit in the theory of political morality that those decisions presuppose. He is able to survey all of the diverse laws within a system and then construct a comprehensive theory of political morality that shows those laws to be as coherent and unified and just as they can be. From this theory not only will right answers in hard cases emerge, but the value of integrity—the value of extending to everyone the rights extended to some so that equal concern and respect is secured for all—will be honoured. In contrast, Herbert, the judge Dworkin introduces as Hercules' nemesis, thinks that law ends just at the point where hard cases begin. Herbert is intellectually flatfooted in the face of legal challenges that Hercules can handle adeptly and accurately.[1]

But where did the amazing Hercules come from? Herbert's ancestry is well known. We are told that he is a legal positivist in the mould of H.L.A. Hart. Hart famously presented his legal theory "as part of the history of an idea", and from that history we can trace Herbert's lineage to Austin and Bentham and perhaps even Hobbes.[2] Herbert's views—that is Hart's views—may have evolved from those held by earlier generations of legal positivists, but he is part of the same jurisprudential family.

In contrast, Hercules and his legal philosophy seem to have no jurisprudential past or pedigree at all. Dworkin does insist that the task of jurisprudence is descriptive as well as normative in character, and he has recently affirmed that the legal method that his theory of

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[1] Hercules and Herbert are introduced in Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), pp. 105, 125.

[2] H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593, at p. 594.

law-as-integrity describes best "is in fact the traditional common law method."[3] But Dworkin shows no interest in the history of theorising about common law method, and does little to discourage the impression that law-as-integrity is a new legal theory.[4]

In this essay I will suggest that law-as-integrity does have a history, and I will trace that history to the first generation of English lawyers to offer theoretical accounts of the "traditional common law method" that animates Dworkin's jurisprudential ideas. This method began to emerge in its modern form at the same time that the forces of Renaissance humanism were reshaping intellectual life in England. Theories of the common law from this period were therefore informed by humanist values and methods. Humanist lawyers supplemented older positivist and natural law explanations of the common law by invoking values of coherence and equality not unlike those found in Dworkin's theory. Indeed, one of these early common law theorists, John Dodderidge, described the work of certain legal humanists as "*Herculean*"[5]—a coincidence, of course, but a fateful one. As we shall see there is good reason to say that Dworkin's Hercules is a legal humanist—or at least that his ancestors were.

II. Dworkin and the Natural Law Sting

Before looking at the work of the common law humanists, it is worth stopping to consider why Dworkin avoids serious consideration of the history of jurisprudence when developing his own theory of law. No doubt the answer is in large part simply personal scholarly style. But the answer is also, in part, substantive in nature. Indeed, it may be said that Dworkin suffers from the effects of (to borrow and adapt one of his own metaphors) the *natural law sting*.[6] Sufferers of this sting assume that because natural law theory is premised upon metaphysical and/or religious premises that they regard as unacceptable, legal theories of the past that invoke natural law are tainted by the association and therefore unworthy of serious consideration. Although Dworkin insists that he wants to "rehabilitate" the older attitude to law reflected by classic common law metaphors—like "The law works itself pure"—he offers his own legal theory as the proper way to understand these metaphors and the method they reflect,

[3] Ronald Dworkin, *Justice in Robes* (Cambridge, Mass 2006), p. 251.

[4] Dworkin acknowledges that he does not generally try to compare his views with other philosophers, classical or contemporary: Ronald Dworkin, *Law's Empire* (Cambridge, Mass. 1986), p. ix. On the difficulties in identifying the origins of Dworkin's jurisprudential thought, see Stephen Guest, *Ronald Dworkin* (Edinburgh 1992), pp. 1–7.

[5] Sir John Dodderidge, *The English Lawyer, Describing A Method for the managing of the Lawes of this Land* (London 1631), p. 53 [emphasis in text].

[6] See Dworkin's "semantic sting" at *Law's Empire*, note 4 above, at p. 45.

saying little or nothing of the historical theories associated with them.[7] Stung by the natural law claims that invariably form part of common law theories of the past, he is blinded to the possibility that these old theories might offer guidance today.[8]

Dworkin clearly shares with natural lawyers the anti-positivist view that law and morality are in some sense inherently connected; but he holds very different views about the truth-status of propositions of law and morality from those traditionally advanced by natural lawyers. Natural law theory—at least as it was historically formulated—made claims of a metaphysical nature. Human law, it was said, is closely related to a set of constant and objective moral truths that exist independently of human will, opinions, experiences, traditions, or practices, and which are capable of identification through a faculty of natural reason possessed by each rational person.[9] Dworkin also insists upon the objectivity of moral (and legal) truths, but he denies that metaphysical claims of the sort associated with traditional natural law theory have any real meaning as metaphysical claims; in his view, second-order or "archimedean" claims about the status of first-order or substantive claims about morality obscure the sense in which truth in morality—or in any form of evaluative inquiry—exists.[10] Borrowing the technique of "reflective equilibrium" found in the work of John Rawls, Dworkin develops a method of normative reasoning, applicable to all forms of evaluative inquiry, that purports to show how one can claim objective truth yet deny the distinction between first- and second-order claims about truth.[11] It is necessary to sketch the outlines of this method and how it applies in the legal context because, as we

[7] Ronald Dworkin, "Law's Ambitions For Itself" (1985) 71 Virginia L. Rev. 173 at pp. 173–176. The metaphor on law's purity invoked by Dworkin is often traced to *Omychund* v. *Barker* (1744) 1 Atkyns 21, per William Murray Sol. Gen. (later Lord Mansfield) at pp. 32–33 ("the common law works itself pure by rules drawn from the fountain of justice"). On natural law and common law generally, see D.J. Ibbetson, "Natural Law and Common Law" (2001) 5 Edinburgh L. Rev. 4.

[8] Dworkin says that if natural law simply implies that the content of law sometimes depends on answers to moral questions he is "guilty of natural law": Ronald Dworkin, "'Natural' Law Revisited", (1982) 34 U. Florida L. Rev. 165 at p. 165. But he generally distances his own position from classical natural law theory: *Taking Rights Seriously*, note 1 above, at pp. 337, 339, 342; Ronald Dworkin, "Response to Overseas Commentators" (2003) 1 International J. of Constitutional Law 651, at p. 654.

[9] E.g., Sir Henry Finch, *Law, Or A Discourse Thereof, In foure Bookes* (London 1627), pp. 3–4 ("The law of Nature is that soueraigne reason fixed in mans nature, which ministreth common principles of good and euill…"; it is "unchangeable and perpetuall", a "great light which God hath set in the firmament of our heart", "a facultie of the soule that offreth vnto vs things cleare & lightsome of themselues, without any further reasoning or discourse"). But see John Finnis, *Natural Law and Natural Rights* (Oxford 1980), pp. 33–34, for the view that classical natural law, properly interpreted, did not assert "metaphysical" claims of right and wrong.

[10] Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It" (1996) 25 Philosophy and Public Affairs 87. See also Dworkin, "Response to Overseas Commentators", note 8 above, at p. 654.

[11] Dworkin relies upon John Rawls, *A Theory of Justice* (Cambridge, Mass. 1971), pp. 46–53. See *Taking Rights Seriously*, note 1 above, at pp. 155–168; *Law's Empire*, note 4 above, at p. 424 fn. 17; Dworkin, "Objectivity and Truth", *ibid.* at p. 119; *Justice in Robes*, note 3 above, at p. 246.

shall see (once the natural law sting is removed), humanist theories of the common law adopted something similar.

Dworkin says that truth about what is just (or moral or legal) is obtained through a process of reflection that oscillates between consideration of beliefs or convictions about particular examples or paradigm cases of justice (or morality or legality) and a general theoretical structure that shows those beliefs to constitute a unified and justifiable body of convictions, with the expectation that both particular beliefs and general theory will be refined until a satisfactory point of equilibrium is reached.[12] The resulting theoretical structure not only explains and justifies existing determinations, but it provides answers in relation to points of controversy not yet determined.[13] At least at a general level, Dworkin has followed the approach charted by Gadamer and so the analysis has hermeneutic aspects.[14] The task of understanding and using normative concepts, says Dworkin, is one of *interpretation*. It entails an analysis of particular social practices or personal convictions or other pre-interpretive data with a view to constructing a theory that not only fits the set of practices or convictions analysed, but also shows them in their best light—as coherent and unified in light of their point or value—after which the practices or convictions are revisited and, if necessary, refined in a final post-interpretive stage to ensure that they do indeed manifest the theoretical structure fully and correctly.[15]

Of course, Dworkin concedes that people will disagree about the interpretation of complex ideas or practices; but he says that this disagreement is theoretical rather than semantic, empirical or metaphysical in nature. In constructing an interpretive claim about truth, one cannot appeal to facts, like the criteria people follow when using a term, nor can one appeal to a metaphysical reality "out there". Instead, genuine theoretical disagreement and argument occurs when different ways are presented of achieving reflective equilibrium between the particular practices we follow and convictions we have on the one hand and the set of more abstract principles that show these practices and convictions to be coherent and justified on the other hand.[16]

[12] *Taking Rights Seriously*, note 1 above, at p. 155; *Justice in Robes*, note 3 above, at p. 246.
[13] *Taking Rights Seriously*, note 1 above, at p. 155.
[14] Dworkin cites Gadamer at *Law's Empire*, note 4 above, at pp. 55, 62, though he is careful to distance himself from key parts of Gadamer's hermeneutics. It has been said that Dworkin's work offers a "crypto-Gadamerian jurisprudential hermeneutic": Pierre Schlag, "The Aesthetics of American Law", (2002) 115 Harvard L. Rev. 1047 at p. 1079. On hermeneutics, Gadamer and Dworkin generally, see Robert Cover, "Violence and the Word" (1986) 95 Yale L.J. 1601 at p. 1610 fn. 24.
[15] *Law's Empire*, note 4 above, at pp. 65–76; *Justice in Robes*, note 3 above, at p. 246.
[16] *Taking Rights Seriously*, note 1 above, at p. 160; Dworkin, "Objectivity and Truth", note 10 above, at pp. 119–128; *Justice in Robes*, note 3 above, at pp. 59–60, 79, 141–143; *Law's Empire*, note 4 above, at pp. 78–85.

For Dworkin, legal interpretation is a subset of this sort of moral and political interpretation. In a common law setting, the judge confronted by a hard case will examine past cases for evidence of underlying principles and seek a form of reflective equilibrium that establishes a theoretical justification of the old cases and right legal answers in new ones. Legal principles—like "no one should profit from their own wrong"—have a "dimension of weight": unlike rules, which provide all-or-nothing answers when they apply, principles may compete with other principles in hard cases and the weight they have will vary depending upon the circumstances of the case.[17] Judges thus engage in a "justificatory ascent" from individual cases and principles to abstract theories of political morality that show how principles are reconciled consistently over time; and although judges may emphasize "local" coherence within particular departments of law, they aspire, or should aspire, to achieve the Herculean accomplishment of ascending to a theoretical pinnacle, from which vantage point a comprehensive theory of political morality can be constructed showing all parts of the legal system to be coherent and justified.[18] Indeed, Dworkin does not limit the ideal of coherence to law: he thinks that it may be possible to articulate a single theory for *all* primary political values—legality *and* democracy, equality, justice, etc.—that shows each value "in a larger and mutually supporting web of conviction" so that all "humane values" are harmonised.[19] "…I see no other way," he explains, "in which philosophers can approach the assignment of making as much critical sense as is possible of any, let alone all, parts of this vast humanist structure."[20]

These aims may not seem wholly alien to traditional natural law theory, but in rejecting the metaphysical claims associated with that theory Dworkin's humanist structure of political-moral truth appears to be premised upon very different philosophical assumptions and methods. Even so, we should not be stung by the differences. Common law humanists may have been natural lawyers, but they had more to say about normative reasoning than simply that each person enjoys a universal faculty of natural reason divinely inscribed upon their hearts—and some of what they had to say resembles Dworkin's jurisprudence in important ways.

[17] *Taking Rights Seriously*, note 1 above, at pp. 24–26.
[18] *Law's Empire*, note 4 above, at pp. 250–254; *Justice in Robes*, note 3 above, at pp. 25, 52–53.
[19] *Justice in Robes*, note 3 above, at p. 168 and Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass. 2000), p. 4.
[20] *Justice in Robes*, note 3 above, at p. 161.

III. Renaissance Humanism and Jurisprudence

When John Dodderidge, writing in about 1610, described the work of legal humanists as "Herculean" he was referring mainly to the French jurists and historians of the sixteenth century who had begun the ambitious task of reconstructing the classical meaning of the Roman *Corpus Iuris Civilis*, a task that involved unearthing the texts of Roman law from beneath layers of medieval gloss. These jurists were humanist because they employed the new approaches to rhetoric, philology, grammar and history that were part of the intellectual revolution of Renaissance humanism. The humanist jurisprudence that resulted permitted forms of critical reflection about legal and historical meaning that had not previously been possible, a reflective attitude that was particularly sensitive to law's place in culture and in time.[21]

But Dodderidge and other theoretically-minded English lawyers of the late sixteenth and early seventeenth centuries faced a different set of challenges from those confronting continental legal humanists. Their concern was not primarily the interpretation of written codes or legislative texts but the rationality of England's unwritten common law. Indeed, developments during the sixteenth century made this concern particularly pressing: the common law had begun to move away from its medieval form, as the "common erudition" of the legal profession based upon archaic forms of action and pleading, and towards its modern form as a body of law developed by judges in the course of deciding individual cases.[22] As the common law became a system of "case law", traditional accounts of its theoretical foundations—the view of the common law as a set of immemorial customs based on a set of immutable natural laws—were no longer sufficient, and scepticism emerged about its rationality. "[O]ur law and order thereof is over-confuse[d]", wrote Starkey in 1535. "It is infinite, and without order or end", for judges decide cases "after their own liberty … as the circumstance of the cause doth them move."[23] Much as Dworkin would turn to interpretive theories of truth to defend law against later generations of legal sceptics, Dodderidge and his contemporaries turned to humanist theories of knowledge

[21] See in general Guido Kisch, "Humanistic Jurisprudence" (1961) 8 Studies in the Renaissance 71; Donald Kelley, "*Vera Philosophia*: The Philosophical Significance of Renaissance Jurisprudence" (1976) 14 Journal of the History of Philosophy 267; Richard Schoeck, "Humanism and Jurisprudence", in A. Rabil Jr. (ed.), *Renaissance Humanism: Foundations, Forms, and Legacy*, Volume 3: *Humanism and the Disciplines* (Philadelphia 1988), pp. 310–326.

[22] J.H. Baker, "Introduction" to *The Reports of Sir John Spelman* (Selden Society vol. 94, London: 1978), p. *161* ('common erudition'); in general see Sir John Baker, *The Oxford History of the Laws of England*; *Volume VI: 1483–1558* (Oxford 2004), pp. 11–15, 48–49, 385–407, 468–469, 486–489.

[23] Thomas Starkey, *A Dialogue Between Reginald Pole & Thomas Lupset*, ed. K.M. Burton (London 1948), pp. 173–174.

and truth to defend the rationality of common law method. Continental legal humanism as such proved to be of limited assistance to this project, but English lawyers did find guidance within the general developments in intellectual inquiry associated with Renaissance humanism, especially developments in logic and rhetoric, and a "humanist spirit" soon became apparent in common law writing.[24]

During the Renaissance, the *studia humanitatis* within European universities, which included the study of logic, rhetoric, grammar, natural and moral philosophy and metaphysics, were re-oriented away from the abstract and fragmented methods of medieval scholasticism and toward more practical and holistic approaches to intellectual inquiry centred upon fresh readings of classical sources.[25] This humanising change was particularly marked in relation to logic and rhetoric. Medieval scholasticism adopted a rigid approach to Aristotelian structures of understanding and reasoning. Theoretical or scientific knowledge fell within the province of logic or dialectic, while practical knowledge was left to rhetoric. Logic was divided into two parts: invention and judgment. Invention involved testing propositions about a subject through consideration of fifteen places (*loci*) of knowledge, such as species, property, time, place, and so forth. Judgment involved arranging propositions into formal syllogisms and linking them together into longer discourses. In the end, however, the entire logical edifice was contingent upon identifying "middle terms" that connected the major and minor premises within each syllogism, and medieval scholars assumed that these terms were simply intuitions about truth that could be taken on faith. Practical reasoning about contingent or probable truth was relegated to the province of rhetoric. Rhetoric followed similar patterns of analysis—it had a set of topical places or *loci* of invention too—but it contemplated a looser analytical attitude because it was not aimed at truth but only persuasion.

[24] Baker, *Oxford History of the Laws of England*, note 22 above, at p. 23 (reference to "humanist spirit"), and see in general pp. 3–52. Also, R.J. Schoeck, "Rhetoric and Law in Sixteenth Century England" (1963) 50 Studies in Philology 110; Louis Knafla, "The Influence of Continental Humanists and Jurists on English Common Law in the Renaissance", in R.J. Schoeck (ed.), *Acta Conventus Neo-Latini Bononiensis: Proceedings of the Fourth International Congress of Neo-Latin Studies* (Binghamton, N.Y. 1985), pp. 60, 61, 67; C.P. Rodgers, "Legal Humanism and English Law – The Contribution of the English Civilians" (1984) 19 Irish Jurist (N.S.) 115; C.P. Rodgers, "Humanism, History and the Common Law" (1985) 6 Journal of Legal History 129.

[25] The points made in this paragraph are drawn from Hanna Gray, "Renaissance Humanism: The Pursuit of Eloquence" (1963) 24 Journal of the History of Ideas 497; Louis Knafla, "Ramism and the English Renaissance", in Louis Knafla, M.S. Staum and T.H.E. Travers (eds.), *Science, Technology, and Culture in Historical Perspective* (Calgary 1976), pp. 26–50, esp. pp. 26–29; Wilbur Samuel Howell, *Logic and Rhetoric in England, 1500–1700* (New York 1961), ch. 1.

Humanism attacked the highly artificial logic of medieval scholasticism.[26] For humanists, reasoning and understanding were still structured upon the distinction between invention and judgment. But in an effort to integrate theoretical and practical reasoning, greater emphasis was placed upon methods of reasoning—like the use of context, examples, metaphors, and analogies—that previously fell within the province of rhetoric. Humanism was a renaissance of classical rhetoric or eloquence in which there was "a harmonious union between wisdom and style"[27], a commitment to the idea that sensitivity to language and interpretive technique could lead to civic virtue and improvement in the human condition. The dialectical aspect of logic was thus emphasised: the possibility that knowledge could emerge through argument and discourse was contemplated, and a firmer connection between the art of reasoning, or logic, and the art of arguing, or rhetoric, was made. In other words, humanism pursued unity and coherence within the liberal arts as essential to civic virtue and the good of the *res publica*—or the goals of civic republicanism.

In England, the humanist revolt against scholastic logic occurred between 1574 and 1600 and was heavily influenced by the work of French scholar Peter Ramus.[28] Ramus sought to undermine the distinction between theoretical and practical reasoning by taking the looser process of topical invention traditionally followed in rhetoric and placing it at the centre of dialectic or logic. The effect was a streamlined logic. Ramists approached problems in two steps: invention or discovery, through which arguments about a subject were identified by considering ten places or *loci* or lines of inquiry that were informed by practical experience (causes, effects, subjects, adjuncts, opposites, comparatives, names, divisions, definitions, and witnesses or authorities), and judgment or disposition, whereby these arguments were arranged as propositions, propositions were combined into syllogisms, and, finally, the various conclusions reached were ordered according to one comprehensive and coherent "method" in

[26] For accounts of humanist reforms see Erika Rummel, *The Humanist–Scholastic Debate in the Renaissance & Reformation* (Cambridge, Mass. 1995), pp. 11–12, 153–155; Neal Gilbert, *Renaissance Concepts of Method* (New York 1960), pp. 96, 119–120; Lisa Jardine, "Humanist Logic", in Quentin Skinner and Eckard Kessler (eds.), *The Cambridge History of Renaissance Philosophy* (Cambridge 1988), p. 176; Thomas Conley, *Rhetoric in the European Tradition* (Chicago 1990), pp. 110–134; Gray, "Renaissance Humanism", *ibid.*, at p. 502 fn. 10, p. 504. On humanism and civic republicanism, see J.G.A. Pocock, "Virtues, Rights, and Manners: A Model for Historians of Political Thought" (1981) 9 Political Theory 353.

[27] Gray, "Renaissance Humanism", note 25 above, at p. 498. See also Conley, *Rhetoric in the European Tradition*, *ibid.*, at p. 109.

[28] Howell, *Logic and Rhetoric in England*, note 25 above, at p. 7; Knafla, "Ramism and the English Renaissance", note 25 above, at pp. 26–50.

which the whole subject matter was structured in descending fashion from general to particular.[29]

Two aspects of Ramism deserve to be emphasised. First, although Ramists may have accepted the idea of metaphysical truth in nature, they also contemplated the possibility of discovering that truth through what were, in essence, rhetorical or discursive methods—through debate and argument—rather than simple sense or intuition. Dialectic or logic is, Ramus wrote, the art of disputing and reasoning well.[30] Secondly, Ramism asserted that understanding truth involved moving from an analysis of experience (the *loci*) to more general axioms or propositions that could then be methodically arranged in order descending from general to particular in "a sort of long chain of gold" with each link depending upon other links, thus achieving "the order and continuity of the whole."[31] Ramism thus offered an anti-metaphysical, discursive—or hermeneutic—approach to language, reason and truth premised upon the value of holistic coherence.[32] It was to Ramist dialectics and rhetoric in particular that common law humanists turned.

IV. Common Law Humanism and Law-as-Integrity

The common law humanists included, in addition to John Dodderidge, writers such as Abraham Fraunce, William Fulbecke, Henry Finch, and Francis Bacon. These writers were hardly uniform in their views and they embraced Ramism with varying degrees of enthusiasm and openness. Abraham Fraunce's *The Lawiers Logike* (1588) was the first attempt to theorise English law within a structure provided by humanist dialectic and rhetoric, and it explicitly invoked Ramism as its model.[33] William Fulbecke's *Preparative for the Study of Law* (1600) was Ramist in orientation, though not explicitly.[34] Sir

[29] On Ramism see Howell, *Logic and Rhetoric in England*, note 25 above, at pp. 148, 154–158; Wilbur Samuel Howell, *Eighteenth-Century British Logic and Rhetoric* (Princeton 1971), p. 16; Craig Walton, "Ramus and the Art of Judgment" (1970) 3 Philosophy and Rhetoric 152; Gilbert, *Renaissance Concepts of Method*, note 26 above, at p. 129; Craig Walton, "Ramus and Bacon on Method", (1971) 9 Journal of the History of Philosophy 289. For a more sceptical view of Ramus, see W.J. Ong, *Ramus Method and the Decay of Dialogue* (Cambridge, Mass.1958).

[30] Peter Ramus, *Dialectique* [1555] (N. Bruyère (ed.), Paris 1996), pp. 17, 18.

[31] *Ibid.*, at p. 76, as translated by Howell, *Logic and Rhetoric in England*, note 25 above, at p. 161.

[32] Donald Kelley, "Horizons of Intellectual History: Retrospect, Circumspect, Prospect" (1987) 48 Journal of the History of Ideas 143, at pp. 144–145, 152–153.

[33] Abraham Fraunce, *The Lawiers Logike, exemplying the praecepts of Logike by the practise of the common Lawe* (London 1588). On Fraunce and Ramism, see Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London 1990), pp. 18, 28–29, 46–47; Peter Goodrich, "*Ars Bablativa*: Ramism, Rhetoric, and the Genealogy of English Jurisprudence", in Gregory Leyh (ed.), *Legal Hermeneutics: History, Theory, and Practice* (Berkeley 1992), pp. 61, 65; Ralph Pomeroy, "The Ramist as Fallacy-Hunter: Abraham Fraunce and the Lawiers Logike", (1987) 40 Renaissance Quarterly 224, at p. 230.

[34] William Fulbecke, *A Direction or Preparative to the study of the Lawe* (London, 1600). On Fulbecke, humanism and Ramism, see Goodrich, *Languages of Law*, above note 33., at pp. 98, 100–101; Goodrich, "*Ars Bablativa*", *ibid.*, at p. 60.

Henry Finch was committed to Ramist methods, but his *Law, Or a Discourse Thereof* (1627) did not cite Ramus.[35] Sir John Dodderidge's *The English Lawyer* (written in about 1610 and published in 1631) relied upon the work of a number of humanists, including Ramus.[36] Whether Francis Bacon qualifies for membership within this group of common law humanists is perhaps debateable.[37] Although often regarded as initiating a modern and empiricist or positivist approach to science and law, his work can also be read as part of the dialectical and rhetorical tradition of Renaissance humanism—and that is the approach taken here.[38] Although Bacon was openly critical of Ramist method, his jurisprudence may still be seen as a general development of the same humanist ideas and goals Ramus pursued.[39]

The ideas advanced by the common law humanists on law and philosophy, on the value of coherence, on interpretation and truth, and on integrity and the case-law method, are suggestive of many of the jurisprudential assumptions now associated with Dworkin's theory of law-as-integrity. I will now consider each of these four themes in turn.

A. Law and Philosophy

Common law humanism, like humanism generally, denied the distinction between theory and practice. The common law existed as part of a larger philosophical enterprise, and therefore the *studia humanitatis* were relevant to understanding its substance and form. Fraunce began his book by announcing his own revelation in this respect: after studying both philosophy and law he perceived the practice of law to be the use of logic, and the method of logic to be the "light" of law.[40] Law without "Philosophy", he said, was "rude" and "barbarous", and logic, as "the hand of Philosophie", was therefore

[35] Sir Henry Finch, *Law, Or A Discovrse Thereof, In foure Bookes* (London 1627) is an English translation of *Nomotexnia; Cestascavoir, Vn Description Del Common Leys Dangleterre Solonqve les Rules de Art* (London 1613). On Finch, humanism and Ramism, see Wilfrid Prest, "The Dialectical Origins of Finch's *Law*" [1977] C.L.J. 326, at pp. 328–329, 331, 344, 348; Goodrich, *Languages of Law*, note 33 above, at pp. 100–101.

[36] Dodderidge, *English Lawyer*, note 5 above. On Dodderidge, humanism and Ramism, see Richard Terrill, "Humanism and Rhetoric in Legal Education: The Contributions of Sir John Dodderidge (1555–1628)" (1981) 2 Journal of Legal History 30; Goodrich, *Languages of Law*, note 33 above, at pp. 98, 100–101.

[37] For Bacon's works, see J. Spedding, R.L. Ellis, and D.D. Heath (eds.), *Works of Francis Bacon* (London, 1857–74), 14 volumes. On Bacon's jurisprudence, see Paul Kocher, "Francis Bacon on the Science of Jurisprudence" (1957) 18 Journal of the History of Ideas 3; Julian Martin, *Francis Bacon, the State, and the Reform of Natural Philosophy* (Cambridge 1992), pp. 2–3, 165–171; Daniel Coquillette, *Francis Bacon, Jurists: Profiles in Legal Theory* (Stanford 1992).

[38] Lisa Jardine, *Francis Bacon: Discovery and the Art of Discourse* (Cambridge 1974), pp. 2, 8, 69; Stephen Gaukroger, *Francis Bacon and the Transformation of Early-Modern Philosophy* (Cambridge 2001), pp. 37, 40, 58.

[39] John Briggs, *Francis Bacon and the Rhetoric of Nature* (Cambridge, Mass. 1989), pp. xi, 201, 213–214.

[40] Fraunce, *Lawiers Logike*, note 33 above, at Preface.

necessarily connected to law.[41] Fraunce's objective was to show how common law cases already revealed forms of argument that followed humanist dialectical methods of the sort advocated by Ramus, and also how a more thorough order might be brought to the common law through a more rigorous application of those methods.

Indeed, all of the common law humanists advocated linking theory and practice. The "rules of reason" that "direct our course in the arguing of any case", wrote Finch, derive out of "the best and very bowels of Diuinitie, Grammer, Logicke, [and] also from Philosophie natural, Politicall, Oeconomick, [and] Morrall"—i.e., the *studia humanitatis*—and although the cases "in our reports and yeere-bookes" may not always expressly refer to this body of liberal learning "yet the things which there you finde are the same; for the sparkes of all Sciences in the world are raked vp in the ashes of the Law…."[42] For his part, Bacon was critical of the fact that those who had written about law did so "either as philosophers or as lawyers", the former offering unhelpful abstraction, the latter narrow description; only by integrating theory and practice—law and philosophy—could writers succeed in writing as "statesmen."[43] That these views might have been controversial for English lawyers at the time is perhaps indicated by the lengthy argument Dodderidge made against "remov[ing] the knowledge of all forraigne Arts and Sciences liberall"—again a reference to the *studia humanitatis*—from law.[44] Law is, Dodderidge argued, a "discourse of reason" that involves identifying, understanding and applying "many fundamentall Maximes and Principalls", and so law must "of necessity stretch out her hand" to the liberal arts and sciences, especially "Morall Philosophy" which provides its "foundation", and "Logicke", which is "the Art of reasoning."[45]

In these statements, the common law humanists were not just giving the old line about how the common law embodies natural law or some metaphysical form of morality to be discovered through natural reason. Instead, they were suggesting that the common law was woven into a very specific and developed intellectual tradition associated with the liberal arts and sciences that were (mainly) taught within European universities at the time and that could not be known to judges and lawyers through the spark of natural reason alone. Indeed, this integration of the common law with the *studia humanitatis*

[41] *Ibid.*, at Preface and fol. 1–2.
[42] Finch, *Law*, note 35 above, at pp. 5, 6.
[43] Bacon, *The Advancement of Learning*, in Spedding, note 37 above, at vol. III, p. 475. *Cf.* Ronald Dworkin, "Law's Ambitions For Itself", note 7 above, at p. 178 ("Showing positive law in its best light means showing it as the best course of statesmanship possible").
[44] Dodderidge, *English Lawyer*, note 5 above, at p. 30.
[45] *Ibid.*, at pp. 37, 38, 62.

is what makes this body of common law theory humanist. Rephrased in somewhat different terms, the common law humanists were arguing that determinations of common law involved interpretations of law in light of a theory of moral and political philosophy evidenced by a very specific cultural and intellectual tradition. And this, of course, is essentially what Dworkin argues too.

B. Coherence

Humanism, as seen, involved the renaissance of a rhetorical tradition in which eloquence and aestheticism were in some sense related to ideals of civic virtue. One aspect of this tradition was the importance placed upon coherence. In legal terms, the relationship between coherence and civic virtue is pretty clear: some degree of legal coherence is necessary for the ideal of the rule of law to flourish. The common law humanists were attentive to this relationship and sensitive to the claim that it was compromised by the common law's case-based method.

The common law of England, wrote Fraunce, is "in vaste volumes confusedly scattered and vtterly vndigested".[46] The solution lay in conceiving of the common law through the appropriate form of "Art" or a "Methodicall disposition of true and coherent preceptes…."[47] Fraunce's ambitious—we might say Herculean—objective was to show how adoption by common lawyers of Ramist dialectic could produce a "Methodicall coherence of the whole common law…."[48]

Similarly, Fulbecke addressed the claim that the common law was "obscured with difficult cases" and could not be "plain & manifest to al…."[49] The solution, he said, was to develop an "art" in which the "perfect reason" of the law was revealed through identifying the "generall preceptes" upon which specific legal rules rested.[50] Through "Methode", Fulbecke said (with Ramism no doubt a model), the law could be divided and subdivided into parts and parcels showing "a consent and coherence of the entire thing".[51] From the "apt composition, coordination, and mutuall dependance" of the various parts of the common law, true understanding of it would be possible.[52]

In *De Augmentis*, Bacon warned against using overly "fine and far-fetched distinctions" to reconcile contradictory laws, for this "makes the whole body of laws ill-assorted and incoherent".[53] Indeed, at times

[46] Fraunce, *Lawiers Logike*, note 33 above, at Preface.
[47] *Ibid.*, at fol. 1.
[48] *Ibid.*, at fol. 119.
[49] Fulbecke, *Preparative*, note 34 above, at fol. 4.
[50] *Ibid.*
[51] *Ibid.*, at fol. 83.
[52] *Ibid.*
[53] Bacon, *De Augmentis*, in Spedding, note 37 above, at vol. V, p. 99.

Bacon appeared willing to put up with the appearance of contradiction in law. In his *Maxims of Law*, Bacon set forth twenty-five legal maxims, or what Dworkin would call principles, "gathered and extracted out of the harmony and congruity of cases".[54] Bacon had thus taken the first step towards developing a coherent Herculean theory of the law, but, unlike Fraunce and Fulbecke, he seemed unwilling to take the next step. Bacon observed that he could have "digested" the various maxims "into a certain method or order", which "would have been more admired", for it would have shown every "particular" maxim through its "coherence and relation" to the others to appear "more cunning and more deep"; but instead he decided to offer the maxims "in distinct and disjoined aphorisms" leaving "the wit of man more free to turn and toss, and to make use of that which is so delivered to more several purposes and applications."[55] One might say that Bacon's aphoristic approach would not sit well with Dworkin, who has written that it is "easier to find a deep sense of rightness in a unified, integrated set of values than in a shopping list"—indeed Gerald Postema argues that Bacon's stance reflects a general resistance by common lawyers of this time to anything more than local coherence within the law.[56] But Bacon did not deny that the next step, the move from list of principles to coherent theory of principles, was possible or useful; rather he simply wished to leave the necessary interpretive tossing and turning of cases and maxims—or (we might say) the oscillation necessary for reflective equilibrium—to be performed by lawyers and judges when necessary.

Finally, Dodderidge insisted that knowledge required finding "the certaine dependency and coherence of the parts of the matter", and that a Ramist method would assist the common law to achieve this end.[57] Ramus contemplated comprehensive (or Herculean) theories—and so did Dodderidge. The principles within particular departments of law, said Dodderidge, should demonstrate "coherency" ("local" coherence Dworkin would say); but Ramist method, if followed to its end, would leave not just "every title of the Law" but "the whole body thereof" in "a perfect shape".[58] Common law method should, he said, permit one to see "a perfect plot of the coherence of things", a series of rules and principles arranged "from the most ample and highest Generall, by many degrees of descent, as in a Pedigree or Genealogie, to the lowest speciall and particular", with all of the structure's parts

[54] Bacon, *Maxims of the Law*, in Spedding, note 37 above, at vol. VII, p. 320.
[55] *Ibid.*, at vol. VII, p. 321.
[56] *Justice in Robes*, note 3 above, at p. 162; Gerald J. Postema, "Philosophy of the Common Law" in Jules Coleman and Scott Shapiro (eds.), *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford 2002), p. 594.
[57] Dodderidge, *English Lawyer*, note 5 above, at pp. 64, 95.
[58] *Ibid.*, at p. 190.

"combined together as it were in a consanguinity of blood and concordancie of nature."[59]

The common law humanists therefore sought Herculean levels of coherence within the common law, and they were confident that such coherence was possible if sound humanist logical or dialectical methods were followed.

C. Interpretation and Truth

Each of the authors considered here held ideas about moral truth that Dworkin dismisses as unhelpful to moral and political philosophy and jurisprudence, including the idea that people are endowed with a faculty of natural reason that reveals universal and divine truths of natural law, or morality, and that human laws were ultimately founded, if only indirectly, upon those truths.[60] However the legal theories that the common law humanists developed are not, in all respects, at odds with a modern liberal theory of law like law-as-integrity. We must remove the natural law sting that obscures this conclusion.

The task of removing the sting is assisted by recalling the approach to English law developed by Christopher St. German in *Doctor and Student*.[61] St German accepted that English law consisted, in part, of immemorial custom and natural or primary reason, but he also insisted that much of it was the "lawe of reason secundarye"—or those rules identified through a process of reasoning that, while informed by primary or natural reason, was directed at identifying the full implications of rules or principles that were not founded upon primary or natural reason, including, significantly, most of the common law of property.[62] St. German's argument, then, suggests a shift from the view of law-as-reason to the view of law-as-reasoning—or, to use a more Dworkinian expression, law-as-interpretation. Following St. German's lead (in some cases explicitly), the common law humanists moved from acknowledgment of abstract natural reason as the general backdrop for law and legal reasoning to far more detailed and practical examinations of secondary or artificial reason. Finch, without citing St. German, distinguished between rules of primary reason, or natural law, which were thought to be inscribed

[59] *Ibid.*, at p. 258.

[60] Fraunce, *Lawiers Logike*, note 33 above, at fols. 2, 24; Fulbecke, *Preparative*, note 34 above, at fols. 1, 8, 62; Finch, *Law*, note 35 above, at pp. 1–4; Bacon, *Advancement of Learning*, in Spedding, note 37 above, at vol. III, p. 475; Dodderidge, *English Lawyer*, note 5 above, at p. 191. On Bacon, see also Bernard McCabe, "Francis Bacon and the National Law Tradition" (1964) 9 Natural Law Forum 111.

[61] T.F.T. Plucknett and J.L. Barton (eds.), *St. German's Doctor and Student* (Selden Society vol. 91, London 1974).

[62] *Ibid.*, at pp. 33–39. See also Mark Walters, "St. German on Reason and Parliamentary Sovereignty" [2003] C.L.J. 335, at pp. 339–341.

within all rational beings and were self-evident, and secondary rules of reason, or the law of reason, by which one could arrive at principles "by the discourse of sound reason" the outcome of which was not at all obvious or self-evident.[63] Dodderidge, citing St. German's analysis explicitly, made the same distinction.[64] Bacon adopted a similar approach, using an analogy to the game of chess to make the point (much as Dworkin did in making a similar point[65]). Although the rules of the game of chess are, said Bacon, positive and not derived from reason, one plays to win and makes decisions that are "artificial and rational"; and the same is true of human laws that are "positive upon authority[,] and not upon reason" and "what is most just, not absolutely, but relatively and according to those maxims" is a matter of "disputation" involving "secondary reason".[66] It is in their emphasis on this sort of secondary reasoning, then, that the common law humanists share common ground with Dworkinian attitudes about interpretation and truth.

This common ground is not always obvious. The idea of interpretation central to Dworkin's jurisprudence appears, at first glance, to be absent from common law humanism. The common law humanists refer to the "interpretation" of laws when referring to the "exposition" of particular laws.[67] But "interpretation" is not used to describe the foundation of their political, moral and legal philosophy. Upon closer analysis, however, it is clear that they simply used different ways of indicating the same general idea.

"The Art of Logicke," wrote Dodderidge, "is the Art of reasoning…to find out truth by argument and disputation", for "the truth is found out by Argument, debate, and discourse of reason on both parts" and hence the "Instruments of knowledge are the formes of discourse…."[68] Humanists like Ramus saw logic or dialectic as an essentially rhetorical—or hermeneutic or discursive or (we may say) interpretive—process of reasoning about truth. Dodderidge worked within that humanist tradition, and so his references to the art of logic, the art of reasoning, and the discourse of reason imply an intellectual exercise not unlike the art of interpretation Dworkin contemplates.

Like Dworkin, Dodderidge emphasised the argumentative nature of law: he accepted both that there was a "truth" about legal matters

[63] Finch, *Law*, note 35 above, at pp. 3–4.
[64] Dodderidge, *English Lawyer*, note 5 above, at pp. 198, 199, 204.
[65] *Taking Rights Seriously*, note 1 above, at pp. 101–105.
[66] Bacon, *Advancement of Learning*, in Spedding, note 37 above, at vol. III, p. 480.
[67] Fulbecke, *Preparative*, note 34 above, at fol. 8 ("the Judges are interpreters"), fol. 35 ("The best interpreter of the law is common reason and intendement"); Finch, *Law*, note 35 above, at p. 20 ("the exposition of Statutes"); Dodderidge, *English Lawyer*, note 5 above, at p. 140 ("the Iudges, unto whom power of interpretation and exposition of those Lawes is given"); p. 209 ("Interpreters of Law").
[68] Dodderidge, *English Lawyer*, note 5 above, at pp. 62, 63, 64.

and that there was "debate" about what that truth was. It may have been easier for Dodderidge and other common law humanists to hold this view given their metaphysical (natural law) assumptions about truth. But they also assumed that most legal debates were conducted through *secondary* reason, and so their views in this respect were less significant than one might think. Fulbecke's response to the argument, that law could not be founded upon "agreeable conclusions" of "reason and truth" because lawyers always disagreed about what the law was in difficult cases, is instructive.[69] The argument should be rejected, said Fulbecke, because, first, "professors and practisers" of *all* arts, including history, philosophy and politics, disagree in their opinions and yet these other arts are not subjected to criticism for this reason, and, second, "the varietie of opinions" in law are to be valued because "the truth is disclosed and made manifest by the conflict of reasons."[70] In other words, Fulbecke did *not* rely upon notions of a metaphysical truth about legal propositions when responding to the claim about truth and disagreement in law; rather, he invoked a discursive notion of truth—a secondary form of reason—to defend law from claims of sceptics.

In Dworkin's view, truth emerges from our internal efforts to mould coherent justifications for the convictions we hold or the paradigm cases we accept, and although we may begin with particular convictions or cases and move towards general explanations, the demand of coherence or integrity requires an oscillation between concrete and abstract conceptions until the appropriate equilibrium is reached. Something like this process is contemplated by humanist dialectic.

The humanist model of reasoning that Fraunce adopted for the common law was explicitly Ramist, and so began with the invention of arguments by reference to the ten topical places of invention and ended with the disposition of those arguments in a comprehensive method that permitted judgment. The point of invention was to identify "axioms" to be disposed of in judgment.[71] In the course of discussing the topical places of invention, Fraunce said that the objective was to extract axioms that were as general as possible about the thing examined, noting that the "generall" was simply "a multitude or uniuersality of thinges like in essence" and "[t]he higher you ascend, the more generall thinges bee: the more generall thinges bee, the fewer particular proprieties are they tyed unto: and therefore the moste generall doth agree to most particulars."[72] In this way were

[69] Fulbecke, *Preparative*, note 34 above, at fol. 25.
[70] *Ibid.*, at fol. 25, 26.
[71] Fraunce, *Lawiers Logike*, note 33 above, at fol. 7.
[72] *Ibid.*, at fol. 33.

the "generall precepts" of all arts "first inuented by the induction of many particulars and specials."[73] It was within invention, then, that the opportunity for theoretical ascent and some oscillation between general and particular propositions existed. The second part of logic—judgment—was a process of fitting the invented axioms together into one comprehensive arrangement descending from general axioms or principles to particular ones. However, as Fraunce observed, this "Methode" could only take place once the axioms were invented or found, and the point of this comprehensive structure was "the teaching and conformation of them", and not, apparently, further refinement.[74] The process of judgment, once complete, would demonstrate "a Methodicall coherence of the whole common law".[75] But the full theoretical structure of the law could not be known until the judgment stage, and there seemed no chance for a final post-interpretive refinement of particular and general propositions of the sort contemplated by Dworkin. We might conclude, then, that the process of reflective equilibrium was at best implicit and limited with Fraunce's structure of common law reasoning.

Bacon, however, seemed to adopt a method closer to Dworkin's reflective equilibrium. According to Bacon, "all true and fruitful Natural Philosophy hath a double scale or ladder, ascendant and descendent; ascending from experiments to the invention of causes, and descending from causes to the invention of new experiments…."[76] To pursue knowledge, he continued, we must "abridge the infinity of individual experience as much as the conception of truth will permit"; "all things by scale … ascend to unity" and "harmony".[77] For Bacon, the only sure way to truth was one that "derives axioms from the senses and particulars, rising by a gradual and unbroken ascent, so that it arrives at the most general axioms last of all."[78] Or, Dworkin would say, what is needed is a "justificatory ascent."

There is, then, an apparent resemblance to Dworkin's theory of interpretation within Bacon's method of discovering truth—indeed Bacon described his method as the "*Interpretation*" of nature.[79] For Bacon the method of ascending from practice to theory was not just a matter of "order" but was one of "substance" too: when the example was set forth as the basis for a theoretical discourse it put that discourse in a new light that might occasionally serve to "correct the

[73] *Ibid.*
[74] *Ibid.*, at fol. 114.
[75] *Ibid.*, at fol. 119.
[76] Bacon, *Advancement of Learning*, in Spedding, note 37 above, at vol. III, pp. 351–352.
[77] *Ibid.*, at vol. III, pp. 356, 357, 365.
[78] Bacon, *Novum Organum*, in Spedding, note 37 above, at vol. IV, p. 50.
[79] *Ibid.*, at vol. IV, p. 51 [emphasis in text].

discourse thereupon made''.[80] Taken together, these various passages from Bacon's work reveal a structure of reasoning that parallels the Dworkinian process of reflective equilibrium closely. Of course, Bacon had natural philosophy foremost in mind; however, he also stated that his ''method of interpretation'' applied to other sciences too, including ''logic, ethics, and politics''.[81] Indeed, it has been argued that his entire theory of natural philosophy was drawn from the jurisprudential ideas he developed as lawyer and judge.[82]

D. Integrity, Equality and Case Law

The common law method that law-as-integrity emulates is one in which judges in hard cases extend to people today the rights that are implicit within the theory of political morality that best justifies the recognition of rights in relevant judicial decisions of the past. Integrity—treating like cases alike—is thus served, and the general right of each individual to be treated by the community with equal concern and respect is acknowledged. The theory of common law method advanced by common law humanists comes very close to law-as-integrity in this respect, though at times this similarity is obscured by the humanist insistence upon forcing legal reasoning into (what now appear as) artificial steps of invention and judgment found in humanist dialectic. Of the ten topical places of invention set out by Ramus, the topic of comparison seems particularly relevant to common law method. As Fraunce explained, it directed one to consider the likeness—the ''similitude'' or *similia*—of different things and whether they fell within the same or different general propositions or principles. Fraunce summed up this analytical process with canons like: ''Of likes there is like reason'' and ''Of things that be equall, there is equall reason and iudgment ….''[83]

Similarly Fulbecke observed that although ''the Law bookes are so huge, & large, and that there is such an ocean of reportes, and such a perplexed confusion of opinions'', there was ''nothing in the Law which may not be reduced unto some uniuersall *theoreme*….''[84] For Fulbecke (like Dworkin) once law is conceived as a system of general principles it can be seen to yield particular answers in all cases. Lawyers and judges must, wrote Fulbecke, be ''guyded by the principall reason & inseparable truth of euery thing, which the understanding straineth out of the secret and hidden causes of thinges

[80] Bacon, *De Augmentis*, in Spedding, note 37 above, at vol. V, p. 56.
[81] Bacon, *Novum Organum*, in Spedding, note 37 above, at vol. IV, p. 112.
[82] Martin, *Francis Bacon, the State, and the Reform of Natural Philosophy*, note 37 above, at pp. 2–3, 165–171; Harvey Wheeler, ''The Invention of Modern Empiricism: Juridical Foundations of Francis Bacon's Philosophy of Science'' (1983) 76 Law Library Journal 78.
[83] Fraunce, *Lawiers Logike*, note 33 above, at fols. 72, 74, 76, 82.
[84] Fulbecke, *Preparative*, note 34 above, at fol. 5.

… for as in hearbes, if we touch them outwardly, we do not finde nor feele any moisture in them, but rather take them to be drie, until by pressing or distilling of them, we wring out a iuyce proper to their nature…"[85] There is, in effect, *always* some general theorem ready to provide the basis for a remedy—law is a seamless web—and although the number of legal controversies in law is potentially infinite, law is the "handmayd of Justice" and will therefore be ready to "determine them all…."[86] Like Fraunce, Fulbecke suggested that lawyers follow the structures of humanist logic (invention and judgment), and he pointed to examples in the cases where judges engaged in reasoning by going to the places of invention, in particular the place of comparison, using arguments "drawen *á simili*" or treating like cases alike.[87]

Like other humanists, Fulbecke showed a general dislike for the formal syllogistic argument of the "Schools".[88] Instead, he had in mind a looser form of inquiry, not unlike the judicial balancing of competing principles and cases that Dworkin says have a "dimension of weight" and pull in different directions in different contexts. "[T]he authorities and cases", Fulbecke wrote, "should rather be weighed, then numbred: that is, should rather be examined how they accord with reason, then how many they be in number…."[89] Where two arguments of principle seem evenly balanced—where they both "fit" in Dworkin's terminology—Fulbecke said the right answer lay with the one most consistent with "reason" or "Equitie", and in this respect judges should favour the "publicque good" over "priuate aduantage".[90] Finch also mentioned that the cases illustrated the principle of political philosophy of favouring the interests of the "Common weale."[91] These assertions, on the surface, may appear to advocate judicial decision-making on the basis of utilitarian or policy arguments rather than arguments of individual right or principle—an approach Dworkin famously denounced.[92] But when read within the context of civic republicanism that informed humanist thought, these statements take on a different sense. Earlier in his book, Fulbecke, citing Cicero for support, concluded that "the end at which the Law doth ayme is the generall aduantage of common societie in a iust maner distributed and dealt to euerie one"—a statement in line with the civic republican ideal of the common good as embracing equality and opposing

[85] *Ibid.*, at fol. 45.
[86] *Ibid.*, at fol. 14.
[87] *Ibid.*, at fol. 94.
[88] *Ibid.*, at fol. 24.
[89] *Ibid.*, at fol. 32.
[90] *Ibid.*, at fol. 31.
[91] Finch, *Law*, note 35 above, at p. 39.
[92] *Taking Rights Seriously*, note 1 above, at pp. 81–100.

favouritism to individuals or groups.[93] In other words, Fulbecke did not advance utilitarian or policy-based grounds for the common law, though the principled basis for judicial decision-making that he did advance may have differed somewhat from Dworkin's liberal conception of principle.

As Bacon had done, Finch focused upon drawing specific principles or maxims from the cases. As seen, he was explicit about the fact that these principles were extracted through a consideration of larger theoretical ideas, including logic and moral, political, economic, and natural philosophy. One principle of moral philosophy illustrated by the cases, he said, was the principle, "No man shall take a benefit of his owne wrong"[94]—which is one of Dworkin's examples. Like Dworkin, Finch acknowledged that these principles of the common law "do many times crosse & incounter one another, which is the greatest difficulty that we find in the arguing of our cases", but that on such occasions those principles prevail "that carrie the most excellent and perfect reason with them."[95] Bacon made the same (Dworkinian) point about the gravitational force of cases and principles: a legal principle or maxim (drawn from the cases) is "like the magnetic needle" in that it "points at the law, but does not settle it."[96]

Dodderidge adopted the same approach as other common law humanists, asserting that the common law consisted of general principles from which particular rules or rights were inferred when required. In this respect he relied upon the Ramist idea that knowledge exists "in *concreto* as well as in *abstracto*"—much as Dworkin would later say that rights may be contemplated in concrete and abstract dimensions.[97] Like the other common law humanists, Dodderidge acknowledged that the principles of moral philosophy illustrated by past judicial decisions could be seen to conflict in subsequent legal arguments. But because these principles were mainly drawn from rules of secondary reason (rather than absolute natural law) they could be balanced and qualified depending upon the circumstances: the various axioms and propositions of the common law are "upon discourse & disputation of reason" limited in application by equity or by "some other Rule or Ground of Law" which seems to conflict with "the Ground or Rule proposed", and so although in abstract form legal principles may appear to compete, properly considered together in

[93] Fulbecke, *Preparative*, note 34 above, at fol. 2. On Renaissance humanism and civic republicanism in general see J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton 1975), and on republicanism, liberty and equality see Quentin Skinner, *Liberty before Liberalism* (Cambridge 1998).
[94] Finch, *Law*, note 35 above, at p. 46.
[95] *Ibid.*, at pp. 70–71.
[96] Bacon, *De Augmentis*, in Spedding, note 37 above, at vol. V, p. 106.
[97] Dodderidge, *English Lawyer*, note 5 above, at p. 108.

concrete cases they are "knit and conjoyne[d]… in reason".[98] Dodderidge illustrated this point using the same principle Dworkin uses: the general principle of law that one cannot enter upon another's land without permission may be balanced by the general principle that no man shall benefit from his own wrong, with the result that if the owner of land was the cause of the wrongful entry he cannot complain and the person entering may be justified.[99] Dodderidge said that many cases at common law involved balancing principles of law in this way, with the result that legal determinations involved a "conference or comparing of Maximes and Principles together, discoursing which thing is directly under the reason of the said Maxime; and what matter or circumstance may make a difference, and will be by exception exempted from the same …."[100]

But what, in the end, governs the balancing of general maxims or principles in these cases? Here Dodderidge contemplated an oscillation between concrete and abstract propositions of law:

> …mans understanding for the attaining of knowledge proceedeth from the effect to the cause, and againe from the cause to the effect; that is, from the particular to the speciall, and from the special to the generall; and so to the more generall, even to a principall and primary position or notion, which needeth no further proofe, but is of it selfe knowne and apparent. And so againe from such chiefe & primary Principles and propositions to more speciall and peculiear Assertions, descending even to every particular matter.[101]

This process of justificatory ascent and descent is not unlike Dworkin's reflective equilibrium. Dodderidge may have contemplated a metaphysical truth at the apex, which Dworkin does not, but Dodderidge also seemed to suggest that one arrives at the apex of truth through examination of particulars in light of generals, which Dworkin does accept.

Dodderidge closed *The English Lawyer* with a spirited defence of the common law. In England reliance was placed upon "unwritten law, not left in any other monument, than in the mind of man", a law ready to be identified through "discourse of reason" and "Iudiciall determination" when the occasion should be offered and not before, and by this means individual concerns were balanced with general principles better than by some "positive Law" made in advance.[102] The true grounds of law are, said Dodderidge, "not at all expressly published in words, but left neverthelesse implied and included in the

[98] *Ibid.*, at pp. 209–210.
[99] *Ibid.*, at pp. 215, 220.
[100] *Ibid.*, at p. 230.
[101] *Ibid.*, at p. 237.
[102] *Ibid.*, at p. 241.

cases so decided''.[103] Indeed, they may ''aboundantly serve to infinite uses, in the determinating of other doubts, which daily doe and may come in debate''; in all doubtful or new cases there are existing legal answers waiting to be drawn from the cases, for the English lawyer ''is most beholding to Inference and application, wherewith he is instructed and taught, that Cases different in circumstance, may be neverthelesse compared each to other in equality of Reason; so that of like Reason, like Law might be framed.''[104] ''[W]e perceive a coherence and likenesse between divers and sundry cases,'' he wrote, ''which therefore we know are applyable to our purpose'', and from ''the unity of reason so found and considered in the said cases'' we are able to construct general grounds or propositions to explain them.[105] It follows, then, that ''[i]t is not the Case ruled this way, nor that way, but the reason which maketh Law'', and that by this means judicial determinations ''concurre in equality of reason, likenesse, and proportion....''[106] In these statements of common law humanism are found the values of equality and integrity that Dworkin would later shape into the theory of law-as-integrity.

V. Historicising Modern Jurisprudence

The efforts made by humanist jurists of the late-sixteenth and early-seventeenth centuries to theorise early-modern common law method produced conclusions on the relationship between law and philosophy, the value of coherence, the nature of interpretation and truth, and the importance of integrity and equality for legal reasoning that resemble, in fundamental ways, the tenets of Dworkin's theory of law-as-integrity. But they did not anticipate all aspects of Dworkin's jurisprudence—nor could they have. In two related ways their conclusions differed from law-as-integrity. First, the common law humanists thought, and Dworkin does not, that natural reason, a metaphysical truth about right and wrong, informed legal reasoning at its most abstract levels. Second, they did not often speak, as Dworkin does, of individual rights in general or rights to equality in particular. Of course they celebrated the relationship between the common law, coherence, and equality, emphasising the importance of ''like Reason'' or the ''equality of reason'' to the common law. But it is hard to find any explicit acknowledgment of a connection between the idea of like-reason on the one hand and the conception of the individual as a rights-bearing member of a community of principle committed to

[103] *Ibid.*, at p. 243.
[104] *Ibid.*, at pp. 243–244.
[105] *Ibid.*, at pp. 265–266.
[106] *Ibid.*, at pp. 268, 270.

treating everyone with equal concern and respect on the other hand. The political philosophy of humanism, J.G.A. Pocock insists, was republicanism[107], and the common law humanists seem to have taken the republican values of the *studia humanitatis* to heart. In contrast, law-as-integrity is, first and foremost, a *liberal* theory of legalism.

Are these two differences between law-as-integrity and common law humanism too fundamental for us to say that one theory is a descendant of the other? To discount the differences in the political thought of different historical periods in order to find in the past something familiar to us today is, as Quentin Skinner reminds us, to risk distorting historical and conceptual analysis.[108] It may be said that Dworkin is right to avoid historical arguments that might favour law-as-integrity because the theoretical history of common law method is obscured by the association between that method and natural law ideas which form no part of the theory he wishes to advance. And it may be said that if Dworkin is right to insist that jurisprudence in general is an aspect of normative political theory, and that law-as-integrity in particular is an aspect of liberal political theory, it follows that any attempt to find its antecedents within a legal theory informed by a different political theory is doomed to failure.

In the end, however, I think we can accept Skinner's point about the history of political thought without accepting arguments against historicising Dworkin's jurisprudence. In relation to the natural law objection, the argument I have presented is that once historical theories of common law method are carefully reconsidered this objection is fully met—we may, in other words, remove the natural law sting. Yes, the common law humanists were natural lawyers in a way that Dworkin is not; but they also relied upon a theory of secondary reason that renders this difference largely immaterial when we seek to elucidate the central similarities between common law humanism and law-as-integrity. It is not a difference that can be ignored, of course, but it does not prevent points of basic commonality from being identified and explored.

The second objection is perhaps more difficult to address. Even if we accept that common law humanism was informed by that sense of republicanism that informed Renaissance humanism generally, the common law humanist theory of law that emerged was still a *common law* theory that sought to make sense of the particular character of "unwritten" law articulated by English judges on a case-by-case basis. The distinctly liberal understanding of state and individual that informs law-as-integrity may only have emerged afterwards, but there

[107] Pocock, "Virtues, Rights, and Manners", note 26 above, at p. 359.
[108] Quentin Skinner, "Meaning and Understanding in the History of Ideas" (1969) 8 History and Theory 3.

is no reason to think that the theory of the common law as unwritten or case law that the English legal humanists articulated ceased to be relevant once liberal ideas did emerge. On the contrary, it could be argued that the humanist understanding of the common law became more relevant, that it fit emerging liberal values *better* than the republican ones. It might even be argued that the idea of common law developed by humanists may have *contributed* to the emergence of the liberal conception of state and individual in England. Or (better yet) we might resist the assumption that there are serious differences between liberal and republican conceptions of the state and individual. Indeed, by reading the common law humanists in light of Dworkin we can see within their republican approach to law a liberal theory of rights emerging, and by reading Dworkin in light of the common law humanists we can see within the liberal theory of rights the republican sense of public good. We need not take a position on any of these arguments here, but the fact that such arguments are plausible suggests that it would be wrong to insist upon the simple view that each political theory has its own unique legal theory and that exploring historical and conceptual connections between different theories from different historical periods is pointless.

Jurisprudence is best seen, I think, as an aspect of normative political theory. To understand a particular legal theory involves placing it within its normative political context, and this requires placing it within its larger historical context. As David Dyzenhaus has argued, the attempt by analytical legal positivists today to depoliticise legal theory involves denying legal positivism's genealogy, in particular its history within the utilitarian reform movements of the nineteenth century.[109] Analytical jurisprudence of this type is not just apolitical, but it is apolitical in part because it is ahistorical. Conversely, to locate a legal theory within its normative political context some account of its history—where it came from and how it has changed and how it is the same—seems essential. If Dworkin's jurisprudence really is to be, as he wants it to be, a legal theory within a particular normative political theory, then it must be a legal theory with a history. The argument in this essay is that law-as-integrity has its own history to which it can legitimately lay claim, and that this history extends back to the early-modern common law and to the jurisprudence of legal humanism. We may conclude, then, that Hercules comes from a long line of legal humanists.

[109] David Dyzenhaus, "The Genealogy of Legal Positivism" (2004) 24 O.J.L.S. 39.