Introduction by Allen D. Boyer

Certain law-books become eponymous, and certain authors become authorities. The books wear off their titles and become bodies of work, artifacts of their authors' careers and reputation. The authors become the texts with which their surnames are connected. In this collection of essays, Thomas Barnes offers a brilliant group portrait of a set of farsighted jurists and the books that enduringly bear their names—Glanvill, Fortescue, Littleton, Coke, Bacon, Dalton, Hudson, Selden, Hale—and of two kings and a cleric who figured profoundly in the law. Their lives and works, along with Magna Carta and *The Laws and Liberties of Massachusetts*, shaped legal rights and constitutional theory as they emerged in early modern England, the defining moment for the common-law system and Anglo-American political institutions.

Among these equals, Glanvill is first—Ranulf de Glanvill, justiciar of England, and the treatise *Tractatus de Legibus et Consuetudinibus Regni Angliae*, "commonly called Glanvill." With Glanvill begins "legal memory," the history and era of the common law; earlier there is only "the time before which the memory of the law does not reach."[1] Only rarely can any judge claim a share in the historical glamour of an age. If any law-giver can, it is Glanvill, who was counselor and chevalier to one of history's great kings. At the court of Henry II, Glanvill must have headed the royal judges who deliberated long ("*multis vigiliis excogitata et inventa*," it was said), drafting the writ of novel disseisin.[2] At the battle of Alnwick, when the English scattered the Scottish host of King William the Lion, it was Glanvill who commanded, and who is said to have personally taken King William prisoner.

Of equal moment are the contents of the treatise. In Glanvill one

finds the first thorough treatment of the jury—so new and so innovative a mechanism, Professor Barnes observes, that the royal counselors explained its workings in thorough, confident detail. The breaking of further new ground appears in the discussions of the writs. Novel disseisin, praecipe, mort d'ancestor, darrein presentment, utrum—in the clear morning light of the Angevin legal revolution, the writs display the brilliance of a new coinage.

> These were the first writs of course, boilerplate instruments which gave the king's court jurisdiction and demanded the parties' amenableness to it. They were the common law's first forms of action, and so made it truly "common" in the sense of one law, of one procedure and one substance, for each writ was available to any freeman for the assertion of his interest in any free tenement with the mere purchase of the writ.

If Glanvill the justiciar did not actually compose Glanvill the treatise, the book was written within his circle and circulated under his authority; to England's preeminent judge was attributed the first treatise on English law. The book was completed in the last stage of King Henry's reign, between November 29, 1187 and June 7, 1189. The justiciar was elderly, but he was not exhausted. Glanvill put aside his law-books to take the cross. In November 1190, he died on crusade, in the English camp before the walls of Acre. Jerusalem remained in the Saracens' hands, but Glanvill's achievement was already complete.

The customs of England and the rules by which the judges of England decided cases, even though unwritten, Glanvill had maintained, merited the name of laws. Making law in this common-law system has involved the unceasing process of striking a series of balancing transactions. A controversy pending before the court must be decided in a way that addresses squarely the facts of the case, is consonant with relevant legal doctrine, and is consistent with the understandings and practices by which the everyday legal system functions. The balance need not be delicate but it must be careful, and it is customarily done in a manner mindful of tradition—that is, in the awareness of how similar balances have previously been struck.

As the honor paid by the system to eponymous classics illustrates, the common law places a crucial emphasis upon the role of the judge, the author to whom a given judgment or rule of law may be ascribed. In his seminal essay, "The Common Law and Legal Theory," A. W. B. Simpson has worked out with a philosopher's rigor certain conclusions that follow from such premises.

> If all laws are laid down, all laws must have an author, for someone must have performed the act of positing the law. Secondly, there must be some test or criterion for identifying the lawmaker or lawmakers who have authority to lay down the law, or entitlement to do so, for it would be absurd if anyone who cared to do so could lay down law. . . . Thirdly, if law is by definition laid down, all law must originate in legislation, or in some law-creating act. Fourthly, law so conceived will appear as the product of acts of will, and the law which results as the will of the lawmaker. Fifthly, if laws owe their status to their having been laid down by the right author, it cannot be a necessary characteristic of law that it should have a particular content, for its content will depend upon the will of the lawmaker.[3]

Perennially, when the common law's apologists have denounced what the common law is not, they have rejected abstraction, even disparaged it. They have said that the common law, however it may be defined, cannot be equated to the application of unmediated logic, mechanical jurisprudence, neutral principles of adjudication, or economic analysis. Simpson has gone far toward explaining this aversion. He has reiterated what may too easily be overlooked, that the common law is never univocal. The content of a rule of law depends upon the will of the individual lawmaker. Positivists may hear in the law the imperative tone of a sovereign, and natural lawyers may hear rights and duties articulated in whatever tongue the angels speak. By contrast, the common law is to be heard as a consort of human voices.

The greatest subject of the common law is a document that cannot be ascribed to any one common lawyer's hand. Magna Carta figures here in all its guises: as a political concord of sweeping scope and particular detail; as the first statute, the enactment by which all subsequent laws have been admeasured, the outward and visible sign of an unwritten constitution; as a document that has been ignored as well as venerated; as a reference linking the epochal crises of medieval England to Stuart parliamentarians and the eloquent colonial lawyer John Adams.

The *Tenures* of Sir Thomas Littleton and *De Laudibus Legum Angliae*, by Sir John Fortescue reflect a medieval balance of the real with the ideal. Fortescue was a judge to be reckoned with: an experienced local magistrate, a veteran of eight parliaments, a tough-minded partisan of the House of Lancaster, and ultimately so steadfast a servant of the crown that he could make his peace with the Yorkist regime of Edward IV. His ultimate achievement, S. B. Chrimes opined, was credibly "to make up a doctrine that had its roots on one side in abstract political theory, and roots on the other side

in the concrete facts of political practice. He contrived to link up what he wanted to say about England with the sanction of high theory."[4]

Like Fortescue, Littleton was a shrewd common lawyer, able to write on the theoretical level because he possessed a deep knowledge of the working law. In the name of critique and reason, he pruned from his *Tenures* the case citation that might have fleshed out the rules that he formulated. "The didactic ends of Littleton did not require authority," Professor Barnes summarizes. "Each short section was an assertion posed by putting a case. It made no difference for analytical purposes whether the case was real or hypothetical." The result was a Tudor best-seller, the first law-book printed in English, "a rose of rational analysis and jurisprudential concerns in a thicket of how-to and what-was-done works."

Richard Hooker was a divine, not a lawyer, but his work may claim a place among the law-books. He may have titled his masterwork *The Laws of Ecclesiastical Polity* to answer the civilian-turned-theologian Jean Calvin, who (following Justinian) had titled his own treatise *The Institutes of the Christian Religion*. Part of the reason that Hooker would exalt reason, "natural reason revealing natural law," may be that he preached to the lawyers of the Inner Temple. Certainly he defined law in terms that his congregation would have understood:

> That which doth assign unto each thing the kind, that which doth moderate the force and measure, that which doth appoint the form and measure . . . we call a law. So that no certain end could ever be attained, unless the actions whereby it is attained were regular; that is to say made suitable, fit and correspondent unto their end, by some canon, rule or law.

Rather than revelation and authority, this outlook relies upon fairness and process. Very similarly, Hooker ventured to explain the religious community in terms of "an order expressly or secretly agreed upon," an implicit consent by the community's members to act and allow for the common good. This idea would later find broader, explicitly political scope. The judicious Hooker, the learned parson would be called—a compliment, fittingly, paid by John Locke.

With *The True Law of Free Monarchies* and *Basilicon Doron*, the Stuart dynasty's most gifted member staked a claim to be considered as a world-class university president born wrong. The starting point for Professor Barnes's consideration of James I is the provocative bon mot of the French ambassador, that James spoke like a despot whenever he tried to sound like a king, and was vulgar whenever he sought to show the common touch. Not the least of James's problems, this essay observes, was that the king's

four principal speeches on kingship were delivered, at increasingly greater length, to successive sessions of the same Parliament. His concessions on common-law jurisdiction, his intelligent arguments for an Anglo-Scottish union, his serious attempts to define the partnership of crown and parliament, all such initiatives suffered: "James's repetitiveness doubtless fell on progressively deafer ears." In the end, the Commons heard only the rhetoric and the self-concern, and not the message about the concerns of the realm. The evil done by these speeches lived after them.

The voice and character that Professor Barnes restores to *The Trial of Charles I* are those of the king himself. He emphasizes about Charles what often has remained hidden in plain sight: that the narrative of Charles's career is not merely a chronicle of flawed judgments and disastrous outcomes, but rather the story of the will that drove Charles to persevere in his course, despite a series of disasters—the story of one man's determination to govern his realm. "Charles' destruction is the strongest evidence of his central importance to the age and its events," Professor Barnes writes, in a deceptively simple sentence.

The essay on William Hudson's *Treatise of the Court of Star Chamber* draws deeply on the scholarly work for which Professor Barnes remains best known. Around the Camera Stellata there has settled a black legend almost as sinister as that which envelops the Spanish Inquisition. This essay does not fully dispel that—no one work is likely to dispel that—but it wisely observes that what Star Chamber supplied to the common law was "a not unmixed blessing but a substantial benefaction." In particular, "the law of sophisticated crime" can be traced to this institution:

> Crimes against justice (perjury, maintenance, champerty, embracery, vexatious litigation, contempt); crimes by officers (subornation and extortion); crimes of covin and deceit (forgery, fraud, impersonation, extortion); criminal libel—and in distinction to it the modern civil tort—and sedition; inchoate crime (conspiracy and attempt) were all crimes either largely created and developed by Star Chamber in the exercise of its common-law jurisdiction or else were statutory offenses defined and refined by the court.

How royal laws were translated into legal practice is the theme of Michael Dalton's *The Countrey Justice*. Dalton claimed that "my calling is to a country life," but the countryside with which he dealt was neither peaceful nor bucolic. As William Lambarde had noted, Tudor lawmakers had laid "not loads, but stacks of statutes" upon the rural justices. Dalton offered his fellow justices a guide to follow in exercising the judgment required of them by the new enactments. "From Alehouses to Affray to Armor to Bar-

rator to Bastardy," Professor Barnes comments, *The Countrey Justice* "corresponded to the realities of a single JP's existence." This essay also casts a quick, illuminating sidelight on how the day-to-day government of Stuart England represented an interplay between the central government and the county justices—who not only served in local office, but could frequently count on framing central policy when called to Westminster as Members of Parliament.

The essays on *The Countrey Justice* and Hudson's *Star Chamber* treatise recall that jurisprudence in isolation does not amount to a legal system. So to speak, the justices who paged through Dalton's manual and the robed magnates who made speeches in Star Chamber both represent allegorical figures of law in action. The justices used their discretion and local authority to apply the law. The Privy Council sat in Star Chamber to back up government policy with legal decisions and to adapt the law to changing circumstances. The continuing effort to make new law and reinterpret old precedents was the embodiment of the common law's vitality.

The same interplay between learning and process was one of the concerns upon which Simpson has focused. Simpson concludes that the law is defined by its acceptance by the professional community—that propositions of law have value only depending "upon the degree to which such propositions are accepted as accurate statements of received ideas or practice," and insofar as they are consistent with lawyers' practice. If deciding cases and settling rules remains in each and every case an act of will, for continuing generations of judges, as well as for the judge who first articulated a point, such decisions and principles will be accepted only as long as they persuade.

> The notion that the common law consists of rules which are the product of a series of acts of legislation (mostly untraceable) by judges (most of whose names are forgotten) cannot be made to work, if taken seriously, because common law rules enjoy whatever status they possess not because of the circumstances of their origin, but because of their continued reception.[5]

The tradition of the common law, the mechanism that provides for transmission over time of a received body of knowledge and learning, resembles the rules that govern language.

> Formulations of the common law are to be conceived of as similar to grammarians' rules, which both describe linguistic practices and attempt to systematize and order them; such rules serve as guides to proper practice since the proper practice is in part the normal practice; such formulations are always inherently corrigible, for it is always possible that they may be improved upon, or require modification as what they describe changes.[6]

Change as well as continuity—"corrigibility," as Simpson puts it—is part of a tradition. And the way in which an individual's voice will make itself heard may best have been explained by T. S. Eliot, speaking not of the lawyers but of the poets.

The irony of a tradition, Eliot observed, is that tradition "cannot be inherited, and if you want it you must obtain it by great labor." It requires the engagement of an individual's talent and perspective with the conventions with which other artists have previously chosen to work. Of absolute importance is the historical sense, an awareness "of the timeless as well as of the temporal and of the timeless and the temporal together." Yet tradition is not simple juxtaposition and coexistence. To the contrary, a tradition is a dynamic.

> What happens when a new work of art is created is something that happens simultaneously to all the works of art which preceded it. The existing monuments form an ideal order among themselves. . . . The existing order is complete before the new work arrives; for order to persist after the supervention of novelty, the *whole* existing order must be, if every so slightly, altered; and this is conformity between the old and the new.[7]

In the works of Sir Edward Coke, the *Reports* and the *Institutes* that remade the common law, the process described by Eliot can be unmistakably seen. Coke tirelessly traced into the past the concerns and doctrines of the courts he knew. "He brought the medieval literature of the common law into line with the modern literature," Sir William Holdsworth wrote. "Glanvil, Bracton, Britton and Fleta were made to explain and illustrate Perkins, Fitzherbert, Staunford and Lambarde." Coke hailed Littleton's *Tenures* as "the most perfect and absolute book that ever was written in any humane science," but he changed and conformed the text nonetheless. Coke added discussions of related legal points wherever they were tangentially relevant, turning a carefully structured treatise on the law of real property into a sprawling one-volume legal encyclopedia. The ultimate effect was to put numberless new lives into the old volume's leasehold.

> [Coke] supplied as a thick overlard on Littleton's spare text a discrete commentary on Littleton's scholarship by the addition of cases from the Middle Ages going to support Littleton's citationless assertions. . . . Coke's *Reports* had already begun to revolutionize the way lawyers looked at cases, the purpose they found for cases, the dawning realization that in cases was to be found the law.

Adding old cases gave Littleton new relevance. In making his own contribution to the lawyers' art, Coke changed an old masterpiece, rewriting Littleton in every sense except the literal.

Sir Francis Bacon's perennial projects for the reform of English law found their most eloquent presentation in *The Elements of the Common Laws of England*. Other lawyers were content to rely upon familiar maxims, some to coin new maxims; the bursts of Latin tag-lines that drove home the courtroom arguments of Bacon's worthiest rivals had their counterpart in the bursts of Latin tag-lines with which Marlowe closed scenes in *Doctor Faustus*. Bacon planned to do more. His analysis of the law, the first step of which was to reduce the basic principles of the law to 25 maxims, he presented less as a strategy for winning cases than as a strategy for exploring the balances and subtle connections of the law. Bacon found in his maxims, epitomes of Year Book cases, rules that might be abstracted from the precedents, rather than the reverse—even the first fruits of the harvest for which Bacon hoped, a grand set of the "laws of laws."

In *Areopagitica*, which John Milton published in 1644, one finds the complexity that a brilliant talent brings to a subject with which he has both a political engagement and a personal stake. The framing here is judicious. Milton's reputation as an advocate of freedom of speech is balanced against his record as a zealous pamphleteer in *The Tenure of Kings and Magistrates*, "a hodgepodge of spurious history lightly reinforced by a stringing together of the most fanatical advocates of insurrection and tyrannicide." A second irony, far from humorous, lies in Milton's having been the Interregnum official who, searching for seditious papers, had his pursuivants ransack the study of William Prynne, the same sarcastic historian who had lost his ears by decree of King Charles's Star Chamber. Yet nonetheless, the double-handed nature of Milton's ambitions finally allow for their author's redemption. Ultimately, *Areopagitica* remains known for Milton's call, "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." That eloquence, Professor Barnes suggests, must be heard as the voice of Milton's better angel.

The essay on John Selden, focusing on the *Table Talk of John Selden*, catches the political lawyer and first great English legal historian at his most engaging—both deeply and lightly learned. The wit and insight that Selden characteristically displayed are the more notable for having been sounded against a brooding political silence. As counsel in the *Five Knights' Case* (1627), Selden had the misfortune of seeing contradictory truths. He understood that Charles I had gone too far in imprisoning gentlemen who had resisted the royal Forced Loan of 1626. At the same time, he saw that, bound by existing doctrine, the courts could stretch no English law, not even Magna Carta, far enough to hold that his clients' imprisonment was

invalid. The quandary in which Selden found himself forced to act reflected the larger impasse at which the court and the country had arrived.

Other Englishmen were less concerned with the Gordian complexity of mid-century politics. The same year that King Charles was negotiating with Parliament and intriguing with the Scots, the magistrates of New England issued a *Book of the General Laws and Libertyes Concerning the Inhabitants of the Massachusetts*. They had turned their attention to New World problems, to man-stealing, idolatry, false witness, and a widow's right to her husband's chattels. Their mind-set was not experimental; it was responsive, responsible, and quietly but forcefully independent.

> From title-page to the oath for viewers of pipestaves, there is nothing that would indicate that the Bay colonists were subjects of Charles I. . . . The only citation to an institution beyond the Bay is that to "the High Court of Parliament in England" in the proheme. Such silence is deafening.

With Bacon's insights, with Milton entertaining irreconcilable contradictory propositions, with Selden understanding what the age demanded, the first great, honest survey of English law was attempted. Sir Matthew Hale's *History of the Common Law* was the work of a committed Christian who avoided sectarian disputes—of a great advocate who, amid the vicious politics of the Interregnum and Restoration, was noted for his rare ability to walk a middle line and follow principle in doing so.

The *History* was never published by Hale, who did take the trouble to publish two pamphlets on Torricellian fluid dynamics. Hale may have left his best work unpublished, even incomplete, this essay suggests, because he did not wish to perpetuate, even by an honest contribution, an intellectual debate that was savagely charged with politics. Hale rejected the conservative political theory upon which England's radicals relied (the myth of an ancient constitution, of a golden age before the Conquest whose liberties might yet be restored to the English people). He had even less patience with the radical doctrine that conservatives had adopted, Thomas Hobbes's paean to absolute monarchy. *The History of the Common Law* was remarkably fair and intelligently balanced in an age in which to argue for moderation was to challenge received ideas and invite angry rejoinders. Hale's reluctance to put such a document into print only reiterated the caution that it represented.

> By his manifest learning and impartial conduct on the bench, by his 'natural philosophic' speculations published and conveyed by discourse among the intellectuals of his day, and by his exemplary demeanor as a pious and devoted

> Churchman, Hale was held to be a man above partisanship and beyond the corruption of power. . . . Hale's contemporaries understood that to his voice they should hearken because he said so little.

Hale self-effacingly served the common law with the same intense avocation that his friends in the Royal Society accorded to the study of natural philosophy. It was to another body of learned gentlemen, his colleagues of Gray's Inn, that Hale left his manuscripts. In 1688 those lawyers would help bring to the throne of England William III, the monarch whose Act of Settlement would guarantee the political independence of the judiciary.

Lawmakers, law-books, lawyers, and litigants—across five hundred years, these essays ring changes on these elements in the history of the common law. These themes have been marshaled by a remarkable intellect and personality. Thomas Garden Barnes received his A.B. from Harvard University in 1952 and his doctorate from Oxford University in 1955. After teaching history at Lycoming College, he joined the history faculty at the University of California at Berkeley in 1960 and the Berkeley law-school faculty in 1966. After forty-five years at Berkeley he took emeritus status, but he has not ceased to teach or to pursue research. He has long been a Councillor of the Selden Society and has recently completed a term as a board member of the Board of the American Society for Legal History. Outside academia, he has served for a quarter-century as chair of the editorial board of the Legal Classics Library.

The studies selected for this volume contain a wealth of knowledge, and Professor Barnes writes lucidly and piquantly. These pieces are always thoughtful, customarily independent, generous in their insights, and frequently brilliant. In these respects they reflect their author.