SIR EDWARD COKE'S INFIDEL: IMPERIAL ANXIETY AND THE COLONIAL ORIGINS OF A "STRANGE EXTRAJUDICIAL OPINION"

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In the middle of his report on *The Case of the Post-nati* or *Calvin's case* (1608), Sir Edward Coke drew a distinction between the legal status afforded to conquered Christian and infidel territories. Scholars have long interpreted this brief remark as a reflection of Coke's involvement in the Virginia Company. However, the assumptions that underpin this colonial reading have recently been shown to be untenable. In this essay, I offer a new reading of the influence of England's early colonial ventures on Coke's report. Coke's remarks on infidels, I argue, were intended to respond to a particular line of argument advanced before the Exchequer Chamber. Specifically, Coke aimed to foreclose the denization of indigenous Americans in England as a result of colonial conquests, a possibility raised by counsel for both the plaintiff and the defense. Anxious about the potentially disordering implications of imperial expansion, Coke hoped to secure England's legal order by excluding infidels from English subjecthood. But if this was what Coke intended by his remarks on infidels, what his words did was furnish a new justification for colonial conquest that seemed to run contrary to his own aims. In the conclusion of this essay, I exploit this disconnect between Coke's intentions and the effect that his words had to make a modest contribution to ongoing debates over the relationship between law and history.

During the late spring and early summer of 1608, the lord chancellor of England, Thomas Egerton, Lord Ellesmere, and a panel of the kingdom's most senior judges assembled in the Exchequer Chamber at Westminster Hall to render an advisory opinion in the *Case of the Postnati*, or *Calvin's case*.[1]

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[1] Assembled in this manner, the Exchequer Chamber was not a court of record but an advisory assembly that offered legal guidance to lower courts. M. Hemmant, ed., *Select Cases in the Exchequer Chamber before all the Justices of England*, 2. Vols. (London, 1933-1945), 1:lxxiii-lxxv; J.H. Baker, *An Introduction to English Legal History,*

Their opinion would determine the outcome of two cases, one at King's Bench, the other at Chancery, each of which turned on whether a child born in Scotland in November 1605—James Colville—could maintain an action at common law to recover lands in England of which he had been disseized.[2] Underlying each dispute was the question of whether the eponymous post-nati—those subjects of James VI of Scotland born after his 1603 accession to the English Crown as James I—were subjects in English law. Deciding this question required the judges to rule on a matter of the utmost political and constitutional importance: the nature of the relationship that bound English subjects to their prince. For this reason, *Calvin's case* was, in the words of the chief justice of the common pleas, Sir Edward Coke, "the greatest case that euer was argued in the Hall of Westminster" and the "weightiest that euer was argued in any court; ... both for the present, and for al[l] posteritie."[3]

Coke's authoritative report on *Calvin's case* was to live up to his prediction. It provided the rule for subjecthood and citizenship in England and across the British empire for three centuries,

5th Ed. (Oxford, 2019), 150-51. Fourteen judges sat with the Lord Chancellor. From King's Bench: Sir Thomas Fleming CJ, Sir John Croke, Sir Edward Fenner, Sir David Williams, and Sir Christopher Yelverton. From Common Pleas: Sir Edward Coke CJ, Sir William Daniel, Sir Thomas Foster, Sir Thomas Walmsley, and Sir Peter Warburton. From the Exchequer of Pleas: Sir Lawrence Tanfield CB, Sir James Altham, Sir Edward Heron, and Sir George Snigge. *Calvin's Case* (1608) [hereafter *CC*], in Edward Coke, *La Sept Part des Reports Sr. Edw. Coke* (London, 1608), fols.1-28, at 2r.

[2] Throughout the proceedings, the infant James was referred to as "Robert Calvin," hence *Calvin's case*. The plaintiff was the son of Robert Colville and grandson of James, Lord Colville of Culross, a Scottish diplomat and key supporter of James's ambitions for union. The case at Chancery concerned lands near Bishopsgate occupied by John Bingley and Richard Gryffin. At King's Bench, the issue was a messuage in Shoreditch occupied by Richard and Nicholas Smith. In both cases, the parties joined in a demurer on the question of whether Colville, being Scottish-born, ought to be answered in his complaint. Hatfield House, Hertfordshire, Cecil Papers [hereafter *Hatfield*, CP] 276/2, fols.1-8, The Post-Nati Case, 14 June 1608, fols. 1r, 6r; *Hatfield*, CP/194, fols.16-18, Grant of the King to Robert Calvyn, ca. October 1607; Arthur H. Williamson, "Colville, James, first Lord Colville of Culross," *Oxford Dictionary of National Biography*, https://doi.org/10.1093/ref:odnb/67449 [hereafter *ODNB*].

[3] Coke, *Sept Part*, Preface, [A5]r (quoted); *CC*, 3v. Ellesmere expressed a similar sentiment. *Hatfield*, CP/276/2, fol.3v.

cementing the case's importance to historians of law and of political thought.[4] Moreover, the coincidence between *Calvin's case* and the settlement of the Jamestown colony in the Powhatan homeland, Tsenacommacah, has made Coke's report an indispensable resource for understanding the development of the imperial constitution.[5] Coke's brief, and curious, remarks about the conquest of infidel territories have also led scholars to read his report on *Calvin's case* as an early English justification for the dispossession of indigenous peoples.[6]

But as Mary Sarah Bilder has recently demonstrated, colonial readings of Coke's report rest on doubtful foundations. Efforts to "write about *Calvin's case* in the American colonial context," she argues, often reproduce a "seductive" narrative that connects Coke to the Virginia Company, and the colony to his report on *Calvin's case*, out of a "desire for the origins of American constitutionalism" whereby "Magna Carta's liberties" are imagined to "extend to American soil through the early colonial charters." Such accounts rest on assumptions about Coke's involvement in the Virginia enterprise and his alleged authorship of the company's first patent, which supposedly "caused Magna Carta to cross the Atlantic." As Bilder shows, however, there is no evidence that Coke participated in the company's activities, and while as Attorney General he would have played a

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[4] *Calvin's case* was cited as the basis for birthright citizenship in the United States until 1898 and Britain until 1949. Polly J. Price, "Natural Law and Birthright Citizenship in *Calvin's Case* (1608)," *Yale Journal of Law & the Humanities* 9.1 (1997):73-145, at 74; Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge, 2004), 176-99.

[5] Daniel J. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," *Law and History Review* 21.3 (2003):439-82; Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge, 2006), 33-38; Christopher L. Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (Cambridge, 2010), 82-92; Craig Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory, 1675-1775* (Cambridge, 2011), 34-40.

[6] Robert A. Williams, *The American Indian in Western Legal Thought: the Discourses of Conquest* (Oxford, 1990), 199-218; Gavin Loughton, "Calvin's Case and the Origins of the Rule Governing 'Conquest' in English Law," *Australian Journal of Legal History* 8.2 (2004):143-80; Aziz Rana, *The Two Faces of American Freedom* (Cambridge, Mass., 2010), 31-40; Anthony Pagden, *The Burdens of Empire: 1539 to the Present* (Cambridge, 2015), 126-30.

role in drafting its patent, there is little reason to think his role was anything more than cursory.[7] Having severed the link between Coke and the Virginia Company, Bilder develops a revised argument for the origins of English liberties in American constitutionalism.[8] And in doing so, although it is not the focus of her essay, she also troubles the ground from which scholars have claimed that Coke's curious remarks on infidels were designed to support the Virginia Company's colonial project.

In the wake of Bilder's work, I wish to place the colonial reading of Coke's report on a new footing by attending to the doubts that imperial expansion provoked about the integrity of the English polity. I argue that Coke's turn to the infidel was no straightforward story of imperial promotion. Instead, it was a defensive maneuver, an anxious effort to defend English law against the disordering implications of an encounter with a world of radical difference.[9]

This origin story does not exhaust the contexts in which Coke's report may be profitably read. After all, what Coke produced in his report was *law*, an account of "the right rule & reason of the case" that could serve as "a publique Report for the present & al posteritie."[10] It aimed at a kind of intermingling of past, present, and future, a "structural repeatability," as Reinhart Koselleck put it, by which law makes its normative claim on the future.[11] But once it was out of his hands, Coke

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[7] Mary Sarah Bilder, "Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter," *North Carolina Law Review* 94 (2016):1545-98, 1554-64, quoted at 1548, 1558. For the claim that Coke authored the first patent, see F.W. Maitland, "English Law and the Renaissance," in *Select Essays in Anglo-American Legal History. Volume 1* (Boston, 1907), 168-207, at 203; Hulsebosch, "Ancient Constitution," 459-60. For the claim that Coke was a member of the company, see Williams, *American Indian*, 201-02.

[8] Bilder, "Charter Constitutionalism," 1569-76.

[9] This was an instance of colonialism, as Lauren Working puts it, contributing to "the foundations of an imperial polity at home." Lauren Working, *The Making of an Imperial Polity: Civility and America in the Jacobean Metropolis* (Cambridge, 2020), 2.

[10] Coke, *Sept Part*, Preface, A[5]r.

[11] Reinhart Koselleck, "History, Law, and Justice," in *Sediments of Time: On Possible Histories*, ed. and trans. Sean Franzel and Stefan-Ludwig Hoffmann (Stanford, 2018), 130-31; see also Natasha Wheatley, "Law and the Time of Angels: International Law's Method Wars and the Affective Life of Disciplines," *History and Theory* 60.2 (2021):311-30, 325-26.

could no longer control how his report moved through time, and as the meaning of his report shifted, so too did the contexts in which it was interpreted. Quickly, Coke's remarks on infidels were read as a spur to, and a justification for, the very imperial projects that had sparked his anxiety. What Coke's remarks on infidels did, then, came to be unmoored from what he had intended in drafting them.[12] With that in mind, this paper concludes with an account of the subsequent history of Coke's remarks on infidels, in the hope of making a modest intervention into recent debates over the relationship between law and history.

"All Infidels are in law *perpetui inimici*"

Across two paragraphs of his uncommonly long report on *Calvin's case*—which ran to fifty-six-pages—Coke drew a distinction, in *dicta*, between the conquest of Christian and infidel kingdoms.[13] This discussion built on Sir John Croke's distinction, earlier in the proceedings, between the acquisition of kingdoms by conquest, and—as in James's accession in England—their acquisition by descent.[14] Following Croke, Coke noted that when "a king hath a kingdome by title of discent," he "cannot change those laws of himselfe, without consent of Parliament," because it was "by the lawes of that kingdome hee doth inherit the kingdome." Coke contrasted this with cases of conquest, but in doing so he insisted upon "a diversitie between a conquest of a kingdome of a Christian king, and the conquest of a kingdome of an Infidel." In conquered Christian territories (Ireland being the paradigmatic example), the king could "at his pleasure alter and change the lawes of that kingdome,

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12 For the argument that history must attend not only to what an actor *intended* to do, but also to what they *did*, regardless of their intentions, see Constantin Fasolt, "History, Law, and Justice: Empirical Method and Conceptual Confusion in the History of Law," *UC Irvine Law Review* 5.2 (2015):413-62, 458.

13 *Obiter dicta* or *dicta* are statements made in a judicial decision that do not form a necessary part of the formal, deliberate judicial opinion. Baker, *Introduction*, 209-10.

14 Croke arged that "yf one kingdome come to the other by descent the lawes remaine inviolable. by conquest otherwise." The Public Records Office at the National Archives, Kew, State Papers [hereafter *PRO*, SP] 14/34/10, fols.11-28, at fol.14r, Notes owt of the Judges Speeches in the Exchequer touching the ante and post nati, April-June 1608.

but vntill hee doth make an alteration of those lawes, the antient lawes of that kingdome remaine." In conquered infidel kingdoms, by contrast, "*ipso facto* the lawes of the Infidel are abrogated," not only because they were "against Christianitie, but against the law of God and of nature, contained in the Decalogue." Until "certaine lawes bee established" among conquered infidels, Coke continued, "the king by himselfe, and such Judges as he shall appoint, shall iudge them and their causes, according to natural equitie, in such sort as kings in auncient time did within their kingdomes, before any certaine municipall lawes were giuen." Coke's divergent treatment of Christians and infidels was itself rooted in a typology of alien status at English law. The subjects of "the kings and princes in Christendome" could be temporary friends or enemies, depending on the prevailing disposition of their prince to the English king. However, no possibility of amity existed with infidels, who "are in law *perpetui inimici*, perpetuall enemies."[15]

In these passages of Coke's report, jurists and scholars have found what Gavin Loughton calls "the earliest version of the conquest rule"—and "the first element of the colonies rule"—"in an English law report."[16] This is doubtless what Coke's report came to mean for those who read it, and scholars have sought to explain Coke's motive in making these remarks by way of his excessive piety,[17] or his "medieval" antipathy to non-Christians.[18] Both of these charges would figure prominently in the later reception of Coke's dictum, and neither seems unreasonable on its face. But

[15] *CC*, 17r-17v. The term *perpetui inimici* was the Latin plural of *inimicus perpetuus,* which Coke used throughout the case, and not an Italian phrase borrowed from Machiavelli, as some have assumed. Cf. Richard Tuck, "Alliances with Infidels in the European Imperial Expansion," in *Empire and Modern Political Thought,* ed. Sankar Muthu (Cambridge, 2012), 61-83, at 70n26; Edward Cavanagh, "Infidels in English Legal Thought: Conquest, Commerce and Slavery in the Common Law from Coke to Mansfield, 1603-1793," *Modern Intellectual History* 16.2 (2019):375-409, at 384.

[16] Loughton, "Calvin's Case," 178, 180; see also Williams, *American Indian*, 199-200.

[17] Anthony Pagden describes Coke as an "extreme" Calvinist. Pagden, *Burdens of Empire*, 126. Cf. Allen Boyer, who notes that while Coke was close to many puritans, he was "conventional in his own beliefs, and proved sufficiently conformable to hold high government office." Allen D. Boyer, *Sir Edward Coke and the Elizabethan Age* (Stanford, 2003), 176-88, quoted at 176.

[18] Williams, *American Indian,* 199-200.

one is still left with the question of why Coke felt prompted to make these remarks on the occasion of *Calvin's case*, and of what his intention was in drafting them.[19]

Comprehending Coke's own argumentative purpose depends on forming a view of what his dictum was "intended to mean, and of how that meaning was intended to be taken," to borrow Quentin Skinner's formulation.[20] I wish to suggest that even though Coke was not involved in the Virginia Company,[21] *Calvin's case* activated in him a keen, albeit negative, investment in colonialism. Faced with the argument in the Exchequer Chamber that the naturalization of the post-nati could soon lead to the denization of large numbers of non-Christians in England, Coke developed his dictum on infidels with the intention of foreclosing that eventuality. Far from being a self-confident proponent of English empire, then, Coke was anxious to defend the common law against a threat posed by imperial expansion.

Not all of Coke's contemporaries shared his anxiety. Sir Francis Bacon, who argued the plaintiff's case as Solicitor General, took the occasion of *Calvin's case* to characterize England as "a warlike and a magnanimous nation fit for empire," with laws that "open up her lap to receive in people to be naturalized."[22] Like many in the legal profession, Coke doubtless shared Bacon's warm

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[19] For the distinction between motives and intentions, see Quentin Skinner, *Visions of Politics. Volume 1: Regarding Method* (Cambridge, 2002), 96-102, 135-43. For an account that shares my doubts about Coke's intentions, though on different grounds, see Ken MacMillan, "Benign and Benevolent Conquest? The Ideology of Elizabethan Atlantic Expansion Revisited," *Early American Studies* 9.1 (2011):32-72, 59n65.

[20] Skinner, *Regarding Method*, 86.

[21] Coke was never named among the members of the Virginia Company, though another "Edward Cooke" was mentioned in a bill of complaint in Chancery in 1612 as having failed to contribute a promised adventure to the Company. First Virginia Charter, 10 April 1606, and Second Virginia Charter, 23 May 1609, in *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, 7 Vols., ed. Francis N. Thorpe (Washington, D.C., 1909), 7:3783-3802; Ordinance and Constitution Enlarging the Council, 9 March 1607 in *The Genesis of the United States*, 2 Vols., ed. Alexander Brown (Boston, 1891), 1:91-95; Virginia Company vs. Sir Thomas Mildmaye etc. Bill of Complaint, 25 November 1612, *The Records of the Virginia Company of London*, 4 Vols., ed. Susan M. Kingsbury (Washington, D.C., 1906-1935) [hereafter, *RVCL*], 3:38-39. Coke reputedly boasted about his prudence in not investing in joint-stock enterprises. Dudley North, *Observations and Advices Oeconomical* (London, 1669), 87.

[22] Francis Bacon, "Case of the Post-nati," in *The Works of Francis Bacon, Volume 7,* ed. James Spedding, Robert L. Ellis, and Douglas D. Heath (London, 1859), 641-79, at 664-65 [hereafter *SFB*].

regard for English civility. His sense of English law as a precious inheritance owed a great deal to the contrast between Protestant England and the Papist continent, on the one hand, and likely between England's civil masculinity and the putative savagery of America, on the other.[23] But if Bacon anticipated an empire that would make subjects of England's Others, Coke's dictum sought to raise a defensive rampart against the disorder that he feared might attend the denization of infidels in England.

The threat was certainly not an imminent one, but Coke did worry that some arguments before the Exchequer Chamber invited the possibility of serious disorder. During the case, lawyers for both sides implied that the plaintiff's arguments could lead to the denization of all of the West Indies in England, whether on the basis of a royal match between James's heir, Henry, Duke of Cornwall, and the Spanish *Infanta*, or colonial adventures like those of the Virginia Company.[24] And while Coke was aware that denization offered a route by which aliens might become English subjects, his choice of metaphor in discussing the threat posed by aliens in general hints at the nature of his concern in this instance. Aliens were barred from holding land in England, he argued, because they threatened the stability of the realm and its legal order. In times of war, "strangers might fortifie themselues in the heart of the Realme" like a "Troian horse," while in times of peace they could cause "a failer of iustice (the supporter of the Commonwealth)" if they secured freehold and were returned to juries.[25] To automatically denizen innumerable infidels—imagined as strangers with whom faith was necessarily uncertain—risked drawing into the kingdom a device for its own

[23] Richard Helgerson, *Forms of Nationhood: The Elizabethan Writing of England* (Chicago, 1992), 70-72. On civil masculinity and its relationship to images of American savagery, see Lauren Working, "Locating Colonization of the Jacobean Inns of Court," *The Historical Journal* 61.1 (2018):29-51, 37-41.

[24] *SFB*, 658-59. On James's hopes for the Spanish match, see David B. Quinn, "James I and the Beginnings of Empire in America," *Journal of Imperial and Commonwealth History* 2.1 (1974):135-52, 140.

[25] *CC*, 18v (quoted). In his speech, Coke invoked the Trojan Horse just prior to his reference to infidels. *PRO*, SP/14/34/10, fol.22v.

undoing. This prospect may have attuned Coke to a familiar metropolitan anxiety, namely, as Lauren Working notes, that England would be "consumed by literal 'savages.'"[26]

Read in this way, Coke's dictum on infidels formed part of his wider preoccupation with securing England's legal order. If the common law was a precious inheritance, Coke was keenly aware that it was also a fragile one. As David Smith has shown, the chief justice of the common pleas was troubled by the risks posed to the common law by those "who might plot the overthrow of the government or pervert the law and its process," thereby eroding "confidence in legal institutions" and interfering "with the duty of the monarch to give justice to her subjects." Throughout his legal career, Coke pursued a project of legal reform that could "remedy or repulse ... threats to the common law," which he understood to be an essential safeguard for the king's moral obligations to deliver justice to his subjects.[27] Consistent with this preoccupation, Coke's dictum on infidels aimed at preserving England's legal inheritance in the face of threats posed by imperial expansion.

But to make sense of Coke's zeal for reform and its relationship to his remarks on infidels, it is necessary to approach *Calvin's case* anew. Two puzzles present themselves. First, why did Coke elaborate on the case of conquest in a report concerned with the Scottish subjects of a king who had come to the English crown by descent? And second, why did he opine on the status of infidels in a case about the relationship between James's English and Scottish kingdoms? Answering these questions will be aided by bringing together the methodological insights of both legal historians and historians of political thought.

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[26] Working, "Locating Colonization," 41.

[27] David Chan Smith, *Sir Edward Coke and the Reformation of the Laws: Religion, Politics and Jurisprudence, 1578-1616* (Cambridge, 2014), 6, 60.

The problem of context in *Calvin's case*

"The history of early modern political thought," as Constantin Fasolt urges, "is incomplete if it does not include the jurists."[28] For early modern England, therefore, historians of political thought must attend to the common law, that "body of accumulated wisdom" and "system of law" exemplified by long usage and the common learning of the legal profession.[29] Bringing the history of the common law and the history of political thought into conversation depends on marrying the insights of legal and intellectual historians. Legal historians have developed methodological resources for making sense of the technical forms and procedures of legal practice, the conventions that gave meaning to the social action of common lawyers.[30] At the same time, the complementary strategies of intellectual historians mean that legal sources can be read for "the context and occasion of utterances," bringing to light how particular lines of argument took shape during legal proceedings.[31]

Establishing the context of Coke's dictum on infidels in *Calvin's case* is complicated by the fact that his own notes on the case are lost.[32] Moreover, perhaps because he addressed his case report to a wider audience than was normal for his law reports, Coke furnished the reader with little information about the proceedings before the Exchequer Chamber, presenting a seamless account

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[28] Constantin Fasolt, *The Limits of History* (Chicago, 2004), 48.

[29] Baker, *Introduction*, 207-12, quoted at 207. For earlier treatments of the common law as a site of political thought, see J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge, 1957); David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-century Britain* (Cambridge, 1989); Glenn Burgess, *Absolute Monarchy and the Stuart Constitution* (New Haven, 1996); Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (Cambridge, 2006); Smith, *Edward Coke.*

[30] Sir John Baker, "Reflections on 'doing' legal history," in *Making Legal History: Approaches and Methodologies*, ed. Anthony Musson and Chantal Stebbings (Cambridge, 2012), 8-11; also S.F.C. Milsom, "Law and Fact in Legal Development," *University of Toronto Law Journal* 17.1 (1967):1-19. On the importance of understanding the conventions that govern social meaning, see Skinner, *Regarding Method*, 101-02, 142.

[31] Skinner, *Regarding Method*, 114-15. Skinner follows R.G. Collingwood here: "whether a given proposition is true or false, significant or meaningless, depends on what question it was meant to answer." R.G. Collingwood, *An Autobiography* (Oxford, 1939), 39.

[32] J.H. Baker, *The Legal Profession and the Common Law: Historical Essays* (London, 1986), 183. Coke drafted his report from these missing case-notes. Coke, *Sept Part*, Preface, A[5]r.

of the majority opinion and eliding the to-and-fro of the arguments themselves.[33] The volumes of the *Reports* had always brought together the professional concerns of a common lawyer with Coke's political thought, though these preoccupations were ordinarily kept apart. As Richard Helgerson noted, because they were printed in Law French, Coke's case reports were addressed to the "purely professional audience" of common lawyers who had a command of that language. In contrast, the Latin and English prefaces were addressed "to a broader English and even continental readership," providing "ideal figurations of the legal community and the nation" that advanced Coke's vision of "what England was and what part lawyers had in the making of its identity."[34] *Calvin's case* occupies an intermediate space between these distinct if mutually reinforcing genres: it bears many of the hallmarks of a case report, but Coke's choice to print it in English and Latin suggests that he took the case to have particular relevance to the wider, non-professional audience of his *Reports*.[35] Here was a case that could testify to "the au[n]tient & excellent Lawes of England" that were "the birth-right and the most au[n]tient and best inheritance that the subiects of this realm haue," as Coke had put it three years earlier.[36] But presented in this seamless form, Coke's report sheds little light on the arguments that prompted his dictum on infidels.

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[33] Coke had a reputation for reporting judicial decisions in a manner that suited his own aims. In 1615, for example, Ellesmere accused Coke of reporting cases "otherwise then they were adiudged" and of "setting downe the sudden opinions of Iudges for resolucions, which is more then the Iudges themselves intended, or in scattering or sowing his owne conceits almost in every Case by takeing occasion though not offered to range and Exspaciate vpon by-matters." Thomas Egerton, "Observacions vpon ye Lord Cookes Reportes," in Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge, 1977), 297-318, at 297-98. See also Baker, *Legal Profession*, 188.

[34] Helgerson, *Forms of Nationhood*, 86; see also George Garnett, "'The ould fields': Law and History in the Prefaces to Sir Edward Coke's Reports," *The Journal of Legal History* 34.3 (2013):245-84, 247. On the sources and methods of Coke's reports, see Baker, *Legal Profession*, 177-204.

[35] The report was separately foliated and prefixed to his *Sept Reports*, which may already have been in type at the printers when the case was decided. Theodore F.T. Plucknett, "The Genesis of Coke's Reports," *Cornell Law Review* 27.2 (1942):190-213, 209. The volume had yet to be printed when Coke wrote to Salisbury in late summer. *Hatfield*, CP/195, fol.47r, Sir Edward Coke to Salisbury, September 11, 1608.

[36] Edward Coke, *Quinta Pars Relationum Edwardi Coke* (London, 1605), Preface, [A6]r.

In order to peer beneath the veneer of Coke's report, it is essential to turn to the wide array of sources—records, speeches, case notes, manuscript reports—familiar to the legal historian.[37] Two categories of sources are especially promising. First are the speeches made during the proceedings. In addition to the published speeches—Francis Bacon's speech for the plaintiff, and Ellesmere's closing speech before the Exchequer Chamber[38]—two other speeches survive in manuscript form: Baron Altham's speech on the second day of judicial deliberation, and Justice Yelverton's speech on the fourth day.[39] Second are the surviving case notes and reports taken in the Exchequer Chamber. These sources are indispensable for reconstructing the order in which different lines of argument emerged and were refashioned over the course of the proceedings. Ellesmere, for example, took notes on the speeches of Justice Williams, Baron Snigge, and Coke,[40] while John Hawarde, a member of the Inner Temple, reported on the final three days of judicial speeches.[41] But perhaps the

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[37] Baker, *Legal Profession*, 443-55, especially 450-55; James Oldham, "Detecting Non-Fiction: Sleuthing Among Manuscript Case Reports for what was *Really* Said," in *Law Reporting in Britain*, ed. Chantal Stebbings (London, 1995), 133-68, especially 154-55; D.J. Ibbetson, "Report and Record in Early-Modern Common Law," in *Case Law in the Making: The Techniques and Methods of Judicial Records and Law Reports*, 2 Vols., ed. Alain Wijffels (Berlin, 1997), 1:55-66. For an earlier reconstruction of the arguments in *Calvin's case* based on some of the sources I examine here, see Bruce Galloway, *The Union of England and Scotland, 1603-1608* (Edinburgh, 1986), 151-55.

[38] *SFB*; Thomas Egerton, *The Speech of the Lord Chancellor of England, in the Eschequer Chamber, touching the post-nati* (London, 1609) [hereafter *SLCE*].

[39] Huntington Library, San Marino, California, Ellesmere Collection [hereafter *Huntington*, EL] 1868, Case argued in the Exchequer Chamber, 1608; British Library, London, [hereafter *BL*] Hargrave MS 17, fols. 219v-211v, Sir Christopher Yelverton's Argument in the Exchequer Chamber in the Case of the Post Nati. 7 May 1608. The attribution of the first of these speeches to Altham is supported by its correspondence with notes on Altham's speech among the State Papers. *PRO*, SP/14/34/10, fols.14v-15v. For the order of speeches, see *CC*, 2r.

[40] *Huntington*, EL/1873, Notes on the speeches of Williams and Snigg on Calvin's case, 3 May 1608; *Huntington*, EL/1872, Notes on Coke's Speech on Calvin's case, 4 June 1608.

[41] Harry Ransom Center, University of Texas, Austin, Carl H. Pforzheimer Collection of English Manuscripts, MS 3244, Container 1.40 [hereafter *HRC Pforz/1.40*], pp.331-54, John Hawarde, *Les reportes del cases in Camera Stellata*. In his edition of Hawarde's *Reportes*, Paley Baildon, abridged the report on *Calvin's case*, which he took to be "inaccurate and careless." In doing so, he distorted Hawarde's account of Coke's distinction between Christian and infidel conquest. William Paley Baildon, ed., *Les Reportes Del Cases in Camera Stellata, 1593 to 1609: from the original ms. of John Hawarde* (Clark, N.J., [1894] 2008), viii (quoted), 349n1 [hereafter *JHR*]. For ease of reference, where the abridged transcript is accurate, I cite Baildon's edition.

most interesting surviving source is a fair copy of a report held among the State Papers, which covers the speeches on all but two days of the case and offers an outline of the entire proceedings.[42]

This last manuscript is of unknown authorship, though it may have been prepared for the use of the King's Principal Secretary and Lord Treasurer, Robert Cecil, the Earl of Salisbury. It was likely conveyed to the State Papers Office along with a wide array of materials collected by the Principal Secretary, including two other documents relating to *Calvin's case*: a copy of Yelverton's speech and a printed copy of Ellesmere's speech.[43] Salisbury, who attended much of the proceedings,[44] had contrived *Calvin's case* in response to the king's demand for a speedy resolution to the question of the post-nati. In the months before the case began, he plotted the course by which an action would come before the judges: he urged a settlement by way of a concrete legal action, arranged for the king to convey lands to Colville, identified individuals like John Bingley who would serve as defendants, and outlined the strategy of pleading that would lead the parties to join in

[42] *PRO*, SP/14/34/10, fols.11-28. The first page of the manuscript is headed "Notes owt of the Arguments in ye Exchequer chamber touching the ante nati [sic]," suggesting the work of a copyist unfamiliar with the case. The first day of arguments between Bacon (plaintiff) and Hyde (defense) and the seventh day, when Warbarton and Fenner delivered their judicial speeches, are omitted.

[43] In a note appended to a copy of Yelverton's speech at the British Library, he mentioned delivering copies of his speech to Ellesmere and Salisbury. *BL*, Hargrave MS 17, fol. 211v. Ellesmere's copy is at the Huntington Library, while a near identical copy among the State Papers is presumably Salisbury's. *Huntington*, EL/1869, Justice Yelverton in the Check Chamber, 7 May 1608; *PRO*, SP/14/32/40, fols.64r-71v, Speech of Justice Yelverton, 7 May 1608. Ellesmere's speech held among the State Papers is probably the copy that he sent to Salisbury in February 1608/09. *PRO*, SP/14/34/11, fols.28r-93v, Speech of Lord Chancellor Ellesmere, in the Exchequer Chamber, 1608; *Hatfield*, CP/194, fol.116r, Lord Chancellor to the Lord Treasurer, 3 February 1608/09; see also Knafla, *Law and Politics*, 185. Yelverton's speech is bound separately from the other materials related to the case due to the chronological reorganization of the State Papers in the nineteenth century. On this reorganization, see Natalie Mears, "State Papers and Related Collections," in *Understanding Early Modern Primary Sources*, ed. Laura Sangha and Jonathan Willis (London, 2016), 23-28. Salisbury retained a copy of the records relating to the underlying actions in Chancery and King's Bench among his papers. *Hatfield*, CP/276/2. On the history of the State Papers and the relationship between the State Papers and the Cecil Papers, see G.R. Elton, *England: 1200-1640* (Ithaca, 1969), 66-75, 157-58; Nicholas Popper, "From abbey to archive: managing texts and records in early modern England," *Archival Science* 10.3 (2010):249-66; Mears, "State Papers," 17-20.

[44] *Hatfield*, CP/194, fol.116r; *BL*, Hargrave MS 17, fol.211v; *JHR,* 349.

demurrer that "putt it in iudgm[en]t of the Court whether that [Colville's Scottish birth] make him an naturall borne subiect of the Realme of England or not."[45]

In addition to the surviving materials related to *Calvin's case* itself, valuable context for the proceedings can be gleaned from reports and speeches relating to the February 1606/07 Conference on Naturalization. This conference furnished a legal opinion authored by the most senior judges in England, Sir John Popham CJKB, Sir Thomas Fleming CB, and Coke CJCP, and assented to by a majority of the judges who would preside over *Calvin's case*.[46] In addition to Sir Francis Moore's published report on the conference, surviving manuscripts point to the emergence of arguments that would come to renewed prominence in *Calvin's case*.[47]

Taken together, these sources offer the prospect of illuminating the argumentative context that gave rise to Coke's dictum on infidels. By piecing together the lines of argument mobilized before the Exchequer Chamber, we can begin to grasp what led Coke to use this occasion to elaborate on the status of infidels at English law.

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45 *Hatfield*, CP/122, fol.121, Sir Roger Wilbraham to the Council, 11 October 1607; *Hatfield*, CP/122, fol.150, Sir Thomas Lake to Salisbury, 23 October 1607; *Hatfield*, CP/122, fol.157r, Sir Thomas Lake to Salisbury, 25 October 1607; *Hatfield*, CP/134, fol.116r, King James to Salisbury, ca. October 1607; *Hatfield*, CP/123, fol.176, The case touchinge the Post nati, ca. October 1607 (quoted); *Hatfield*, CP/194, fols.16-18. See also, Galloway, *Union*, 148-49.

46 Popham died before *Calvin's case* began. Croke, Foster, and Heron were not present at the conference. Moore's printed report makes no mention of Yelverton's attendance, though his name has been inserted into the list of judges present in a manuscript copy of Moore's report at the British Library. Walmsley, the sole dissenter at the conference, was joined in dissent in *Calvin's case* by Foster. Francis Moore, *Cases collect & report per Sir Francis Moore* (London, 1663), 805 [hereafter *FMR*]; *JHR*, 354; *BL*, Add. MS 8981, fols.1-30, at fol.21r, "An account of the conference between the lords and the commons relative to Scotland," 1606/07.

47 *FMR*, 790-805; *PRO*, SP/14/26/64, fols.133v-134v, Note of Coke's speech at the conference ... on the naturalization of Scots, 25 February 1606/07; *PRO*, SP/14/26/65, fols.135-36, Bacon's report of the first day's conference between the Lords and Commons on the question [of the post nati], 26 Feb 1606/07; *PRO*, SP/14/26/66, fols.137-38, Bacon's report of another conference, with the Lords on the same question, 2 March 1606/07; *BL*, Add. MS 48101, fols.126r-131r, Copy of Speeches of Sir John Popham, Lord Chief Justice, at a conference... concerning naturalization of the Post Nati, 26 February 1606/07.

Conquest and the common law

Nobody who gathered in the Exchequer Chamber to hear the arguments in *Calvin's case* doubted that James Colville was a natural-born subject of James Stuart, bound to the king by a relation of ligeance.[48] What was in dispute was whether Colville was James's subject in a sense that had implications at English law. Counsel for the defense argued that ligeance "followeth the kingdom," or the king body politic. Colville, on this view, could either be a liege subject of the King of Scotland, or a liege subject of the King of England, but not both.[49] In contrast, Bacon, for the plaintiff, insisted that allegiance "cannot be applied to the law or the kingdom, but to the person of the king," the king body natural. Ligeance, the Solicitor General argued, was a matter of natural law "because it began before laws, it continueth after laws, and it is in vigour where laws are suspended and have not their force."[50] Here, Bacon was following a path that had been cleared a year earlier by Coke, Fleming, and Popham at the Conference on Naturalization. Offering an idea of subjecthood well-suited to an emerging imperial polity, the judges held that even subjects who travelled beyond the realm remained bound by the relationship of ligeance. "The Kings law," they argued, "followeth his Allegiance out of the local limit of the laws of England."[51]

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48 Coke defined ligeance as the "true and faithfull obedience of the subiect due to his soueraigne." *CC*, 4v. On the history of ligeance, see Kim, *Aliens*, 137-43.

49 *SFB*, 650-51. Bacon delivered the first speech before the Exchequer Chamber. His refutation of the defense case referred to the arguments of "Mr. Walter" (perhaps John Walter, d.1630) at an earlier hearing in King's Bench. *SFB*, 642, 650ff; Wilfred Prest, "Walter, Sir John," *ODNB* https://doi.org/10.1093/ref:odnb/28635. Little survives of the defense case argued by Serjeant Richard Hutton and Laurence Hyde or the arguments of the Attorney General, Sir Henry Hobart, for Colville, though see *Huntington*, EL/1868, fol.6r; *PRO*, SP/14/34/10, fol.12r-12v.

50 *SFB*, 665. The doctrine of the king's two bodies, which according to David Norbrook only attained prominence in the context of the Stuart succession, was contested in *Calvin's case*. *SLCE*, 98-103; *JHR*, 354; David Norbrook, "The Emperor's new body? *Richard II,* Ernst Kantorowicz, and the politics of Shakespeare criticism," *Textual Practice* 10.2 (1996):329-57, 342-45.

51 *FMR*, 799. It was this distinction between the king's law and the territorially-circumscribed common law that meant, as Croke and Coke put it in *Calvin's case*, that the king's writs "mandatorie, and not remediall" could "commaund any of his subiects residing in any forraine Countrey to returne into any of the kings owne Dominions," while his writs mandatory and remedial could not reach beyond England. *FMR*, 804; *CC*, 20r

It was amidst these contending accounts of subjecthood that conquest made its first appearance in *Calvin's case*. Counsel for both sides agreed that conquered persons became subjects and that conquest was a mode of subjection that was "natural and more ancient than law."[52] At the Conference on Naturalization, moreover, the judges used the case of conquest to demonstrate that ligeance underpinned the law: "between soveraignty and allegiance, laws are begotten, and therefore in nations conquered there are no laws, yet is there present allegiance, and after allegiance gotten, it is secondary for the K[ing] to deliver laws to the people of his allegiance."[53] When a conqueror spared the lives of conquered peoples, these new subjects were burdened with the reciprocal obligation of allegiance.[54] Such conquered persons were denizens, rather than natural-born subjects, but as Bacon argued this was a distinction "not in matter, but in time."[55] Although by the eighteenth century the denizen would be treated as a subject with inferior rights, those gathered in the Exchequer Chamber in 1608 understood that once a person passed through the temporal threshold of denization, their subsequent actions were akin to those of a natural-born subject.[56] Discussing conquest, then, was a way to clarify the central concepts of ligeance and subjecthood that lay at the heart of the case.

(quoted); *PRO*, SP/14/34/10, fol.14r. On the geographic scope of prerogative writs, see Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, Mass., 2010), especially 84-87.

52 *SFB*, 646, 659.

53 *FMR*, 799.

54 *SFB*, 646.

55 If a denizen purchased "freehold after his denization, he may take it; but if he have purchased any before, he shall not hold it: so if he have children after, they shall inherit; but if he have any before, they shall not inherit." *SFB*, 648-49, quoted at 649. In his report, Coke sometimes wrote as if conquest only denizened the conqueror's subjects in the newly conquered territory. *CC*, 6r, 18r. But his discussions of Ireland make clear that conquered peoples were also denizened in the conquering country. *CC*, 17v, 23r; *PRO*, SP/14/34/10, fol.20r.

56 Cf. William Blackstone, *Commentaries on the Laws of England*, 4 Vols. (Oxford, 1765-69), 1:362. The rights of denizens could be qualified by letters patent, while only Parliament could effect subjecthood retrospectively. *CC*, 5v-6r, 7r.

In the context of the Stuart accession, however, the language of conquest had taken on a new political charge. As far back as Sir John Fortescue's writings in the fifteenth-century, the idea that England's laws had survived a succession of conquests had been used to stress their excellence, a point reiterated by Coke and Popham at the Conference on Naturalization. As Coke put it, although "many nations had conquered and inhabited this land"—Romans, Britons, Saxons, Danes, and Normans—"yett none of them had euer changed or ext[in]guished the fundamental laws of Engl[and]."[57] Five years earlier, in the preface to the second volume of his *Reports*, Coke had insisted that this was because "the auncient Lawes of this noble Island ... excelled all others."[58] But if this history of conquests testified to the excellence of the common law, to James's opponents in Parliament the Stuart accession threatened a conquest that would imperil England's ancient laws.[59] Responding to James's desire to unite England and Scotland into a Kingdom of Great Britain, a Committee of the House of Commons declared there to be "no Precedent, at home or abroad, of Uniting or Contracting of the Names of Two several Kingdoms, or States, into One Name, where the Union hath grown by Marriage, or Blood; and that those Examples, which may be alleged … are but in the Case of Conquest."[60] In 1604, "all the Judges of the Realme" confirmed this bleak view, arguing that if Parliament were to grant the King "the name of great Britany, there followeth necessaryly by our Lawes a distraction, or rather an utter extinct[ion] of all the Lawes now in force,"

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57 John Fortescue, *De Laudibus Legum Anglie*, ed. and trans. S.B. Chrimes (Cambridge, 1949), 38-41; *BL*, Add. MS 48101, at fol.129r; *FMR*, 797; *PRO*, SP/14/26/64, fols.133v. Coke first developed this argument in 1592. Smith, *Edward Coke*, 115-38. On seventeenth-century debates over the antiquity of the common law, see Christopher W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge, 2008), 122-23. On arguments about the multiple conquest, see J.P. Sommerville, "History and Theory: the Norman Conquest in Early Stuart Political Thought," *Political Studies* 34.2 (1986):249-61, 252-55.

58 Edward Coke, *Le Second Part Des Reportes* (London, 1602), Preface (unpaginated). George Garnett argues that Coke didn't intend these historical claims to be taken entirely seriously. Garnett, "ould fields," 260-64.

59 On the Parliamentary opposition, see Galloway, *Union*, 18-23, 93-136.

60 *Journal of the House of Commons* (London, 1802-), 1:188a. For the list of precedents, see *BL*, MS Harley 292, fol. 135, Concerning the three different kinds of Union, April 1604. As Claire McEachern notes, the king had presented Parliament with "an unusually bleak vision of colonialism, with England as the colonial territory." Claire McEachern, *The Poetics of English Nationhood, 1590-1612* (Cambridge, 1996), 142.

including "the very recognicons of the king in this Parliam[en]t to be lawefull possesser of the Crowne of England."[61] In this charged political context, Coke's decision to turn to the example of conquest in *Calvin's case* risked the appearance of opposition to the king's desired union.

Against this backdrop, it is tempting to read Coke's distinction between conquest and descent as a harbinger of his later parliamentary opposition to Stuart absolutism. On this view, when Coke limited the legislative power of those who acquired their kingdoms by descent, he aimed to stall the king's ambitions for a perfect union.[62] This certainly seemed to be the aim of the defense counsel in *Calvin's case* when they argued that territories acquired by conquest, like Ireland, were joined as a parcel of the conquering realm, subject to its laws, a condition that did not hold for James's accession in England by descent. Bacon spent a considerable amount of time refuting these claims. Ireland had become subject to English law not at the time of Henry II's conquest, he argued, but only with the extension of English laws over Ireland by a charter of King John. Moreover, the defense counsels' position was flatly absurd inasmuch as it held "that the law of England should *ipso facto* naturalize subjects of conquests, and should not naturalize subjects which grow unto the king by descent; that it should confer the benefit and privilege of naturalization upon such as cannot at the first but bear hatred and rancour to the state of England, and have had their hand in the blood of the subjects of England, and should deny the like benefit to those that are conjoined with them by a more amiable mean." Any distinction between cases of conquest and descent, Bacon insisted, "is but a device full of weakness and ignorance; and that there is one and the same reason of

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[61] *PRO*, SP/14/7/85, fol.284-85, at fol.284r, Cecil to Sir James Elphinstone, 28 April 1604. At the Conference on Naturalization, Coke claimed to have conceived of this opinion as Attorney General. *PRO*, SP/14/26/64, fols.133v; see also Garnett, "ould fields," 248-49; J.H. Baker, *The Reinvention of Magna Carta, 1216-1616* (Cambridge, 2017), 339-46. As Baker notes, the king apparently agreed that "immediately on our succession, divers of the ancient laws of this realm are ipso factor expired." Royal Proclamation, 20 October 1604, quoted in Baker, *Magna Carta*, 340. Nevertheless, twelve years later, James still resented the "foolish" opinion of his English Judges on the legal implications of union. James I, "A Speech in the Starre-Chamber," 20 June 1616, in Charles H. McIlwain, ed., *The Political Works of James I* (Cambridge, Mass., 1918), 329.

[62] Brooks, *Law, Politics, Society*, 132-35.

naturalizing subjects by descent, and subjects by conquest; and that is the union in the person of the king." Among his aims, then, was to "overthrow that distinction of descent and conquest."[63]

Coke, however, was unwilling to follow Bacon in overthrowing this distinction. To be sure, he agreed that the obedience owed to a prince in cases of acquired ligeance such as conquest or other denization was one with the obedience owed by the natural ligeance of birthright.[64] And he closely echoed Bacon's account of the conquest and extension of English law into Ireland, even insisting that prior to John's charter, when England and Ireland "were gouerned by seuerall lawes, any that was born in Ireland, was no alien to the realm of England."[65] But Coke nevertheless insisted that "seeing by the lawes of that kingdome hee doth inherit the kingdome," a king-by-descent "cannot change those laws of himselfe, without consent of Parliament."[66] Descent forged the same relationship of ligeance between king and subject that conquest did, but it did so by a different route. In making this argument, Coke was doing no more than affirming the common wisdom of the judges expressed in Parliament in 1604, namely that any alteration of the fundamental law that resulted from the renaming of the kingdom would imperil the king's own claim "to be lawefull possessor of the Crowne of England."[67] Far from limiting royal power, Coke was insisting that the king's absolute and unquestionable sovereignty depended on a proper appreciation of the distinction between descent and conquest. This was consistent with his abiding view, as David Smith presents

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63 *SFB*, 659-63.

64 *CC*, 4r-12v.

65 *CC*, 17v (quoted), 23r. When punitive action was taken against the Irish in England, it stemmed from the charge that they were "rebels" or "traitours," categories that applied to subjects rather than aliens. *By the Queene. A proclamation for suppressing of the multitude of idle vagabonds...* (London, 1594); *CC*, 7v, 24v.

66 *CC*, 17v. Smith suggests that Coke "advised that kings by succession ought not to change the laws on account of [their] reliance on them to protect their own title," but the direction was stronger here. Cf. Smith, *Edward Coke*, 265.

67 *PRO*, SP/14/7/85, fol.284r.

it, that it was only through the certain and secure application of the common law that the prince could fulfill his moral obligation to protect and deliver justice to his subjects.[68]

But if Coke shared Bacon's view that conquest and descent alike forged an unbreakable bond of ligeance between the king and his subjects, he sought to guard against the extent of this relation in the context of ongoing projects of European empire. By drawing a distinction between the conquest of Christian and infidel territories, Coke was not contributing to any clarification of the question at hand—this argument served no purpose in settling the status of Scots at English law. To understand this additional element, then, it is necessary to look elsewhere in the arguments before the Exchequer Chamber, to the discussion of the possible inconveniences that might result from the naturalization of the post-nati. The West Indies were of central importance to this discussion.

The American origins of Coke's infidel

It is a striking feature of Coke's remarks on infidels in *Calvin's case* that they diverge from his treatment of non-Christians in his later writings. Coke was aware, for example, that England had amicable trade relations with a wide array of non-Christians, not least through the activities of the Levant Company and the East India Company.[69] And in the first volume of his *Institutes*, he treated the case of "an alien enemie" apart from that of any "alien, Christian or infidel" who "purchase[d] houses, lands, tenements, or hereditaments." In such cases, he argued, aliens were able "to take a fee simple but not to hold," with the only exception being made for alien merchants "whose king is in league with ours." These merchant strangers could "take a lease for years" on "a house for habitation … as incident to Commercery, for without habitation he cannot merchandize or trade."[70]

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[68] Smith, *Edward Coke*, especially 8-10; see also Baker, *Magna Carta*, 346.

[69] Boyer, *Sir Edward Coke*, 46.

[70] Edward Coke, *The First Part of the Institutes of the Lawes of England* (London, 1629), 2a-2b.

Coke also insisted that the killing of infidels was a hanging offense.[71] And even though he ruled out alliances ("*fœdus mutui auxilia*") with infidels, Coke acknowledged that treaties of peace ("*fœdus pacis*") and commercial leagues ("*fœdus commercii*") "may be stricken between a Christian Prince and an Infidell" and that oaths sworn to "false gods" might be depended upon in such circumstances.[72] To be sure, he elsewhere appeared to treat infidels as a category apart: for example, he held that they were incapable of being called as witnesses, and that a Jewish widow whose husband had converted to Christianity could lawfully be barred of her dower because she had failed to convert.[73] But as J.H. Baker notes, the inability of an infidel to serve as a witness stemmed less from a theological matter than a technical one, given that oaths in English courts had to be sworn on the Bible.[74] Coke's remarks on the entitlement of a Jewish widow to her dower, on the other hand, were not specific to infidels; they were consistent with the treatment of any alien widow at common law.[75] Coke's tendency, then, was to treat non-Christians not as enemies, per se, but as perpetual aliens, and this was much the same point that he was concerned to advance in *Calvin's case*.

The occasion for this concern stemmed from the discussion before the Exchequer Chamber of the inconveniences that might attend any recognition of the post-nati as natural-born subjects in England based on a bond on natural ligeance between prince and subject. Highlighting the adverse implications of the union had long been a strategy of the king's opponents in Parliament. At the Conference on Naturalization, for example, Edwin Sandys, who was soon to be a leading member of the Virginia Company, warned of the disordering of the realm that could result if all those living

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71 Edward Coke, *The Second Part of the Institutes of the Lawes of England* (London, 1642), 508.

72 Edward Coke, *The Fourth Part of the Institutes of the Lawes of England* (London, 1644), 155. Coke's allowance for peace treaties is hard to square with the claim in *Calvin's case* that between infidels and Christians there "can be no peace." *CC*, 17r-17v. Cf. Tuck, "Alliances," 70-71.

73 Coke, *First Institutes*, 6v, 31v-32r.

74 Baker, *Magna Carta*, 112.

75 During *Calvin's case*, Altham and Yelverton both argued that a wife who was an alien could not inherit land in England. *Huntington*, EL/1868, fol.2r; *BL*, Hargrave MS 17, fol.217v.

under the king's power were subjects in England: "This case may give a dangerous example for mutual naturalizing of all nations that hereafter may fall into the subjection of the King, *although they be very remote*, in that their natural communalty of priviledges may disorder the setled government of every of the particulars."[76] Sandys did not specify the *very remote* regions that he had in mind, but the defense counsel in *Calvin's case* were explicit about it. While acknowledging that the case of Scotland might be exceptional, "being people of the same island and language," the defense worried that the plaintiff's argument "stayeth not within the compass of the present case." If the post-nati were naturalized simply because "they are subjects to the same king," this reason could "be applied to persons every way more estranged from us than they are." In the context of the king's continued efforts to secure a dynastic marriage between his heir and the Spanish *infanta*, the plaintiff's case introduced the very real possibility that "if in future time ... the dominions of Spain should be united with the crown of England," then "all the West Indies should be naturalized; which are people not only *a[l]terius soli* [of another soil], but *alterius cæli* [of another heaven]."[77] If naturalization resulted from a natural bond between king and subject, then ongoing European adventures in the Americas could threaten to overthrow England's legal order.

Refuting the arguments of defense counsel, Bacon took the point even further. Whatever objection they had to the implications of future dynastic marriages, all parties agreed that the same consequence would apply "in countries purchased by conquest." In a line of argument that would surely have called to mind the activities of the Virginia Company as well as English claims to America on the strength of the explorations of John and Sebastian Cabot, the Solicitor General argued that if Henry VII had "accepted the offer of Christopher Columbus, whereby the crown of England had obtained the Indies by conquest or occupation, all the Indies had been naturalized."

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76 *FMR*, 792 [emphasis added]; see also Hulsebosch, "Ancient Constitution," 448-49.
77 *SFB*, 658-59.

Since the defense had accepted "that subjects obtained by conquest are naturalised," their objections to the inconveniences attending naturalization by descent were "destroyed."[78] As Bacon saw it, the fact that Americans were infidels—people *alterius cæli*—in no way barred their naturalization.

We have already seen that Coke's report shared the central thrust of Bacon's reasoning, that ligeance bound the subject to the king's person rather than to his political capacity. And both men agreed that this bond of subjecthood was sufficiently plastic to contain those subjects who ventured beyond the realm. But Coke nevertheless sought to restrict Bacon's claim that "the law of England" opens "her lap to receive in people to be naturalized."[79] Instead, Coke drew a defensive perimeter around the laws of England to guard the realm against the disorders evoked by Sandys. Whether in the context of England's incipient imperial adventures or the proposed Spanish match, Coke sought out a solution that would sever the inhabitants of the West Indies (*alterius cæli*) from the reason of the case rooted in ligeance. If he was inspired in this direction by some enduring "medieval prejudices," he nevertheless took up this position in response to a new problem.

Before turning to how Coke established this defensive perimeter, and why he did so by way of appeals to infidel enmity, it is worthwhile noting that he was not alone among the judges in attempting to address this inconvenience. On the second day of the judicial speeches, and about a month before Coke rose to speak, Justice Croke also attempted to place limits on the theory of subjecthood advanced in *Calvin's case*. Rather than focusing on the exceptional character of non-Christians, Croke took up a different strand of the defense case, arguing that it was the case before the court—Scotland—that was exceptional. "The Iland was once all under one obedience," Croke

[78] *SFB*, 659. For claims to America based on the Cabot patent, see Richard Hakluyt, *Diuers voyages touching the discouerie of America*… (London, 1582), Epistle Dedicatorie, 3v. Bacon took conquest to be an "inforced submission," though his conflation of conquest with "discovery" and occupation was a commonplace in early modern England. *SFB*, 646; MacMillan, "Benevolent Conquest," 36-37; see also Samuel G. Zeitlin, "Francis Bacon on Imperial and Colonial Warfare," *The Review of Politics* 83.2 (2021):196-218, 199-200.

[79] *SFB*, 664. Bacon anticipated this reaction, suggesting that an act of parliament could be passed to prevent the denization of indigenous Americans in England. *SFB*, 659.

argued, at which time "all were naturalized in all parts." Now reunited again under the Stuarts, naturalization for Scots followed as the obvious consequence. A common country (*communis patria*) "is mother to us all and we haue our father w[hi]ch is [th]e k[ing]." Echoing the defense's concerns about a proposed Spanish match, Croke argued that should the king become "k[ing] of Sp[ain] or Emperor, all the post-nati in those kingdomes [were] not to be accounted naturalised in Eng[land]." The difference was that England and Scotland, "are *conterranea,*" the others—Spain and its territories, including the Indies—"*exterranea*."[80] It was the deep roots shared by England and Scotland, on this view, that underpinned the naturalization of the post-nati, a reason that could not extend to encompass the inhabitants of either Catholic Spain or the Indies.

But it was Justice Yelverton who was to bring the status of the infidel at English law into view. "Every Alien that is not an enimie to the Realme may lawfullie & freely come into the realme without any Safe conduit, or any other lycence of the kinge," Yelverton noted, "for the law of nations which Comon reason hath established amongst men and is observed a like in all nations ... doth priviledg him to doe itt." Although such aliens could not own land in England, the law nevertheless afforded them protection for their goods and their persons. But should the subject of an enemy prince enter the realm during wartime, "as w[i]th an enemie in warr" a subject of the king could "take him prisoner, Ransome him, and possesse his goods."[81] Here, the infidel was introduced as a special case: "if a Pagan come into England and a man doe him violence he can haue noe acc[i]on for his recompence." If a Christian enemy of the king was "a private enemie to the Realme," the pagan was "a com[m]on enemie not only to the realme but to all Christendome."

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[80] *PRO*, SP/14/34/10, fol.14r-14v. Counsel for the defense acknowledged that the Scots might constitute a special case, "being people of the same island and language." *SFB*, 658.

[81] *BL*, Hargrave MS 17, fol.218v; Yelverton followed Altham here. *Huntington*, EL/1868, fols.2r, 5r. Coke identified an exception for "*inimicus permissus*, an enemie that co[m]meth into the realme by the kings safe co[n]duct." *CC*, 18r.

Yelverton offered this procedural observation without context, and he had nothing more to say about pagans. Nor did he connect this remark to the wider question of conquest. On the contrary, he insisted this was a subject "farr beyond my reatch."[82] But when Coke sought to establish a bulwark around the common law, he did so on the foundation that Yelverton laid for him here.

In his remarks before the Exchequer Chamber, Coke first mentioned conquest as a means by which an alien-born could enter a relation of ligeance with the king.[83] But the figure of the infidel made its appearance when he returned to the theme of conquest later in his speech. Hawarde's report sketches this turn to the infidel most fully:

> The Isle of Man [is a] possession by conquest and by legal title. Let the law bestow upon the king, what the king bestows upon the king.[84] A conqueror may change the law where he had it by conquest and the inhabitants are infidels, but otherwise where they are Christians. Register. 282. [They] are enemies to Christ [and] will be judged by natural equity.
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> 2 Letter to Corinth., [6] 15. What has God to do with Belial. Christian laws remain until new [laws] are made.[85]

Coke continued with a typology of relations one could have to the king, whether alien or subject:[86]

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[82] *BL*, Hargrave MS 17, fols.218r, 219r.

[83] *JHR*, 356; *PRO*, SP/14/34/10, fol.20r.

[84] Hawarde's "*attribuat lex regi, q[uo]d rex attribuat regi*" seems to be a mis-transcribed reference to Henry de Bracton: "*Attribuat igitur rex legi, quod lex attribuit ei, videlicet dominationem et potestatem. Non est enim rex ubi dominatur voluntas et non lex* [Let the king therefore bestow upon the law what the law bestows upon him, namely, rule and power. For there is no king where will rules rather than law]." Coke did not include this citation in his report on *Calvin's case*, though he included it in the preface to the fourth volume of his *Reports*. He may have referenced it here to suggest that even in cases of conquest kingly rule entailed rule-by-law. *Bracton on the laws and customs of England*, 4 Vols., ed. G.E. Woodbine, trans. S.E. Thorne (Cambridge, Mass., 1968), 2:33 [translation modified]; Edward Coke, *Le Qvart Part Des Reportes* (London, 1604), Preface, [C1]r. On the popularity of this citation to Bracton and Coke's uses of it, see Cromartie, *Constitutionalist Revolution*, 15-17, 208-09; Smith, *Edward Coke*, 259-60.

[85] *HRC Pforz/1.40*, 344 (my translation).

[86] Bacon had developed a similar typology. *SFB*, 647-49.

alien is twofold — friend or / enemy

enemy — perpetual. infidel. / temporary. / permitted.

subject is — made or / born.[87]

In his published report, Coke reversed the ordering of this material and elaborated further. "Everie man is either *Alienigena*, an alien borne, or *subditus*, a subiect borne."[88] If an alien could be either a friend or an enemy, depending on the disposition of his prince toward the English king, a subject—like James Colville—could not be comprehended under such terms. As Coke put it in the conclusion to his report: "Every stranger borne must at his birth be either *amicus* [friend], or *inimicus* [enemy]: But Caluin at his birth could neither be *amicus* nor *inimicus*; *ergo* he is no stranger borne. *Inimicus* he cannot be, because he is *subditus*, and for that cause also he cannot be *amicus*."[89] It was this impossibility of being at once subject and stranger that separated a post-natus like Colville, from the *ante-nati*, who remained subjects of James VI of Scotland but were not naturalized at English law.[90]

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87 *HRC Pforz/1.40*, 345 (my translation). The manuscript sources differ here. The report among the State Papers makes no mention of infidel conquest but elaborates on *inimicus perpetuus* with "as a Turke because he is Enemy to soule and body." *PRO*, SP/14/34/10, fol.22v. The reporter probably ran together Coke's typology of statuses with his citation to Register 282, which concerned conflicts between Christians and Muslims. The reliability of Hawarde's report is suggested by its correspondence with Ellesmere's notes. *Huntington*, EL/1872, fols.3r-3v.

88 *CC*, 17r.

89 *CC*, 25r.

90 Ellesmere worried that the distinction between ante-nati and post-nati might "cut in peeces all the threeds of Allegeance." *SLCE*, 115.

Specifically, the ante-nati could not be natural-born subjects, Coke argued, because of the lingering presence of Queen Elizabeth in the king's political body. "No man can be an Allien by birth but he that may be an Enemy by accident," Coke claimed. The post-nati could not be enemies of the king "by accident" because their prince, James Stuart, could never go to war with himself. However, "the Antenati might have bin Enemies in ye Queenes time therfore they [are] excluded owt of this rule."[91]

If Christians might be accidental enemies on account of the temporary disposition of their prince, Coke echoed Yelverton in contrasting this to the condition of infidels, who were accounted "perpetuall enemies ... for betweene them, as with the diuels, whose subiects they bee, and the Christian, there is perpetuall hostilitie, and can be no peace." Infidels would be unable to "maintaine any action, or get any thing within this Realme," because "a Pagan cannot haue or maintaine any action at all," even in the absence of any "warres by fire and sword." And although the conversion of infidels to Christianity would have defeated this defect, Coke argued that legal reasoning could not begin from the presumption of their conversion, "that beeing *remota potentia*, a remote possibilitie."[92] An infidel, on this view, was incapable of the true and faithful obedience that constituted ligeance at English law.

It was on the basis of this typology that Coke drew the further distinction within his remarks on conquest between the cases of conquered Christian and infidel territories. Recall that Coke argued that the conqueror of a Christian territory could change the laws at will, but until he did so, the ancient laws of the conquered realm remained in force.[93] But, if a Christian prince "should conquer a kingdome of an Infidel, and bring them vnder his subiection, there *ipso facto* the lawes of

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[91] *PRO*, SP/14/34/10, fol.23r; also *CC*, 24v. As Fleming put it, "Queene Elizabethe dothe yet lyve in the person of the kinge." *JHR*, 362.

[92] *CC*, 17r-17v. This echoed Bacon's claim that "the law doth never respect remote and foreign possibilities." *SFB*, 662.

[93] *CC*, 17v. Cf. Coke, Fleming, and Popham at the Conference on Naturalization: "in nations conquered there are no laws." *FMR*, 799.

the Infidel are abrogated, for that they be not onely against Christianitie, but against the law of God and of nature."[94] Citing Aristotle's *Politics* and Cicero's *De Legibus*, which he found affirmed in the common law writings of Bracton, Fortescue, and Christopher St. Germain, Coke was insisting that "whatsoeuer is necessarie, and profitable for the preseruation of the societie of man," not least "magistracie and gouernement," is "due by the law of nature."[95] Because the laws of infidels were supposedly contrary to reason—and so to natural law—infidel kingdoms could not be said to have government, properly understood. In short, and consistent with the Ciceronian view that positive laws that violate the law of nature lack legal force, Coke was arguing that the law of the infidel was no law at all.[96]

When Coke sought warrants for these claims in his report, he returned to the two sources that he invoked in his speech: the claim in Paul's second letter to the Corinthians that covenants between Christians and infidels were invalid,[97] and a writ of protection in Chancery granted to the hospital of St. John of Jerusalem that identified it as a defender of the Church against the "enemies of Christ and Christians."[98] But he also invoked two additional sources of support. From the canon

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94 *CC*, 17v.

95 *CC*, 13r; citing Aristotle, *Pol.*, 1252b27-1253a1; *Cic.*, *Leg.*, 3.1.3. Coke concurred with Bacon, Ellesmere, and Fleming that the "law of nature is part of the laws of England." *CC*, 4v (quoted); *SFB*, 664; *SLCE*, 32; *PRO*, SP/14/34/10, fol.21v, 24v. On the influence of Aristotle and Cicero on common lawyers, see Brooks, *Law, Politics, Society*, 23-29, 67. On Coke's debts to Cicero, see Smith, *Edward Coke*, 151, 154-55. On the need to reach beyond English law to address the questions posed by the proposed union, see Burgess, *Absolute Monarchy*, 101-02.

96 See *Cic.*, *Leg.*, 2.5.13. That Coke's argument appealed to the preeminent authorities of pagan antiquity suggests the scope he intended for his remarks on the defects of infidel law. Toward the end of his report, he also found evidence for his core claims about ligeance in "the law of a heathen Emperor." When St. Paul was arrested in Jerusalem, Coke argued that although "Paule was a Jew, borne at Tarsus in Cilicia, in Asia Minor, ... yet beeing borne vnder the obedience of the Romane Emperor, hee was by birth a Citizen of Rome in Italie in Europa, that is, capable of and inheritable to all priuiledges and immunities of that Citie." Those who argued against Colville's natural subjecthood in England, Coke argued, "might haue made Saint Paule an Alien to Rome." Absent here is any incompatibility between natural law and the laws of non-Christians. *CC*, 24r. Coke discussed Paul's arrest immediately before stating his dictum on infidels. *HRC Pforz/1.40*, 344.

97 2 Cor. 6:15; *CC*, 17v.

98 *Registrum omniu[m] breuium tam originaliu[m] q[uam] iudicialium* (London, 1531), 282v (my translation).

law, he found in his copy of *Decretales Gregorii IX* an injunction against selling a Christian as a slave to a Jew on the grounds that a person who Christ had redeemed could not be rightly held in bondage by a blasphemer.[99] But it was the last of the precedents cited by Coke that arguably provided the most direct support for his claims about the status of infidels in England and that, as we shall see toward the end of this essay, was to draw the strongest criticism from later readers. In the Year Book of 12 Henry VIII (1520), Coke found a dictum of Justice Richard Broke in the Court of Common Pleas that seemed to support Yelverton's earlier assertions about the legal incapacity of infidels: "if a lord beats his villein, or a husband his wife, or someone beats an outlaw, traitor or heathen: these people shall have no action, because they are unable to sue."[100] What this citation underscored was the procedural incapacity of infidels at English law. Whatever status they might have in England, it would never be the status of the subject, properly understood.

Had Coke intended for his remarks on infidel conquest to serve as a justification for colonization, or "to embed a presumption" of a right of conquest over infidel territories "in his common law for ease of future reference," Broke's dictum about the procedural disqualification of heathens in common law courts was surely a strange place to look for support.[101] He might instead have turned to the writings of the canonist Hostiensis, who had argued that infidels should be subject to the rule of Christian princes and whose views had gained renewed prominence against the backdrop of the Spanish conquests in the Americas.[102] Moreover, had he intended a more punitive

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99 Coke included no citation, but Tuck identified the source as *Decretales Gregorii IX,* 5.6.1. Tuck, "Alliances," 70n27; Bernardo Bottoni, Lodovico Bolognini, and Raymond, *Decretales D. Gregorii Papae IX: svae Integritati Vna Cvm Glossis Restitvtae* (Rome, 1582), 1654-55. For Coke's copy, see W.O. Hassall, ed. *A Catalogue of the Library of Sir Edward Coke* (New Haven, 1950), no.442.

100 *Fyloll v. Assheleygh* (1520), in *Year Books of Henry VIII. 12-14 Henry VIII. 1520-1523*, ed. J.H. Baker (London, 2002), 15.

101 Cf. Williams, *American Indian*, 199-200 (quoted); Loughton, "Calvin's case," 178-80.

102 Loughton, "Calvin's case," 176-78. On Coke's familiarity with works in this tradition and his citations to them, see R.H. Helmholz, *The* Ius Commune *in England: Four Studies* (Oxford, 2001), 4.

attitude to infidels in England, he could have turned to the arguments of Robert Brooke in his 1551 reading at Middle Temple on chapter 17 of *Magna Carta*. There, Brooke staked out an exceptional position within the common law tradition, arguing that the murder of "a Turke or a Jew [who] cometh into England without the Kings licence ... is not felony; for hee is neither of the faith of Christ, nor under the Kings protection."[103] That Coke eschewed such authorities raises doubts about the idea that he aimed to justify colonial conquests. It is also noteworthy that Coke identified clear obligations that a conquering Christian prince had toward conquered infidels. A conqueror was obliged, for example, to judge infidels and their causes "according to natural equitie."[104] Like the relation of ligeance itself, judgment according to equity was a matter of the law of nature, that "eternall law of the Creator, infused into the heart of the creature at the time of his creation."[105] By insisting on the equitable treatment of infidels, Coke was arguing that judgment by the king and his agents according to natural equity was the appropriate form of rule before true laws had been settled.

Nor do Coke's remarks suggest that the contrast between infidel and Christian conquests was intended to reinforce his long-standing account of the survival of England's laws in the context of the Norman conquest.[106] According to Coke's argument in *Calvin's case*, there was no doubt that Duke William *could* have altered all of England's laws at will: "for if a king come to a Christian kingdome by conquest, seeing that he hath *vitæ & necis potestatem* [power of life and death], hee may at his pleasure alter and change the lawes of that kingdome."[107] That William retained the common

103 Robert Brooke, *The Reading of M. Robert Brook, Serjeant of the Law, and Recorder of London, Upon the Stat. of Magna Charta, Chap. 17* (London, 1641), 8. On the defect in Brooke's view, see Baker, *Magna Carta*, 112n9.

104 *CC*, 17v. According to Bacon, this equitable rule applied to any alien enemy who came into the realm with safe conduct as "he can have no remedy in any of the king's courts." *SFB*, 648.

105 *CC*, 13r. Coke was alluding to *Cic.*, *Leg.*, 1.6.18-19, 2.4.8.

106 Cf. Hulsebosch, "Ancient Constitution," 465-66n127; Cavanagh, "Infidels," 385.

107 CC, 17v. Cf. Pocock, *Ancient Constitution*, 53.

law merely testified to its peculiar excellence.[108] Invoking a hypothetical rule about the automatic abrogation of infidel laws on conquest added nothing here.

One final puzzle is worth considering when trying to make sense of Coke's discussion of infidel conquest, namely the tension between the idea that infidels were perpetual enemies and the idea that the conquest of infidels entailed "bring[ing] them vnder … [the king's] *subiection*."[109] If infidels were perpetual enemies, then on Coke's account they were necessarily aliens. Inverting Coke's remark about Colville, we might say of the infidel: *Subditus* he cannot be, because he is *inimicus perpetuus*. Coke here placed the infidel in a category of subjection without subjecthood, a situation that bore some resemblance to the treatment of the ante-nati. Although subject to James I, conquered infidels would not be subjects at English law, having no right to own land in England, nor to maintain an action at common law. Coke's turn to Broke here looks less like an effort to argue that infidels could be rightfully conquered than a support for the idea that, once conquered, they should be *disqualified* at English law. Indeed, it makes sense that he might use the occasion of *Calvin's case* to make this observation given that this action, as Edward Cavanagh puts it, was all "about the reception of foreign-born subjects" in England.[110] By turning to the figure of the infidel, Coke addressed the inconveniences that Sandys and the defense counsel in *Calvin's case* worried might arise from recognizing the post-nati as natural-born subjects in England at the same time that he guarded against Bacon's claim that the Spanish match or English conquests in the Americas could naturalize all the West Indies in England.

Thus far, I have argued that Coke's account of the legal disqualification of infidels at English law should be understood as a direct response to the arguments before the Exchequer Chamber in

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108 *PRO*, SP/14/26/64, fols.133v; see also Coke, *Second Reportes*, Preface (unpaginated); Edward Coke, *La Size Part Des Reports* (London, 1607), Preface (unpaginated).

109 *CC*, 17v [emphasis added].

110 Cavanagh, "Infidels," 383.

Calvin's case. By distinguishing between conquered Christians and Infidels, Coke both affirmed the king's project of union and foreclosed the naturalization of peoples *alterius cœli* who might come under the king's power by way of imperial projects. Far from a permissive rule of colonial conquest, this was an anxious effort to fortify the common law against the threat posed by a new world of empires.

But the fact that Coke developed his remarks on infidels in response to the arguments before the Exchequer Chamber does not mean that the wider context—in particular, the affairs of the Jamestown colony—played no role in his thinking. Indeed, there are sound reasons to conjecture that as Coke was putting the final touches to his remarks before the Exchequer Chamber, he may have had the unfolding fate of the Jamestown plantation at the forefront of his mind.

English law in the shadow of Tsenacommacah

On the final day of hearings before the Exchequer Chamber, and two days after Coke delivered his speech, Ellesmere returned to the topic of conquest to deliver a stinging rebuke to those who had sought to draw the "conceipted difference" between territories acquired by conquest and those acquired by descent. The lord chancellor rejected the argument, first advanced by Croke, that in a country "gotten by Conquest, ... the Conquerour may impose what Lawes hee will vpon them: But it is otherwise in kingdomes comming by discent." This position, he insisted, "lacks the foundation of Reason."[111] "Soueraignetie is in the person of the King," and because the subject was bound to the king's person, how a kingdom was acquired did not alter the nature of obligation or ligeance. It was

111 *SLCE*, 67; Cf. *PRO*, SP/14/34/10, fol.14r. Although Ellesmere praised Coke's speech, his notes from the Exchequer Chamber register Coke's commitment to this distinction between conquest and descent. *SLCE*, 79; *Huntington*, EL/1872, fol3r.

this singular sovereignty that allowed the king's seal to reach beyond the realm and to "commaund his subiects, if they be in France, Spaine, Rome or Turkie, or the Indies."[112]

Turning to the question of the proper basis of legal reasoning, Ellesmere identified what he took to be the gross error behind the distinction between conquest and descent. The matter before the chamber, he insisted, ought to be determined by "the depth of reason, not the light and shallow distempered reasons of common Discoursers walking in Powles, or at Ordinaries, in their feasting and drinking, drowned with drincke, or blowne away with a whiffe of Tobacco."[113] He was referring here to the popular conduits by which information circulated through Jacobean London, from the Royal Exchange to St. Paul's Churchyard, whence the latest news and gossip ("Paules talke") would work its way through the taverns and inns along Fleet Street and the Strand en route to Westminster Hall.[114] Those listening to Ellesmere's speech may have heard in the reference to discourses "blowne away with a whiffe of Tobacco" an evocative reference to the affairs of the Virginia Company.[115] Although we lack any definitive basis to conclude that the lord chancellor took enthusiasm for the distinction between descent and conquest to be a result of the influence of reports from the Americas, there is reason to conjecture that the affairs of the embryonic settlement in Tsenacommacah may have added weight to the concerns of those gathered in the Exchequer Chamber during the closing days of *Calvin's case*.

On May 21, 1608, two weeks before Coke delivered his speech, Captain Christopher Newport arrived at Blackwall from Jamestown. Newport brought with him a Powhatan envoy,

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112 *SLCE*, 73-74.

113 *SLCE*, 84.

114 *PRO*, SP/14/34/10, fol.26r (quoted); Adam Fox, *Oral and Literate Culture in England, 1500-1700* (Oxford, 2000), 346-50.

115 The king had earlier condemed tobacco-smoking as an imitation of "the barbarous and beastly maners of the wilde, godlesse, and slauish Indians." James I, *A Covnterblaste to Tobacco* (London, 1604), B[1]v; see also Working, "Locating Colonization," 37-38, 41-50.

Namontack, as well as the first reports of the fate of the colonists who had departed England in December 1606.[116] The news was not good. On arriving in Jamestown in January 1607/08, Newport was confronted with a pathetic sight. Illness and attacks by neighboring indigenous polities had left the settlement much-depleted and riven with factional strife. Of the 104 men Newport had left behind the previous July only around thirty-eight survived, and of the six members of the Council in Jamestown, the colony's first president Edward-Maria Wingfield had been deposed, Bartholomew Gosnold had died, George Kendall had been executed on suspicion of planning a mutiny, and John Smith had been condemned to death. To make matters worse, two days after Newport's arrival with the first supply, most of the settlement was burned to the ground. The ensuing winter proved equally harsh, killing as many of half the remaining colonists. Only around fifty-three settlers remained in Jamestown when Newport departed for England in April 1608.[117]

If Newport's reports from the colony were discouraging, the accounts of the colonists were even more bleak. Newport was accompanied by Wingfield, and he brought back a copy of George Percy's relation of the early settlement. Together, their reports left a grim impression of a chaotic enterprise that depended for its survival on willingness of the neighboring Powhatans to provide the settlers with food. This dependence must have appeared especially troubling when set alongside stories of runaway colonists, indigenous treachery, and cannibalism. So disorderly was the colony that Wingfield urged that its governors ought to be "more sparing of law" until the colonists had "more witt, or wealthe."[118]

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[116] On Namontack, see Alden T. Vaughan, *Transatlantic Encounters: American Indians in Britain, 1500-1776* (Cambridge, 2006), 45-50.

[117] Brown, ed., *Genesis*, 1:151; Alexander Brown, *The First Republic in America* (Boston, 1898), 53-58.

[118] E.M. Wingfield, "Discourse," in *The Jamestown Voyages Under the First Charter, 1606-1609*, 2 Vols., ed. Philip L. Barbour (Cambridge, 1969), 1:213-34, at 219-24, quoted at 224; George Percy, "Observations," in Barbour, *Jamestown Voyages*, 1:129-46, especially 130, 144-45.

News of the colonists' fate quickly circulated around London, making its way into the Spanish ambassador's diplomatic correspondence within a matter of weeks.[119] And there is every reason to suspect that those gathered in the Exchequer Chamber were keenly attuned to the company's affairs. Salisbury and Bingley would both be listed as members of the Virginia Company in the 1609 patent, and Bacon and Sandys were to serve on the governing council based in London. Prior to his death in 1607, Popham had been an avid proponent of the company's affairs and had led efforts to establish a colony at Sagadahoc in 1606. Indeed, his brethren judges may well have met and spoken with the captive Abenaki sagamore, Tahanedo, who lived in Popham's London residence between 1605 and 1607.[120] It seems likely, therefore, that as news of Newport's return and the fate of the Jamestown colonists travelled from Blackwall to the Royal Exchange and on through St. Pauls' Churchyard to the taverns along Fleet Street, it would have found a receptive audience in Westminster Hall.

Accounts of unruly English settlers living amidst supposedly mercurial indigenous peoples must surely have confirmed the prejudices of an English audience committed to norms of hierarchy, order, and civil government. But they also underscored the importance of the institutions of the common law, the erosion of which so worried Coke. Reports of renegade Englishmen who had supposedly attempted to abandon not only God, but also law and civility, to take up life among the Powhatans must have weighed on those contemplating the bonds of obligation and ligeance that bound a subject to the English king and secured the legal order in turn.[121] Coke was to warn against precisely this flight from order the following year when he alluded to the conventional figure of the

119 Don Pedro de Zuñiga to Philip III, 16/26 June 1608, in Brown, *Genesis,* 1:172-79.

120 Vaughan, *Transatlantic Encounters*, 60-65. On metropolitan interest in indigenous visitors to London, see also Coll Thrush, *Indigenous London: Native Travelers at the Heart of Empire* (New Haven, 2016), 1-61.

121 Wingfield, "Discourse," 1:216.

renegade and stressed the importance of regulating those who traded to infidel lands to prevent them from "adher[ing] to infidelism."[122]

In response to the colonists' reports, the Virginia Company engaged in a wholesale reorganization of the colony's government. In the second patent, issued a year after *Calvin's case*, James dismantled the erstwhile "Government, Power and Authority of the President and Council … and all Laws and Constitutions by them formerly made." Complete control of the colony was now to reside with a Governor appointed by the London Company, who would bear "full Power and Authority, to use and exercise Martial Law in Cases of Rebellion or Mutiny."[123] Virginia, it seems, was to be treated in a manner along the lines of that which Coke had attributed to conquered infidel kingdoms, as a place that lacked "certaine municipall lawes."[124]

We might hazard, therefore, that as Coke crafted his judicial speech in *Calvin's case* with one eye on its consequences for the present and for all posterity, he may have recalled Sandys's warning that naturalizing conquered peoples in far distant lands could ultimately destabilize the English body politic. This warning would have been given extra weight by reports, like George Percy's, of America's "vild and cruell Pagans"—the "mortall enemies" of the English—and of the disorder into which English colonists had fallen when they ventured beyond the realm and its laws.[125] Fueled by anxieties born of colonial accounts of Europe's Others, Coke may have seen a new value to Yelverton's discussion of pagans. As he further developed this argument in his report, he looked to the Year Books to search out firmer ground for his view, where he found Broke's dictum foreclosing infidel subjecthood. By arguing for the legal disability of those non-Christians who fell

122 *Michelborne v. Michelborne* (1609), 123 E.R. 952. On renegades, see Nabil I. Matar, "The Renegade in English Seventeenth-Century Imagination," *Studies in English Literature* 33.3 (1993):489-505.

123 Second Virginia Charter, 3798, 3801. Bilder identifies *Calvin's case* as the source for other features of the second charter. Bilder, "Charter Constitutionalism," 1584-86.

124 *CC*, 17v.

125 Percy, "Observations," 1:145.

under the king's power, Coke was attempting to bar the door against a Trojan Horse that might otherwise be drawn into the realm by way of England's ongoing imperial adventures. Far from seeking to bolster England's colonial claims abroad, Coke's dictum on infidels was intended to protect the legal order at home.

Law, history, and the shifting context of Coke's report

Thus far, I have suggested the possible yield of marrying the methods of contextualist intellectual history with techniques of legal history to illuminate the arguments that shaped Coke's dictum on infidels in *Calvin's case*. I have suggested that Coke's intention in making these remarks was to secure the integrity of the common law in the context of European imperialism in the Americas, both Spanish and English. But, as Fasolt notes, to tell the truth about the past requires us to concern ourselves not only with "what ... past people *thought* they were saying and doing" but also with "what they *were* saying and doing."[126] After all, when Coke sought to exclude infidels from subjecthood and defend the English legal order from a possible threat posed by imperial expansion, he did so by depicting Native Americans as hostile and ungoverned persons, estranged from the laws of God and of nature. Far from urging against colonialism, this was a depiction that seemed only to excite interest in colonial enterprises. The first Virginia charter, for example, the drafting of which Coke had overseen as Attorney General, offered a similar—if more irenic—account of the native peoples of Tsenacommacah. There, the king encouraged the spread of Christianity to those who lived "in Darkness and miserable Ignorance of the true Knowledge and Worship of God," and aspired to a time when the English would "bring the Infidels and Savages living in those parts, to human Civility, and to a settled and quiet Government."[127] Against the backdrop of these aspirations to transform

126 Fasolt, "History, Law, Justice," 458.
127 First Virginia Charter, 3784.

the American Other into a civil, Christian subject, what Coke intended by his remarks on infidels was easily eclipsed by what those remarks meant to readers of his report.[128]

Within months of the report's publication, Robert Gray would deliver a sermon in defense of the Jamestown settlement that some have seen as the first application of Coke's supposed rule of infidel conquest. Marrying the aspirations of the Charter with Coke's dictum on infidels, Gray argued "that a Christian King may lawfullie make warre uppon barbarous and Sauage people, and such as liue vnder no lawfull or warrantable gouernment, and may make a conquest of them." In the absence of a government recognizable to the English, the souls of Native Americans would be won for Christ by the same conquest that would impose the foundations of a civil order.[129] Three decades later, in a 1647 dispute before a Parliamentary Committee over the Earl of Carlisle's patent for Barbados, Coke's dictum was referenced in a like register. In order to contest competing claims to the island based on private conquest or purchase from indigenous peoples, Carlisle's counsel argued that "all heathe[n]s are enimies to Christian kings whome the Subiect may Lawfully Conquerr for his Soveraigne, but cannot appropriate vnto themselves in point of a Legall interest, without his graunt." Without citing Coke by name, he based this claim on "a Maxim in the Lawes of England," namely "that all Infidells are p[er]petui inimici, alwaies enemies."[130] Here, the dictum on infidels served to bolster royal authority in a manner that would have met little resistance from Coke in 1608. But it also licensed—encouraged, even—the conquest of non-European territories in a

128 Constantin Fasolt, *Past Sense: Studies in Medieval and Early Modern European History* (Leiden, 2014), 26-27. Skinner is alert to the possible distinction between what an author intended to say and what their text said. Skinner, *Regarding Method*, 110-11.

129 Robert Gray, *A good speed to Virginia* (London, 1609), C[4]r-C[4]v, quoted at C[4]r. On the possible link to Coke, see Williams, *American Indian*, 210.

130 Trinity College, Dublin, MS 736, pp.165-81, at 166-67, 169, The case concerning … Carlisles Interest in the Barbados and Caribee Islands, n.d. For discussions of this dispute, see James A. Williamson, *The Caribbee Islands under the Proprietary Patents* (London, 1926), 125-29; Brian Slattery, "The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of their Territories." (Ph.D. dissertation, University of Oxford, 1979), 16.

manner remote from Coke's aims. Despite his intentions, as I have outlined them, Coke's report had indeed introduced a rule of colonial conquest into the common law.[131]

Here we are confronted with a peculiar feature of the law's temporality, the fact that *as law* it functions by way of an ever-shifting frame of reference that exceeds the narrow intentions of those who author it. As Martti Koskenniemi puts it, the relevant context of a particular legal text "cannot be strictly limited to the chronological moment in which … [an author] lived and where his intentions and projects were formed." One must also consider the wider processes of historical transformation to which an author was contributing, whether consciously or unconsciously.[132] The claim that law makes on the future has led some legal scholars to pose a serious challenge to the kind of contextualist reading that I have employed thus far, especially in recent debates on the history of international law.[133] Because contextualism assumes that the past is both immutable and absent, and because it repudiates any hint of anachronism,[134] critics charge that it tends to misread the shifting dynamics of legal practice.[135] The contextualist intellectual historian who emphasizes questions of doctrine over those of practice overlooks the "uneasy position" familiar to legal historians whose task is to chart a course between the distinct preoccupations of lawyers and historians, not least by accommodating themselves to the different temporalities of law and history.[136] As Anne Orford puts

131 Loughton, "Calvin's Case," 178-80.

132 Martti Koskenniemi, "Vitoria and Us: Thoughts on Critical Histories of International Law," *Rechtsgeschichte* 22 (2014):119-38, quoted at 125; see also Fasolt, *Limits*, 11-12, 209-15.

133 Anne Orford, "On international legal method," *London Review of International Law* 1.1 (2013):166-97. Orford's position has elicited much criticism, and she has responded at length. See, for example, Andrew Fitzmaurice, "Context in the History of International Law," *Journal of the History of International Law* 20.1 (2018):5-30; Lauren Benton, "Beyond Anachronism: Histories of International Law and Global Legal Politics," *Journal of the History of International Law* 21.1 (2019):7-40; Wheatley, "Time of Angels," especially 321-27; Anne Orford, *International Law and the Politics of History* (Cambridge, 2021).

134 Fasolt, *Limits*, 4-16.

135 Orford, *International Law*, 182. Some legal historians characterize this oversight itself as anachronistic. Milsom "Law and Fact," 2-3.

136 Musson and Stebbings, "Introduction," in *Making Legal History*, 4 (quoted).

it, contextualists ignore the fact that the art of legal practitioners is to "mak[e] meaning move across time," and therefore that something like anachronism is central to legal practice and to the shifting reception of legal precedents.[137] Legal scholars who turn to the past in ways that offend the sensibilities of historians do so, she argues, "because the operation of modern law is not governed solely by a chronological sense of time in which events and texts are confined to their proper place in a historical and linear progression of then to now."[138] Contextualist intellectual historians who wade into the terrain of the law, therefore, tend to do so not objectively and impartially, as Orford takes them to suppose, but on one side of an ongoing political dispute over the law.[139]

My own methodological choices in this paper notwithstanding, I have some sympathy for Orford's critique of contextualism, and I remain taken with Fasolt's challenging "affirmation of anachronism" on which she, in part, builds.[140] Nevertheless, by turning to the subsequent history of Coke's report on *Calvin's case* I wish to raise a doubt about Orford's claim that the historian's "attacks on anachronism ... challenge the core of legal method more generally."[141] My aim here is not to rescue historians from Orford's critique. Instead, it is to question Orford's own claim that the legal profession stands on a ground apart from that of the historian.[142]

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137 Orford, "International legal method," 172. For a critique of this claim, see Wheatley, "Time of Angels," 326.

138 Orford, "International legal method," 175. On the variety of approaches lawyers take to the past, see Orford, *International Law*, 1-12, 18-104, 178-252.

139 Orford, *International Law*, 243, 283-84. In reviewing Orford's book, Samuel Moyn has challenged this characterization, arguing that "few historians … reject presentism in some form, and even fewer regard history as independent of politics." Samuel Moyn, Review of *International Law and the Politics of History*, by Anne Orford, *American Journal of International Law* 116:4 (2022):895-900, 898. Orford and Moyn's positions can be contrasted with Fasolt's claim that history is political in a deeper sense, because "the dispassionate study of the past as such, quite irrespective of the results to which research may lead, serves to confirm a certain view of what human beings and their relationships are like." Fasolt, *Past Sense*, 514.

140 Fasolt, *Limits*, especially 4-16; Fasolt, *Past Sense*, 85-90, quoted at 7. Orford's debt to Fasolt is clearest in Orford, "International legal method," 171.

141 Orford, "International legal method," 172.

142 Orford's discussion of F.W. Maitland anticipates some of this critique. There, she examines how lawyers like Maitland wielded the charge of anachronism to excise outmoded elements of the common law. The difference, she suggests, is that he did so for presentist reasons. Orford, *International Law*, 115-19. But even if

When later lawyers turned to Coke's report, it is striking that they found in something like the charge of anachronism a powerful device for invalidating Coke's dictum on infidels, not least by distinguishing between those elements that could be identified as part of "'real' (modern) law" and those parts of his report that could safely be set aside as "'false' (medieval) law."[143] In doing so, they not only made common cause with the progenitors of the historical revolt that inaugurated the modern age—the humanists who laid waste to the old medieval order and inaugurated an age of sovereignty and political freedom; they also rooted modern law in the same commitment to the pastness of the past that forms the bedrock of the historian's prohibition on anachronism.[144] One confusing feature of Orford's otherwise compelling critique of contextualism, then, is that despite her doubts about any "clear demarcation between past and present,"[145] she cuts time along the same medieval/modern axis that forms the bedrock of the historians she criticizes. This is surely how we must understand her insistence that "we moderns no longer really believe that law has a divine or mystical origin" because we "*know* that the authority of modern law derives from its relation to *human acts of creation*." This leads Orford to the view that, in one sense, "we are all contextualists now."[146] Here, it seems to me, history and law "are not enemies at all, but rather allies in the same

one were to agree that contextualists focus too narrowly on authorial intentions, this hardly means that contextualists are unconcerned with the present. For example, when Skinner urged doing "our own thinking for ourselves" and abandoning the idea that classic texts offer readymade answers to our contemporary questions, he still insisted that such texts have "'relevance' and current philosophical significance." This significance lay, as he saw it, in what separated our questions from those of past authors, a sense of distance that could help secure our "self-knowledge" today. Skinner, *Regarding Method*, 88-89; see also Filip Biały, "Freedom, silent power and the role of an historian in the digital age—Interview with Quentin Skinner," *History of European Ideas* 48.7 (2022):871-78, 874-75.

143 I borrow this distinction from Fasolt, *Limits*, 229.

144 As Fasolt puts it, history, by reflecting on the past as something set apart from the present (hence the prohibition on anachronism), "assures us that we are free and independent agents with the ability to shape our fate, the obligation to act on that ability, and responsibility for the consequences." Fasolt, *Past Sense*, 513; see also Fasolt, *Limits*, xiii-45.

145 Orford, "International legal method," 171 (quoted); Orford, *International Law*, 97-98.

146 Orford, *International Law*, 155 [emphasis added]. Cf. Constantin Fasolt, "Scholarship and Periodization," *History and Theory* 50.3 (2011):414-24, 422-24.

logical cause, maintaining, with different means and from different points of view, the same basic understanding of what the world is really like."[147] And this raises some doubts about the methodological/political breach between history and law that Orford otherwise aims to highlight. By examining how lawyers made Coke's dictum on infidels move through time, before finally setting it aside in the late eighteenth century, I wish to illuminate this shared ground of the historian and the modern lawyer.

If Coke did not quite live on the other side of the historical revolt that inaugurated the modern age, he certainly understood the relationship between the present and the past in a manner unfamiliar to modern lawyers and historians.[148] For Coke, the common law represented a precious inheritance, not so much a lingering of the past in the present as an immemorial and continuous legacy. The law, on this view, was not unchanging, but when it did change, whether by statute or judicial decision, this merely entailed the declaration, amplification, or clarification of the ancient wisdom of the common law in response to some specific need.[149] It is a striking feature of the way that Coke's report moved through time that his dictum on infidels increasingly came to be seen not only as legally dubious but also as *historically* questionable. And it would be on the basis of its supposed historical demerits that this dictum would be separated from his remarks on conquest and set aside as "a doctrine disgraceful to the memory of a great man," as Sir Samuel Romilly put it in 1819.[150]

It did not take long for resistance to Coke's dictum on infidels to emerge. In 1632, Edward Littleton, then recorder of London, used the occasion of a reading at the Inner Temple to contest

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147 Fasolt characterizes the relationship of history and philosophy thus, but it seem equally apt to the relationship of history and law. Fasolt, *Past Sense*, 521.

148 Baker, *Legal Profession*, 435.

149 Medieval legal sources were important *historical* authorities for Coke, even as he placed little store in what counted for history in his day. Garnett, "ould fields," 256-66; Baker, *Magna Carta*, 347-51.

150 *Re. Bedford Charity* (1819), 36 E.R. 696, at 707.

Coke's position. Posing the question of whether there was "a perpetual enmity [*un perpetuall enmity*] between the Turks and us," Littleton answered in the negative. Although he raised no doubts about the rule of conquest, he criticized the idea that infidels were perpetual enemies as "the large, and common error based on the opinion of Justice Brooke."[151] Whatever enmity existed between Turks and Christians, Littleton insisted, was a purely spiritual matter, an enmity between religions that did not entail enmity between persons. Littleton had taken the first step in a long line of juristic criticisms of Coke's remarks on infidels and his reading would become a popular citation against the authority of Coke that would, over time, help to maintain the rule of conquest even as "the curious exception as to infidels failed to survive into modern law."[152]

In the domain of colonial practice, too, there was little appetite for Coke's dictum. In the wake of *Calvin's case*, the Virginia Company embraced a strategy of Native American subjecthood by attempting to install Wahunsenacawh, paramount chief of the Powhatans, as the king's vassal. When that maneuver failed, the company sought to get the region's subordinate headmen "to acknowledge no other Lord but Kinge James."[153] By the middle of the seventeenth century, this strategy of indigenous subjecthood was an accepted part of imperial policy. In the wake of the Restoration, for example, Charles II was only too happy to acknowledge that when the Narragansett sachems "transfer[red] ... their Countrey to Our Royall Father for his protecc[i]on" in 1644, they "became his Subjects."[154]

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151 *BL*, Hargrave MS 372, fol.62r (my translation), Edward Littleton's Reading on the Statute of Merchant Strangers of 27 Edw. 3, 1632. Littleton's misplaced reference to "Register fol.282" rather than to Broke's opinion suggests that he had Coke's report on *Calvin's case* in mind.

152 Loughton, "Calvin's Case," 179. Later references to Littleton replaced his *un perpetuall enmity* with Coke's *perpetui inimici*. *Wells v. Williams* (1697), 91 E.R. 45, at 46; *Omychund v. Barker* (1744), 26 E.R. 15, at 29.

153 John Smith, A *map of Virginia*, in Barbour, ed., *Jamestown Voyages*, 2:321-464, at 413-14; Instructions, Orders and Constitutions, May 1609, *RVCL* 3:18.

154 *BL*, Egerton MS 2395, fols.393-95, at 394r, Instrucc[i]ons to Our Trusty … Commissioners for … Our Colony of Connecticott, 1664.

As a matter of English law, however, Coke's dictum on infidels would continue to be cited as authoritative throughout the seventeenth century.[155] In *East India Company v. Sandys* (1683-1685), a case that tested the right of the king to grant monopoly trading rights to foreign territories, John Holt, for the East India Company, invoked the authority of Coke to insist that "the law hath judged … [infidels] to be perpetual enemies." And while Sir George Jeffreys CJKB would end up ruling in favor of the East India Company on distinct grounds, he nevertheless followed Coke in asserting that "the Indians being infidels are by law esteemed common enemies."[156]

Although Coke's dictum on infidels survived *East India Company v. Sandys* intact, these proceedings also saw the development of a new line of criticism that would ultimately be its undoing. During the case, counsel for Thomas Sandys, Henry Pollexfen, and Sir George Treby launched a critique of the idea of perpetual enmity that was framed in decidedly historical terms. Coke's error, they insisted, was one of anachronism or ahistoricism or both. For Pollexfen, Coke's account was impossible to square with the historical record: "if a man considers the general cause and practice of trade and commerce, and legal proceedings in all times and ages," he insisted, "one would think my lord Coke could not be in earnest in what he has said in Calvin's case about infidels." Treby made a similar point. Developing a line of argument earlier pursued by Littleton, he argued that Coke must have been referring to a "spiritual discord" rather than "a constant never-ceasing state of war." Were Coke's remarks taken literally, then the charter of the East India Company itself would have been voided. Treby took Coke himself to have cleared up the matter in his *Fourth Institutes*, when he had observed the possibility of peace treaties and commercial leagues with infidels. Taken literally, then, Coke's argument would have been an anachronistic holdover, "a

155 On the subsequent history of Coke's dictum on infidels, see Slattery, "Land Rights," 16-19; Tuck, "Alliances," 79-82; and especially Cavanagh, "Infidels."

156 *East India Company [E.I.C.] v. Thomas Sandys* (1683-1685), in *Cobbett's Complete Collection of State Trials,* 33 vols., ed. Thomas Bayly Howell (London, 1809-1828), vol.10, cols.371-554, at cols.374, 545.

conceit absurd, monkish, fantastical, and fanatical" born of the Wycliffian heresy that "*Dominium fundatur i[n] Gratia* [dominion is founded on grace]."[157]

Almost a century later, in *Campbell v. Hall* (1774), the chief justice of the king's bench, William Murray, Lord Mansfield, offered a similar, if more biting, challenge to Coke's position. While affirming the rule of conquest—that the "laws of a conquered country continue until they are altered by the conqueror"—Mansfield insisted that Coke's "absurd exception as to pagans" reeked of the "mad enthusiasm of the Croisades." What else could account for the ahistorical character of an "exception [that] could not exist before the Christian æra." When Mansfield condemned Coke's dictum on infidels as a "strange extrajudicial opinion" that "will not make reason not to be reason, and law not to be law," he did so—echoing Pollexfen and Treby—because of its failure to live up to the most rudimentary *historical* examination.[158]

If the task of lawyers is to make meaning move through time, this sometimes involves dispensing with legal maxims that have lost their meaning and come to appear absurd by the criteria of the present. For Mansfield, the historical character of the law inhered not merely in legal precedents, but, as David Lieberman puts it, in "the continual process of legal change and adaptation … in response to altered social conditions." When considering the merits of Coke's dictum from the standpoint of a religiously-tolerant commercial empire, the authority of history and the charge of anachronism proved to be powerful allies to the project of legal reform.[159] In dispensing with Coke's supposedly *medieval* prejudices as anachronistic, reformers like Mansfield shored up the *modern* legal framework of British empire. But this was not because "modern" lawyers

157 *E.I.C. v. Sandys*, cols.391-92, 443.

158 *Campbell v. Hall* (1774), 98 E.R. 848, 895-97. In 1744, Mansfield had made a similar argument as Solicitor General. *Omychund v. Barker*, 21-25. Scholarly treatments that characterize Coke's report as marked by either a "medieval" or "Calvinist" antipathy toward non-Christians seem to accept the judgments of Mansfield, Pollexfen, and Treby as faithful representations of Coke's intentions.

159 Lieberman, *Province of Legislation*, 90-91, 124-26, quoted at 126; see also Cavanagh, "Infidels," 408.

were right, where their "medieval" predecessor was wrong, no matter how much we abhor Coke's views on non-Christians.[160] By the late eighteenth century, metropolitan elites simply had little need to fret that religious difference would disorder the common law. Standing astride the world, their empire could afford to be religiously tolerant. However, these reforms did little to stem enthusiasm for imperial rule, and they offered cold comfort to those peoples whose homelands continued to be the focus of imperial and colonial projects. Colonial conquests would continue to be justified by appeal to civilizational superiority, even if the odor of the crusades had dissipated. I see no reason why, by our lights, we should find such justifications any less abhorrent than Coke's strange extrajudicial opinion on infidels.

By returning to Coke's report on *Calvin's case*, my aim has not been to take up the cause of the historian against the lawyer, and certainly not to suggest that a contextually apt understanding of Coke's dictum on infidels has any value for contemporary legal practice. I have argued, instead, that understanding the intention that shaped Coke's dictum can shed some light on how England was made in the course of its imperial expansion, to borrow Talal Asad's felicitous formulation.[161] The indigenous American, exemplar of radical difference, shaped imperial England's perduring concepts of political belonging and exclusion. But understanding the intention behind Coke's dictum hardly amounts to telling the truth about the past. Doing so also requires us to attend to the consequences of what he wrote, to what his words, and their connotations, *did* as pieces of living law. Similarly, if we are indeed to tell the truth, we must attend no less to those moments when historians and lawyers made common cause in their fashioning of *modern* law.

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160 See Fasolt, "History, Law, Justice," 455-61.

161 "Europe did not simply expand overseas, it made itself though that expansion." Talal Asad, "Muslims and European Identity: Can Europe Represent Islam?" in *The Idea of Europe: From Antiquity to the European Union*, ed. Anthony Pagden (Cambridge, 2002), 220.