

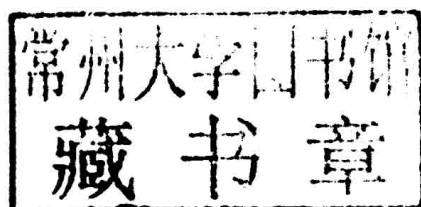


COMMON LAW
AND ENLIGHTENMENT
IN ENGLAND, 1689–1750

Julia Rudolph

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For Matthew

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Finally, this book is dedicated to my husband Matthew Adler, not only because he truly believes in equity, in every sense of the word, but also because he believes in me. That has made all the difference.

Abbreviations

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|------------------------|--|
| BL | British Library |
| CUL | Cambridge University Library |
| DLL | Arthur W. Diamond Law Library, Columbia University |
| <i>English Reports</i> | <i>The English Reports</i> , Full Reprint (1220–1865), Hein Online, Buffalo, NY, 2002 |
| FLP | Free Library of Philadelphia |
| FSL | Folger Shakespeare Library |
| HALS | Hertfordshire Archives and Local Studies |
| HLS | Harvard Law School |
| IT | Inner Temple |
| NA | National Archives |
| NLW | National Library of Wales |
| ODNB | Colin Matthew, Brian Harrison and Lawrence Goldman eds, <i>Oxford Dictionary of National Biography</i> , Online edn, Oxford 2004- |
| <i>State Trials</i> | W. Cobbett and T.B. Howell, <i>Cobbett's Complete Collection of State Trials, and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Time</i> , 34 vols, London, 1809–28 |

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Against Decline

The history of eighteenth-century English common law jurisprudence – and common law culture more generally – has often been narrated as a story of decline and fall. The first half of the century, a period delineated between the Bill of Rights of 1689 and the labours of Blackstone in the 1760s, has particularly been characterised as a time when the common law stood apart from the progressive and enlightened impulses of the era; a time when common law struggled, and largely failed, to maintain its former intellectual and cultural significance. Since this is a narrative that adheres to the pattern of Polybius' cycles – wherein decay invariably succeeds a period of strength and perfection – it relies on the convention of a reversal of fortune, and depicts the century preceding 1689 as a peak in the development of key common law principles.¹ The seventeenth century, an age of Coke, Selden and Hale, is regarded as a triumphal period for the common law, when a language of ancient custom, and a theory of historicised legal authority, flourished and expanded in important ways.² By the eighteenth

¹ Polybius, *The Rise of the Roman Empire*, trans. Ian Scott-Kilvert, F.W. Walbank ed., see bk 6, sects. 9, 43–44, 51. For the general historiographical tradition of decline and fall, from ancient to enlightened histories, see J.G.A. Pocock, *Barbarism and Religion, Volume 3: The First Decline and Fall* (Cambridge, 2003), and Joseph M. Levine, *Humanism and History: Origins of Modern English Historiography* (Ithaca, 1987).

² J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge, 1957; reissued with a retrospect 1987); Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought 1603–1642* (University Park, PA, 1992); Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642* (Cambridge, 2006); James S. Hart Jr., *The Rule of Law 1603–1660: Crowns, Courts and Judges* (New York, 2003), Allen D. Boyer ed., *Law, Liberty and Parliament: Selected Essays on the Writing of Sir Edward Coke* (Indianapolis, 2004); Michael Lobban, *A History of the Philosophy of Law in the Common Law World, 1600–1900*, vol 8. of Enrico Pattaro ed., *A Treatise of Legal Philosophy and General Jurisprudence* (Dordrecht, 2007); Gerald Postema, 'Classical Common Law Jurisprudence (Part I)', *Oxford University Commonwealth Law Journal*, 2, 2 (Winter 2002): 155–80, Postema, 'Classical Common Law Jurisprudence (Part II)', *Oxford University Commonwealth Law Journal*, 3, 1 (Summer 2003): 1–28. For some challenges to this story of the hegemony of common law in the seventeenth century see, for example, Jeffrey D. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford, 1999); J.W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore,

century, however, scholarly convention holds that English common law jurisprudence and common law culture went into a period of defensiveness, irrelevance and ultimate decline. Its practitioners were no longer at the centre of English cultural life; its arguments for custom and precedent were ultimately and fatally outstripped by new discourses and practices of rational contract, legislative change and commercial interest.

This book challenges these conventions and recovers the history of English common law thought and culture during the seminal period 1689–1750. Here is a history of common law in the early eighteenth century that sets aside the focus on decline and takes seriously the question of jurisprudence. This period was, in fact, an enormously important and interesting time for the development of common law jurisprudence, with its understanding of law's authority founded in ancient custom, in a system of pleading and precedent, and enshrined in judicial decisions. Eighteenth-century English lawyers and theorists did not simply overlook questions about the authority and validity of common law, and the answers they gave must be investigated if we are to analyse the enduring importance of precedent in the development of modern jurisprudence.³ This work sets out to understand how eighteenth-century defenders of the common law thought about the justice of those rules, remedies and precedents. Equally important, it explores the ways in which legal ideas, practices and publications related to other eighteenth-century trends, like the flourishing print culture and new practices in the dissemination of knowledge, or the growing interest in science, experimentation and collection, or the expansion of commerce and colonisation. These are some of the issues that must be addressed if we are to rethink that unexamined assumption that a 'conservative' and 'complacent' English common law was the antithesis of eighteenth-century Enlightenment.

In this way the project also contributes to work by scholars like Knud Haakonssen, Sankar Muthu or John Pocock, which has continually sought to destabilise our conception of 'The Enlightenment'.⁴ The accepted image

2000); J.P. Sommerville, 'The Ancient Constitution Reassessed: The Common Law, The Court and the Languages of Politics in Early Modern England', in R. Malcolm Smuts ed., *The Stuart Court and Europe: Essays in Politics and Political Culture* (Cambridge, 1996), 39–64.

³ It should be clear from the outset that my focus is on *English* common law jurisprudence; for discussion of the ways in which my work is situated in relation to scholarship on a colonial American ancient constitutionalism see below pp. 16–17.

⁴ Knud Haakonssen, 'The Idea of Early Modern Philosophy', in J.B. Schneewind ed., *Teaching New Histories of Philosophy* (Princeton, University Center for Human Values, 2004), 101; Haakonssen, 'The History of Eighteenth-Century Philosophy: History or Philosophy?', in Knud Haakonssen ed., *The Cambridge History of Eighteenth-Century Philosophy*, vol. 1 (Cambridge, 2006), 3–25; Haakonssen, ed., *Enlightenment and Religion: Rational Dissent in Eighteenth-Century Britain* (Cambridge, 1996); Sankar Muthu, *Enlightenment against Empire* (Princeton, 2003); J.G.A. Pocock, *Barbarism and Religion*, 5

of eighteenth-century common law as traditional, irrational, and particularist, relies upon a contrasting depiction of eighteenth-century Enlightenment thought as rationalist, empiricist, universal and, eventually, utilitarian. But this is a narrow definition of Enlightenment, one that is restricted essentially to a French incarnation and one that excludes other modes of Enlightenment – moderate, Protestant, critical, provincial – as these Enlightenments developed elsewhere in Europe. Modern scholarship on national and regional Enlightenments has provided a useful corrective to that narrow interpretation, famously championed by Peter Gay, of a singular, Gallocentric and secular Enlightenment.⁵ Moreover, within contemporary debates about the significance of these national and regional Enlightenments investigation of the nature of a British Enlightenment has been particularly important, especially for our understanding of the roles of commerce, manners and religion in Enlightenment.

The matter of Scotland's centrality has been at issue here, first in the assessment of its sceptical and moderate Enlightenment as a period of intellectual fervour which produced influential moral-philosophical, sociological, and economic ideas.⁶ Also relevant to the analysis of Scottish influence has been wider scholarly debate over the interpretation of Enlightenment as a social and cultural practice as well as a movement in the history of ideas. The concerns of the new British history and of the history of the book

vols (Cambridge, 1999–2011); Pocock, 'Historiography and Enlightenment: A View of their History', *Modern Intellectual History*, 5, 1 (2008): 83–96.

⁵ Peter Gay, *The Enlightenment: An Interpretation*, 2 vols (New York, 1966, 1970). As Richard Sher (among other scholars) notes, Gay's interpretation was largely directed against the argument of Carl Becker's *The Heavenly City of the Eighteenth-Century Philosophers* (New Haven, 1959). Richard B. Sher, *The Enlightenment and the Book: Scottish Authors and their Publishers in Eighteenth-Century Britain, Ireland and America* (Chicago, 2006), 12. The work that served as the harbinger of 'national Enlightenments' was Roy Porter and Mikulas Teich eds, *The Enlightenment in National Context* (Cambridge, 1981).

⁶ The literature on Scottish Enlightenment is vast. Some influential, and representative, articles, monographs and collections include: Nicholas Phillipson, 'Culture and Society in the Eighteenth-Century Province: The Case of Edinburgh and the Scottish Enlightenment', in Lawrence Stone ed., *The University in Society*, vol. 2 (London, 1975), 407–48; Duncan Forbes, *Hume's Philosophical Politics* (Cambridge, 1975); Jane Rendall, *The Origins of the Scottish Enlightenment* (New York, 1978); R.H. Campbell and A.S. Skinner eds, *The Origins and Nature of the Scottish Enlightenment* (Edinburgh, 1982); Istvan Hont and Michael Ignatieff eds, *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge, 1983); Richard B. Sher, *Church and University in the Scottish Enlightenment: The Moderate Literati of Edinburgh* (Edinburgh, 1985); Fania Oz-Salzberger, *Translating the Enlightenment: Scottish Civic Discourse in Eighteenth-Century Germany* (Oxford, 1995); Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge, 1996); John Robertson, 'The Scottish Contribution to the Enlightenment', in Paul Wood ed., *The Scottish Enlightenment: Essays in Reinterpretation* (Rochester, 2000), 37–62; Robertson, *The Case for the Enlightenment: Scotland and Naples, 1680–1760* (Cambridge, 2005).

have further encouraged this interest in the sociocultural and sociopolitical dimensions of Scotland's Enlightenment.⁷ Finally, the focus on Scottish Enlightenment and the matter of Britain has prompted some historians to question the direction of influence. Roy Porter, for example, forcefully argued that the origins of Enlightenment are to be found in the scientific and political revolutions of seventeenth-century England, which were only later developed by mid-eighteenth-century Scots. These English origins and Scottish contributions mean, Porter insisted, that such developments are better characterised as a *British* Enlightenment.⁸

This idea of a British Enlightenment not only called into question the narrative of Scottish exceptionalism but it has also helped to foster an argument for a distinctive English Enlightenment among the plurality of Enlightenments. And here sustained scholarly attention to the role of religion in English Enlightenment has been especially important because it has resulted in significant revision of the conventional understanding of anticlericalism and secularism as essential to Enlightenment.⁹ A number of historians have

⁷ For the emphasis on a sociocultural interpretation of Enlightenment see, for example, Roger Chartier, *The Cultural Origins of the French Revolution*, trans. Lydia G. Cochrane (Durham, 1991), and Robert Darnton, 'In Search of the Enlightenment: Recent Attempts to Create a Social History of Ideas', *Journal of Modern History*, 43, 1 (March, 1971), 113–32. The concerns of the new British history, and of the history of the book, relevant to the focus on Scotland's Enlightenment found expression in works like John Robertson ed., *A Union for Empire: Political Thought and the Union of 1707* (Cambridge, 1995), Glenn Burgess ed., *The New British History: Founding a Modern State 1603–1715* (London, 1999), Colin Kidd, 'Gaelic Antiquity and National Identity in Enlightenment Ireland and Scotland', *The English Historical Review*, 109, 434 (November, 1994), 1197–1214, and Sher, *Enlightenment and the Book*.

⁸ Roy Porter, *The Creation of the Modern World: The Untold Story of the British Enlightenment* (New York, 2000); see also Gertrude Himmelfarb, *The Roads to Modernity: the British, French and American Enlightenments* (New York, 2004). And cf the debates over the role of Newtonianism in Enlightenment in Margaret C. Jacob, 'Newtonianism and the Origins of Enlightenment: A Reassessment', *Eighteenth-Century Studies*, 11, 1 (Autumn, 1977), 1–25; Larry R. Stewart, *The Rise of Public Science: Rhetoric, Technology and Natural Philosophy in Newtonian Britain, 1660–1750* (Cambridge, 1992); Jonathan Israel, *Radical Enlightenment: Philosophy and the Making of Modernity* (Oxford, 2001), ch. 27; Israel, *Enlightenment Contested: Philosophy, Modernity and the Emancipation of Man 1670–1752* (Oxford, 2006), ch. 8; and Brian Young, 'Newtonianism and the Enthusiasm of Enlightenment', *Studies in History and Philosophy of Science*, 35, 3 (September, 2004), 645–63.

⁹ It is helpful to recall that the subtitle of Gay's first volume in 1966 was *The Rise of Modern Paganism*. For surveys of this revisionist scholarship see the following review essays collected in the *American Historical Review*: Dror Wahrman, 'Introduction, God and the Enlightenment', Jonathan Sheehan, 'Enlightenment, Religion and the Enigma of Secularization: A Review Essay', Dale van Kley, 'Christianity as Casualty and Chrysalis of Modernity: The Problem of Dechristianization in the French Revolution', *American Historical Review*, 108, 4 (October, 2003), 1057–1104. See also B.W. Young, 'Religious History and the Eighteenth-Century Historian', *The Historical Journal*, 43, 3

demonstrated the importance of a clerical and Anglican Enlightenment, thus countering the more usual tendency to study Dissenting confessions, and freethinking criticisms of Christianity in eighteenth-century England.¹⁰ This focus on an Anglican Enlightenment has provided new insight into what John Pocock long ago termed a 'conservative English Enlightenment' – an Enlightenment that aimed to conserve the constitutional principles, religious toleration and civil peace newly, and precariously, achieved in 1689. This was 'a broadly Whiggish Enlightenment' as Karen O'Brien notes, and it was also a broadly Protestant, polite and erudite Enlightenment which involved 'academics, churchmen and politically involved intellectuals such as Gibbon and Edmund Burke'.¹¹

The study of religion and of an Anglican, clerical Enlightenment, is clearly pertinent, and especially exciting for the analysis of common law and Enlightenment. First, it has opened up that possibility of multiple Enlightenments, allowing for a range of interpretation within which a common law Enlightenment can be included. Like many other scholars who have heeded Pocock's suggestion that we 'think of a family of Enlightenments, displaying both family resemblances and family quarrels', I am persuaded that this

(September, 2000): 849–68, Robert Sullivan, 'Rethinking Christianity in Enlightened Europe', *Eighteenth-Century Studies*, 34, 2 (Winter 2001): 298–309, and Charly Coleman, 'Resacralizing the World: the Fate of Secularization in Enlightenment Historiography', *The Journal of Modern History*, 82, 2 (June, 2010): 368–95. A recent synthetic account can be found in David Sorkin, *The Religious Enlightenment: Protestants, Jews and Catholics from London to Vienna* (Princeton, 2008).

¹⁰ B.W. Young, *Religion and Enlightenment in Eighteenth-Century England: Theological Debate from Locke to Burke* (Oxford, 1998); Isabel Rivers, *Reason, Grace and Sentiment: A Study of the Language of Religion and Ethics in England, 1660–1780*, 2 vols (Cambridge, 1991, 2000). Young, *Religion and Enlightenment*, 3, n. 9, deliberately positions his work in response to the literature on freethinkers including, for example, J.A.I. Champion, *The Pillars of Priestcraft Shaken: The Church of England and its Enemies, 1660–1730* (Cambridge, 1992) and E.J. Hundert, *The Enlightenment's Fable: Bernard Mandeville and the Discovery of Society* (Cambridge, 1994).

¹¹ Karen O'Brien, *Women and Enlightenment in Eighteenth-Century Britain* (Cambridge, 2009), 4. J.G.A. Pocock, 'Clergy and Commerce: The Conservative Enlightenment in England', in R. Ajello ed., *L'Eta dei Lumi: Studi Storici sul Settecento Europeo in Onore de Franco Venturi*, vol. 1 (Naples, 1985), 524–62; Pocock, 'Conservative Enlightenment and Democratic Revolutions: The American and French Cases in British Perspective', *Government and Opposition*, 24, 1 (January, 1989): 81–105; Pocock, *Barbarism and Religion*, Volume 3, 307, and compare Pocock, *Barbarism and Religion*, Volume 1: *The Enlightenments of Edward Gibbon, 1737–1764* (Cambridge, 1999), 5–9. One of the hallmarks of the work of scholars like O'Brien, Pocock, Haakonssen or Young, who explore the evidence for 'conservative Enlightenment', has been a willingness to trace a range of ideas and commitments within this Anglican, clerical thought and culture, allowing for an appreciation of more complex combinations of political affiliations, ideologies, theologies and philosophies than has been usual within the conventional narratives. See, for example, O'Brien, *Women and Enlightenment*, ch. 1, 'Anglican Whig Feminism in England, 1690–1760: Self-Love, Reason and Social Benevolence'.

recognition of diversity not only expands the programme for research but, more importantly, brings us closer to historical understanding.¹² Yet the pluralism within which a common law Enlightenment might be explored should not rely upon the notion of conflict between Enlightenments evoked by Pocock and pursued for example, and for very different ends, in the contested Enlightenments of Jonathan Israel. That kind of emphasis on contest or competition too often returns to a claim about winners and losers as part of the reconstruction of a singular, or in Israel's terms 'linear', definition of Enlightenment.¹³ Rather more promising, and relevant for legal thought and culture, is a 'media-driven concept of the Enlightenment' in which, as Jonathan Sheehan explains, Enlightenment is defined as

a new constellation of formal and technical practices and institutions....[that] might include philosophical argument, but would encompass such diverse elements as salons, reading circles, erudition, scholarship and scholarly techniques, translations, book reviews, academies, new communication tools including journals and newspapers, new or revised techniques of data organization and storage (dictionaries, encyclopedias, taxonomies), and so on.

These and other practices and institutions provide an indication, Sheehan concludes, of 'those places where the social, cultural, and intellectual horizons of religion' – and it should be added, law – 'and the Enlightenment fused'.¹⁴

Equally important, attention to the role of religion in Enlightenment has raised crucial doubts about the accepted narrative of secularisation and modernity and these doubts, in turn, have real implications for the analysis of common law. The 'powerful' and 'surprising' insight that has arisen out of the scholarship on Enlightenment and religion, Dror Wahrman avers, is the 'identification of religion at the heart of the project of modernity itself, a constitutive element of its very shaping'.¹⁵ If Enlightenment is no longer easily equated with the attack on religion and church, then we must also

¹² Pocock, *Barbarism and Religion*, Volume 1, 9; Sheehan, 'Enlightenment, Religion, Secularization', 1068.

¹³ Israel, *Enlightenment Contested*, 7, 11–12, 57. Compare also Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (Cambridge, 2001), and Darrin McMahon, *Enemies of the Enlightenment: The French Counter-Enlightenment and the Making of Modernity* (Oxford, 2002). Note that Jonathan Israel also laments the tendency towards pluralism, and calls for a return to a 'Europeanizing' focus against the chauvinism of Anglo-American historians and philosophers, Israel *Enlightenment Contested*, 59–60. Other scholars similarly advocate recognition of 'a larger pattern of unity' within a pan-European, progressive Enlightenment, despite multiple variations: see for example Sher, *Enlightenment and the Book*, Robertson, *The Case for the Enlightenment*.

¹⁴ Sheehan, 'Enlightenment, Religion, Secularization', 1075–6.

¹⁵ Wahrman, 'God and Enlightenment', 1058.

question the simplistic (and propagandistic) related claim that Enlightenment stood at the threshold of modernity because it posited 'freedom from the shackles of the past'.¹⁶ Once it is possible to accept that the rejection of church and establishment, of tradition and inherited authorities, was not inevitable and everywhere at the heart of enlightened thought, then certainly we must recognise and investigate the ways in which common law jurisprudence – those evolving ideas about the authority of the past – also played a part in the emergence of an enlightened philosophy and culture.

This is simply to claim, of course, that English legal thought and legal culture should be understood, in the first instance, as part of what is termed a conservative or moderate Enlightenment. It is uncontroversial to say that English legal institutions, and the English legal theory of the ancient constitution, were marshalled as part of the defence of a Whiggish Enlightenment, but we must also recall that this meant a newly commercial, polite, clerical and erudite Enlightenment. Scholars continue to debate the nature of the Revolution that ushered in so many of these changes, and to debate the content of the project of modernity and enlightenment that ensued.¹⁷ But they have failed to ask whether this modernity also entailed an appeal to custom, prescription and precedent. In what ways did these principles of common law jurisprudence contribute to Enlightenment? In what ways did these common law principles participate, with other strands of thought and practice, in what scholars have taught us to think of as a pluralised Enlightenment? It is perhaps more controversial, but even more important, to ask these questions because they invite a new kind of reflection on the role of common law jurisprudence as much as natural jurisprudence in the emergence of political ideologies and cultures – liberal, democratic, egalitarian, rational – usually designated as modern.¹⁸ In the end, we must abandon the usual dichotomies between progressive and traditional, philosophical and practical, radical and conservative, and between Enlightenment and common law, in order to arrive at a better understanding of the development of such familiar, and revered, political and legal concepts and practices.

¹⁶ Sheehan, 'Enlightenment, Religion, Secularization', 1066.

¹⁷ Two important recent works that address such issues are Tim Harris, *Revolution: The Great Crisis of the British Monarchy 1685–1720* (London, 2006), and Steve Pincus, *1688: The First Modern Revolution* (New Haven, 2009).

¹⁸ See, for example, Israel, *Enlightenment Contested*, 60, as one among many places he characterises his work as a defence of the French, European and radical as the 'real' 'origins' of 'the accepted values and democratic principles of the egalitarian western world today'. Some historians of American law, like John Philip Reid or James Q. Whitman, have written about the role of common law jurisprudence in the development of a 'modern' 'liberal' 'democratic' political culture, but they have relied on many of the conventional chronologies and categories being questioned here.