Dialogues between a Philosopher and a Student of the Common Laws of England (Thomas Hobbes)

A Dialogue between a Philosopher and a Student of the Common Laws of England, abridged

By Thomas Hobbes

1681–1682


Lawyer.

What makes you say, that the study of the law is less rational than the study of the mathematics?

Philosopher.

I say not that; for all study is rational, or nothing worth: but I say, that the great masters of the mathematics do not so often err as the great professors of the law.

L.

If you had applied your reason to the law, perhaps you would have been of another mind.

P.

In whatsoever study, I examine whether my inference be rational: and have looked over the titles of the statutes from Magna Carta downward to this present time. [...] But I did not much examine which of them was more or less rational; because I read them not to dispute, but to obey them, and saw in all of them sufficient reason for my obedience, and that the same reason, though the Statutes themselves were changed, remained constant. I have also diligently read over Littleton’s book of Tenures, with the commentaries thereupon of the renowned lawyer Sir Edward Coke; in which I confess I found great subtlety, not of the law, but of inference from law, and especially from the law of human nature, which is
the law of reason: and I confess that it is truth which he says in the epilogue to his book, that by arguments and reason in the law, a man shall sooner come to the certainty and knowledge of the law: and I agree with Sir Edward Coke, who upon that text farther says, that reason is the soul of the law; and upon section 138, nihil quod est contra rationem, est licitum; that is to say, nothing is law that is against reason; and that reason is the life of the law, nay the common law itself is nothing else but reason; and upon section 21, aequitas est perfecta quaedam ratio, quae jus scriptum interpretatur et emendat, nulla scriptura comprehensa, sed solum in vera ratione consistens; i.e. Equity is a certain perfect reason, that interpreteth and amendeth the law written, itself being unwritten, and consisting in nothing else but right reason. When I consider this, and find it to be true, and so evident as not to be denied by any man of right sense, I find my own reason at a stand; for it frustrates all the laws in the world. For upon this ground any man, of any law whatsoever, may say it is against reason, and thereupon make a pretence for his disobedience. I pray you clear this passage, that we may proceed.

L. 

I clear it thus, out of Sir Edward Coke (i. Inst. sect. 138), that this is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man’s natural reason; for nemo nascitur artifex. This legal reason is summa ratio; and therefore if all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law of England is; because by so many successions of ages it hath been fined and refined by an infinite number of grave and learned men.

P. 

This does not clear the place, as being partly obscure, and partly untrue. That the reason which is the life of the law, should be not natural, but artificial, I cannot conceive. I understand well enough, that the knowledge of the law is gotten by much study, as all other sciences are, which when they are studied and obtained, it is still done by natural, and not by artificial reason. I grant you, that the knowledge of the law is an art; but not that any art of one man, or of many, how wise soever they be, or the work of one or more artificers, how perfect soever it be, is law. It is not wisdom, but authority that makes a law. Obscure also are the words legal reason. There is no reason in earthly creatures, but human reason. But I suppose that he means, that the reason of a judge, or of all the judges together without the King, is that summa ratio, and the very law: which I deny, because none can make a law but he that hath the legislative power. That the law hath been fined by grave and learned men, meaning the professors of the law, is manifestly untrue; for all the laws of England have been made by the kings of England, consulting with the nobility and commons in parliament, of which not one of twenty was a learned lawyer.

L. 

You speak of the statute law, and I speak of the common law.

P. 

I speak generally of law.

L. 

Thus far I agree with you, that statute law taken away, there would not be left, either here, or any where, any law at all that would conduce to the peace of a nation; yet equity and reason, (laws Divine and eternal, which oblige all men at all times, and in all places), would still remain, but be obeyed by few: and though the breach of them be not punished in this world, yet they will be punished sufficiently in the world to come. Sir Edward Coke, for drawing to the men of his own profession as much authority as lawfully he might, is not to be reprehended; but to the gravity and learning of the judges they ought to have added in the making of laws, the authority of the King, which hath the sovereignty: for of these
laws of reason, every subject that is in his wits, is bound to take notice at his peril, because reason is part of his nature, which he continually carries about with him, and may read it, if he will.

P.

It is very true; and upon this ground, if I pretend within a month or two to make myself able to perform the office of a judge, you are not to think it arrogance; for you are to allow to me, as well as to other men, my pretence to reason, which is the common law, (remember this, that I may not need again to put you in mind, that reason is the common law): and for statute law, seeing it is printed, and that there be indexes to point me to every matter contained in them, I think a man may profit in them very much in two months.

L.

But you will be but an ill pleader.

P.

A pleader commonly thinks he ought to say all he can for the benefit of his client, and therefore has need of a faculty to wrest the sense of words from their true meaning, and the faculty of rhetoric to seduce the jury, and sometimes the judge also, and many other arts which I neither have, nor intend to study.

L.

But let the judge, how good soever he thinks his reasoning, take heed that he depart not too much from the letter of the statute: for it is not without danger.

P.

He may without danger recede from the letter, if he do not from the meaning and sense of the law; which may be by a learned man, (such as judges commonly are,) easily found out by the preamble, the time when it was made, and the incommodities for which it was made. But I pray tell me, to what end were statute laws ordained, seeing the law of reason ought to be applied to every controversy that can arise.

[...]

L.

I say then that the scope of all human law is peace, and justice in every nation amongst themselves, and defence against foreign enemies.

P.

But what is justice?

L.

Justice is giving to every man his own.

[...]

P.
When you say that justice gives to every man his own, what mean you by his own? How can that be given me, which is my own already? Or, if it be not my own, how can justice make it mine?

**L.**

Without law, every thing is in such sort every man’s, as he may take, possess, and enjoy, without wrong to any man; every thing, lands, beasts, fruits, and even the bodies of other men, if his reason tell him he cannot otherwise live securely. For the dictates of reason are little worth, if they tended not to the preservation and improvement of men’s lives. Seeing then without human law all things would be common, and this community a cause of encroachment, envy, slaughter, and continual war of one upon another, the same law of reason dictates to mankind, for their own preservation, a distribution of lands and goods, that each man may know what is proper to him, so as none other might pretend a right thereunto, or disturb him in the use of the same. This distribution is justice, and this properly is the same which we say is one’s own; by which you may see the great necessity there was of statute laws, for preservation of all mankind. It is also a dictate of the law of reason, that statute laws are a necessary means of the safety and well-being of man in the present world, and are to be obeyed by all subjects, as the law of reason ought to be obeyed, both by King and subjects, because it is the law of God.

**P.**

All this is very rational; but how can any laws secure one man from another, when the greatest part of men are so unreasonable, and so partial to themselves as they are, and the laws of themselves are but a dead letter, which of itself is not able to compel a man to do otherwise than himself pleaseth, nor punish or hurt him when he hath done a mischief?

**L.**

By the laws, I mean laws living and armed. [...] If a nation choose a man, or an assembly of men, to govern them by laws, it must furnish him also with armed men and money, and all things necessary to his office; or else his laws will be of no force, and the nation remains, as before it was, in confusion. It is not therefore the word of the law, but the power of a man that has the strength of a nation, that make the laws effectual. [...]

**P.**

We agree then in this, that in England it is the King that makes the laws, whosoever pens them; and in this, that the King cannot make his laws effectual, nor defend his people against their enemies, without a power to levy soldiers; and consequently, that he may lawfully, as oft as he shall really think it necessary to raise an army, (which in some occasions be very great) I say, raise it, and money to maintain it. I doubt not but you will allow this to be according to the law, at least of reason.

**L.**

For my part I allow it. But you have heard how, in and before the late troubles the people were of another mind. Shall the King, said they, take from us what he pleases, upon pretence of a necessity whereof he makes himself the judge? What worse condition can we be in from an enemy? What can they take from us more than what they list?

**P.**

The people reason ill. They do not know in what condition we were, in the time of the Conqueror, when it was a shame to be an Englishman; who, if he grumbled at the base offices he was put to by his Norman masters, received no other answer than this, *thou art but an Englishman*. Nor can the people, nor any man that humours their disobedience, produce any example of a King that ever raised any excessive sums, either by himself or by the consent of his Parliament, but when they had great need
thereof; nor can show any reason that might move any of them so to do.

[...]

L.

But I know, that there be statutes express, whereby the King hath obliged himself never to levy money upon his subjects without the consent of his Parliament. [...]; which statutes have been since that time confirmed by divers other Kings, and lastly by the King that now reigneth.

P.

All this I know, and am not satisfied. [...] How shall I be defended from the domineering of proud and insolent strangers that speak another language, that scorn us, that seek to make us slaves, or how shall I avoid the destruction that may arise from the cruelty of factions in a civil war, unless the King, to whom alone, you say, belongeth the right of levying and disposing of the militia by which only it can be prevented, have ready money, upon all occasions, to arm and pay as many soldiers, as for the present defence, or the peace of the people, shall be necessary? Shall not I, and you, and every man be undone? Tell me not of a Parliament, when there is no Parliament sitting, or perhaps none in being, which may often happen. And when there is a Parliament, if the speaking and leading men should have a design to put down monarchy, as they had in the Parliament which began to sit the third of November, 1640, shall the King, who is to answer to God Almighty for the safety of the people, and to that end is intrusted with the power to levy and dispose of the soldiery, be disabled to perform his office, by virtue of these acts of Parliament which you have cited? If this be reason, it is reason also that the people be abandoned, or left at liberty to kill one another, even to the last man; if it be not reason, then you have granted it is not law.

L.

It is true, if you mean recta ratio; but recta ratio, which I grant to be law, as Sir Edward Coke says, (1 Inst. sect. 138), is an artificial perfection of reason, gotten by long study, observation, and experience, and not every man’s natural reason; for nemo nascitur artifex. [...]

P.

Do you think this to be good doctrine? Though it be true, that no man is born with the use of reason, yet all men may grow up to it as well as lawyers; and when they have applied their reason to the laws, (which were laws before they studied them, or else it was not law they studied), may be as fit for and capable of judicature, as Sir Edward Coke himself, who whether he had more or less use of reason, was not thereby a judge, but because the King made him so. [...] If one should ask him who made the law of England, would he say a succession of English lawyers or judges made it, or rather a succession of kings? And that upon their own reason, either solely, or with the advice of the Lords and Commons in Parliament, without the judges or other professors of the law? You see therefore that the King’s reason, be it more or less, is that anima legis, that summa lex, whereof Sir Edward Coke speaketh, and not the reason, learning, or wisdom of the judges. [...]Therefore unless you say otherwise, I say, that the King’s reason, when it is publicly upon advice and deliberation declared, is that anima legis; and that summa ratio and that equity, which all agree to be the law of reason, is all that is or ever was law in England, since it became Christian, besides the Bible.

[...]

L.

Are not the Canons of the Church part of the law of England, as also the imperial law used in the Admiralty, and the customs of particular places, and the by-laws of corporations and courts of
P.

Why not? For they were all constituted by the Kings of England; and though the civil law used in the Admiralty were at first the statutes of the Roman empire, yet because they are in force by no other authority than that of the King, they are now the King’s laws, and the King’s statutes. The same we may say of the Canons; such of them as we have retained, made by the Church of Rome, have been no law, nor of any force in England, since the beginning of Queen Elizabeth’s reign, but by virtue of the great seal of England.

L.

In the said statutes that restrain the levying of money without consent of Parliament, is there any thing you can take exceptions to?

P.

No. I am satisfied that the kings that grant such liberties, are bound to make them good, so far as it may be done without sin: but if a King find that by such a grant he be disabled to protect his subjects, if he maintain his grant, he sins; and therefore may, and ought to take no notice of the said grant.

[…]

P.

Nor do I hereby lay any aspersion upon such grants of the King and his ancestors. Those statutes are in themselves very good for the King and the people, as creating some kind of difficulty for such Kings as, for the glory of conquest, might spend one part of their subjects’ lives and estates in molesting other nations, and leave the rest to destroy themselves at home by factions. That which I here find fault with, is the wrestling of those, and other such statutes, to the binding of our Kings from the use of their armies in the necessary defence of themselves and their people. […] You may therefore think it good law, for all your books, that the King of England may at all times, that he thinks in his conscience it will be necessary for the defence of his people, levy as many soldiers and as much money as he please, and that himself is judge of the necessity.

[…]

L.

For all this I find it somewhat hard, that a King should have right to take from his subjects, upon the pretence of necessity, what he pleaseth.

P.

I know what it is that troubles your conscience in this point. All men are troubled at the crossing of their wishes; but it is our own fault. First, we wish impossibilities; we would have our security against all the world upon right of property, without paying for it; this is impossible. We may as well expect that fish and fowl should boil, roast, and dish themselves, and come to the table, and that grapes should squeeze themselves into our mouths, and have all other the contentments and ease which some pleasant men have related of the land of Cockaigne. Secondly, there is no nation in the world where he or they that have the sovereignty, do not take what money they please for the defence of those respective nations, when they think it necessary for their safety. The late Long Parliament denied this; but why? Because there was a design amongst them to depose the King. Thirdly, there is no example of any King of England that I have read of, that ever pretended any such necessity for levying money against his
conscience. The greatest sums that ever were levied, comparing the value of money, as it was at that
time, with what it is now, were levied by King Edward III and King Henry V; kings in whom we glory now,
and think their actions great ornaments to the English history. [...] 

L. 

I know not what to say. 

P. 

If you allow this that I have said, then say, that the people never were, shall be, or ought to be, free from being taxed at the will of one or other; that if civil war come, they must levy all they have, and that dearly, from the one or from the other, or from both sides. Say, that adhering to the King, their victory is an end of their trouble; that adhering to his enemies there is no end; for the war will continue by a perpetual subdivision, and when it ends, they will be in the same estate they were before. That they are often abused by men who to them seem wise, when then their wisdom is nothing else but envy of those that are in grace and in profitable employments; and that those men do but abuse the common people to their own ends, that set up a private man’s propriety against the public safety. But say withal, that the King is subject to the laws of God, both written and unwritten, and to no other; and so was William the Conqueror, whose right is all descended to our present King. 

L. 

As to the law of reason, which is equity, it is sure enough there is but one legislator, which is God. 

P. 

It followeth, then, that which you call the common law, distinct from statute law, is nothing else but the law of God. 

L. 

In some sense it is; but it is not Gospel, but natural reason, and natural equity. 

P. 

Would you have every man to every other man allege for law his own particular reason? There is not amongst men a universal reason agreed upon in any nation, besides the reason of him that hath the sovereign power. Yet though his reason be but the reason of one man, yet it is set up to supply the place of that universal reason, which is expounded to us by our Saviour in the Gospel; and consequently our King is to us the legislator both of statute-law, and of common-law. 

[...] 

L. 

I grant you that the King is sole legislator; but with this restriction, that if he will not consult with the Lords of Parliament, and hear the complaints and informations of the Commons, that are best acquainted with their own wants, he sinneth against God, though he cannot be compelled to any thing by his subjects by arms and force. 

P. 

We are agreed upon that already. Since therefore the King is sole legislator, I think it also reason he should be sole supreme judge.
L.

There is no doubt of that; for otherwise there would be no congruity of judgments with the laws. I grant also that he is the supreme judge over all persons, and in all causes civil and ecclesiastical within his own dominions; not only by act of Parliament at this time, but that he has ever been so by the common law. For the judges of both the Benches have their offices by the King’s letters-patent; and so as to judicature have the bishops. Also the Lord Chancellor hath his office by receiving from the King the Great Seal of England. And, to say all at once, there is no magistrate, or commissioner for public business, neither of judicature nor execution, in State or Church, in peace or war, but he is made so by authority from the King.

P.

We have hitherto spoken of laws without considering anything of the nature and essence of a law; and now unless we define the word *law*, we can go no farther without ambiguity and fallacy, which will be but loss of time; whereas, on the contrary, the agreement upon our words will enlighten all we have to say hereafter.

[...]

L.

There is an accurate definition of a law in Bracton, cited by Sir Edward Coke: *Lex est sanctio justa, jubens honesta, et prohibens contraria.*

P.

That is to say, law is a just statute, commanding those things which are honest, and forbidding the contrary. From whence it followeth, that in all cases it must be the honesty or dishonesty that makes the command a law; whereas you know that but for the law we could not, as saith St. Paul, have known what is sin. Therefore this definition is no ground at all for any farther discourse of law. Besides, you know the rule of honest and dishonest refers to honour, and that it is justice only, and injustice, that the law respecteth. But that which I most except against in this definition, is, that it supposes that a statute made by the sovereign power of a nation may be unjust. There may indeed in a statute-law, made by men, be found iniquity, but not injustice.

L.

This is somewhat subtile. I pray deal plainly. What is the difference between injustice and iniquity?

P.

I pray you tell me first, what is the difference between a court of justice, and a court of equity?

L.

A court of justice is that which hath cognizance of such causes as are to be ended by the positive laws of the land; and a court of equity is that, to which belong such causes as are to be determined by equity; that is to say, by the law of reason.

P.

You see then that the difference between injustice and iniquity is this; that injustice is the transgression of a statute-law, and iniquity the transgression of the law of reason. But perhaps you mean by
common-law, not the law itself, but the manner of proceeding in the law, as to matter of fact, by twelve men, freeholders; though those twelve men are no court of equity, nor of justice, because they determine not what is just or unjust, but only whether it be done or not done; and their judgment is nothing else but a confirmation of that which is properly the judgment of the witnesses. For to speak exactly, there cannot possibly be any judge of fact besides the witnesses.

L.

How would you have a law defined?

P.

Thus; a law is the command of him or them that have the sovereign power, given to those that be his or their subjects, declaring publicly and plainly what every of them may do, and what they must forbear to do.

[...]

L.

By your definition of a law, the King’s proclamation under the Great Seal of England is a law; for it is a command, and public, and of the sovereign to his subjects.

P.

Why not, if he think it necessary for the good of his subjects? [...]

L.

Again, whereas you make it of the essence of a law to be publicly and plainly declared to the people, I see no necessity for that. Are not all subjects bound to take notice of all acts of Parliament, when no act can pass without their consent?

P.

If you had said that no act could pass without their knowledge, then indeed they had been bound to take notice of them; but none can have knowledge of them but the members of the houses of Parliament; therefore the rest of the people are excused. [...] I know that most of the statutes are printed; but it does not appear that every man is bound to buy the book of statutes, nor to search for them at Westminster or at the Tower, nor to understand the language wherein they are for the most part written.

L.

I grant it proceeds from their own faults; but no man can be excused by ignorance of the law of reason, that is to say, by ignorance of the common-law, except children, madmen, and idiots. But you exact such a notice of the statute-law, as is almost impossible. Is it not enough that they in all places have a sufficient number of the penal statutes?

P.

Yes; if they have those penal statutes near them. But what reason can you give me why there should not be as many copies abroad of the statutes, as there be of the Bible?
I think it were well that every man that can read, had a statute-book; for certainly no knowledge of those laws, by which men’s lives and fortunes can be brought into danger, can be too much.

[...]

P.

Now define what justice is, and what actions and men are to be called just.

L.

Justice is the constant will of giving to every man his own; that is to say, of giving to every man that which is his right, in such manner as to exclude the right of all men else to the same thing. A just action is that which is not against the law. A just man is he that hath a constant will to live justly; if you require more, I doubt there will no man living be comprehended within the definition.

P.

Seeing then that a just action, according to your definition, is that which is not against the law; it is manifest that before there was a law, there could be no injustice; and therefore laws are in their nature antecedent to justice and injustice. And you cannot deny but there must be law-makers, before there were any laws, and consequently before there was any justice, (I speak of human justice); and that law-makers were before that which you call own, or property of goods or lands, distinguished by meum, tuum, alienum.

L.

That must be granted; for without statute-laws, all men have right to all things; and we have had experience, when our laws were silenced by civil war, there was not a man, that of any goods could say assuredly they were his own.

P.

You see then that no private man can claim a propriety in any lands, or other goods, from any title from any man but the King, or them that have the sovereign power; because it is in virtue of the sovereignty, that every man may not enter into and possess what he pleaseth; and consequently to deny the sovereign anything necessary to the sustaining of his sovereign power, is to destroy the propriety he pretends to.

[...]

P.

Since you acknowledge that in all controversies, the judicature originally belongeth to the King, and seeing that no man is able in his own person to execute an office of so much business: what order is taken for deciding of so many and so various controversies?

L.

There be divers sorts of controversies, some of which are concerning men’s titles to lands and goods; and some goods are corporeal, as lands, money, cattle, corn, and the like, which may be handled or seen; and some incorporeal, as privileges, liberties, dignities, offices, and many other good things, mere creatures of the law, and cannot be handled or seen; and both of these kinds are concerning meum and tuum. Others there are concerning crimes punishable divers ways: and amongst
some of these, part of the punishment is some fine or forfeiture to the King. [...] There be also other controversies concerning the government of the Church, in order to religion and virtuous life. The offences both against the Crown and against the laws of the Church, are crimes; but the offences of one subject against another, if they be not against the Crown, the King pretendeth nothing in those pleas but the reparation of his subjects injured.

P.

A crime is an offence of any kind whatsoever, for which a penalty is ordained by the law of the land: but you must understand that damages awarded to the party injured, has nothing common with the nature of a penalty, but is merely a restitution or satisfaction, due to the party grieved by the law of reason, and consequently is no more a punishment than is the paying of a debt.

L.

It seems by this definition of a crime, you make no difference between a crime and a sin.

P.

All crimes are indeed sins, but not all sins crimes. A sin may be in the thought or secret purpose of a man, of which neither a judge, nor a witness, nor any man can take notice; but a crime is such a sin as consists in an action against the law, of which action he can be accused, and tried by a judge, and be convinced or cleared by witnesses. Farther; that which is no sin in itself, but indifferent, may be made sin by a positive law: as when the statute was in force that no man should wear silk in his hat, after the statute such wearing of silk was a sin, which was not so before. Nay, sometimes an action that is good in itself, by the statute law may be made a sin; as if a statute should be made to forbid the giving of alms to a strong and sturdy beggar, such alms, after that law, would be a sin, but not before; for then it was charity, the object whereof is not the strength or other quality of the poor man, but his poverty. Again, he that should have said in Queen Mary's time, that the Pope had no authority in England, should have been burnt at a stake; but for saying the same in the time of Queen Elizabeth, should have been commended. You see by this, that many things are made crimes, and no crime, which are not so in their own nature, but by diversity of law, made upon diversity of opinion or of interest by them which have authority: and yet those things, whether good or evil, will pass so with the vulgar, if they hear them often with odious terms recited, for heinous crimes in themselves, as many of those opinions, which are in themselves pious and lawful, were heretofore, by the Pope's interest therein, called detestable heresy.

[Omitted is a discussion of the jurisdictions of various English courts.]

P.

[...] Now as to the authority you ascribe to custom, I deny that any custom of its own nature can amount to the authority of a law. For if the custom be unreasonable, you must, with all other lawyers, confess that it is no law, but ought to abolished; and if the custom be reasonable, it is not the custom, but the equity that makes it law. For what need is there to make reason law by any custom how long soever, when the law of reason is eternal? Besides, you cannot find it in any statute, though lex et consuetudo be often mentioned as things to be followed by the judges in their judgments, that consuetudines, that is to say, customs or usages, did imply any long continuance of former time; but that it signified such use and custom of proceeding, as was then immediately in being before the making of such statute. Nor shall you find in any statute the word common-law, which may not be there well interpreted for any of the laws of England temporal; for it is not the singularity of process used in any court that can distinguish it, so as to make it a different law from the law of the whole nation.

L.
If all the courts were, as you think, courts of equity [that is, courts that judge not according to customary common law but according to reason], would it not be incommodious to the commonwealth?

P.

I think not.

[...]

L.

Seeing also all judges ought to give their sentence according to equity, if it should chance that a written law should be against the law of reason, which is equity, I cannot imagine in that case how any judgment can be righteous.

P.

It cannot be that a written law should be against reason; for nothing is more reasonable than that every man should obey the law which he hath himself assented to. But that is not always the law, which is signified by grammatical construction of the letter, but that which the legislature thereby intended should be in force; which intention, I confess, is a very hard matter many times to pick out of the words of the statute, and requires great ability of understanding, and greater meditations and consideration of such conjuncture of occasions and incommodities, as needed a new law for a remedy. For there is scarce anything so clearly written, that when the cause thereof is forgotten, may not be wrested by an ignorant grammarian, or a cavilling logician, to the injury, oppression, or perhaps destruction of an honest man. And for this reason the Judges deserve that honour and profit they enjoy. Since the determination of what particular causes every particular court should have cognizance, is a thing not yet sufficiently explained, and is in itself so difficult, as that the sages of the law themselves, (the reason Sir Edward Coke will leave to law itself), are not yet agreed upon it; how is it possible for a man who is no professed or no profound lawyer, to take notice in what court he may lawfully begin his suit, or give counsel in it to his client?

L.

I confess that no man can be bound to take notice of the jurisdiction of courts, till all the courts be agreed upon it amongst themselves; but what rule to give judgment by, a judge can have, so as never to contradict the law written, nor displease his legislator, I understand not.

P.

I think he may avoid both, if he take care by his sentence that he neither punish an innocent man, nor deprive him of his damages due from one that maliciously sueth him without reasonable cause, which to the most of rational men and unbiassed, is not, in my opinion, very difficult. And though a judge should, as all men may do, err in his judgment, yet there is always such power in the laws of England, as may content the parties, either in the Chancery, or by commissioners of their own choosing, authorized by the King; for every man is bound to acquiesce in the sentence of the judges he chooseth.

L.

In what cases can the true construction of the letter be contrary to the meaning of the lawmaker?

P.

Very many, whereof Sir Edward Coke nameth three: fraud, accident, and breach of confidence. But there be many more; for there be a very great many reasonable exceptions almost to every general
rule, which the makers of the rule could not foresee; and very many words in every statute, especially long ones, that are, as to grammar, of ambiguous signification, and yet to them that know well to what end the statute was made, perspicuous enough; and many connexions of doubtful reference, which by a grammarian may be cavilled at, though the intention of the lawmaker be never so perspicuous. And these are the difficulties which the judges ought to master, and can do it in respect of their ability for which they are chosen, as well as can be hoped for; and yet there are other men can do the same, or else the judges’ places could not be from time to time supplied.

[…]

P.

Let us stop here; for this which you have said satisfies me, that seek no more than to distinguish between justice and equity; and from it I conclude, that justice fulfils the law, and equity interprets the law, and amends the judgments given upon the same law. Wherein I depart not much from the definition of equity cited in Sir Edward Coke (1 Inst. sec. xxii.); viz. equity is a certain perfect reason, that interpreteth and amendeth the law written; though I construe it a little otherwise than he would have done: for no one can mend a law but he that can make it, and therefore I say it amends not the law, but the judgments only when they are erroneous. And now let us consider of crimes in particular, the pleas whereof are commonly called the Pleas of the Crown, and of the punishments belonging to them. And first of the highest crime of all, which is high-treason. […]

[Omitted is a lengthy discussion of the legal definition of treason, heresy, and other crimes.]

P.

[…] But let us give over this, and speak of the legal punishments to these crimes belonging. And in the first place I desire to know who it is that hath the power, for an offence committed, to define and appoint the special manner of punishment. For I suppose you are not of the opinion of the Stoics in old time, that all faults are equal, and that there ought to be the same punishment for killing a man, and for killing a hen.

L.

The manner of punishment in all crimes whatsoever, is to be determined by the common-law. That is to say, if it be a statute that determines it, then the judgment must be according to the statute; if it be not specified by the statute, then the custom in such cases is to be followed: but if the case be new, I know not why the judge may not determine it according to reason.

P.

But according to whose reason? If you mean the natural reason of this or that judge authorized by the King to have cognizance of the cause, there being as many several reasons, as there are several men, the punishment of all crimes will be uncertain, and none of them ever grow up to make a custom. Therefore a punishment certain can never be assigned, if it have its beginning from the natural reasons of deputed judges; no, nor from the natural reason of the supreme judge. For if the law of reason did determine punishments, then for the same offences there should be, through all the world and in all times, the same punishments; because the law of reason is immutable and eternal.

L.

If the natural reason neither of the King, nor of any else, be able to prescribe a punishment, how can there be any lawful punishment at all?

P.
Why not? For I think that in this very difference between the rational faculties of particular men, lieth the true and perfect reason that maketh every punishment certain. For, but give the authority of defining punishments to any man whatsoever, and let that man define them, and right reason has defined them, suppose the definition be both made, and made known before the offence committed. For such authority is to trump in card playing, save that in matter of government, when nothing else is turned up, clubs are trumps. Therefore seeing every man knoweth by his own reason what actions are against the law of reason, and knoweth what punishments are by this authority for every evil action ordained; it is manifest reason, that for breaking the known laws he should suffer the known punishments. Now the person to whom this authority of defining punishments is given, can be no other, in any place of the world, but the same person that hath the sovereign power, be it one man or one assembly of men. For it were in vain to give it to any person that had not the power of the militia to cause it to be executed; for no less power can do it, when many offenders be united and combined to defend one another. There was a case put to King David by Nathan, of a rich man that had many sheep, and of a poor man that had but one, which was a tame lamb: the rich man had a stranger in his house, for whose entertainment, to spare his own sheep he took away the poor man’s lamb. Upon this case the King gave judgment, “Surely the man that hath done this shall die.” What think you of this? Was it a royal, or tyrannical judgment?

L.

I will not contradict the canons of the Church of England, which acknowledge the King of England within his own dominions hath the same rights, which the good Kings of Israel had in theirs; nor deny King David to have been one of those good Kings. But to punish with death without a precedent law, will seem but a harsh proceeding with us, who unwillingly hear of arbitrary laws, much less of arbitrary punishments, unless we were sure that all our Kings would be as good as David. […]

P.

I cite not this precedent of King David, as approving the breach of the great charter [i.e. Magna Carta], or justifying the punishment with loss of life or member, of every man that shall offend the King; but to show you that before the charter was granted, in all cases where the punishments were not prescribed, it was the King only that could prescribe them; and that no deputed judge could punish an offender but by force of some statute, or by the words of some commission, and not ex officio. […] And generally it is a rule of reason, that every judge of crimes, in case the positive law appoint no punishment, and he have no other command from the King, then do consult the King before he pronounce sentence of any irreparable damage on the offender: for otherwise he doth not pronounce the law, which is his office to do, but makes the law, which is the office of the King. And from this you may collect, that the custom of punishing such and such a crime, in such and such a manner, hath not the force of law in itself, but from an assured presumption that the original of the custom was the judgment of some former King. And for this cause the judges ought not to run up, for the customs by which they are warranted, to the time of the Saxon Kings, nor to the time of the Conquest. For the most immediate antecedent precedents are the fairest warrants of their judgments; as the most recent laws have commonly the greatest vigour, as being fresh in the memory of all men, and tacitly confirmed, because not disapproved, by the sovereign legislator. What can be said against this?

L.

Sir Edward Coke, (3 Inst. p. 210), in the chapter of judgments and executions, saith, that of judgments some are by the common-law, some by statute-law, and some by custom; wherein he distinguisheth common-law both from statute-law and from custom.

P.

But you know, that in other places he makes the common-law, and the law of reason, to be all one; as
indeed they are, when by it is meant the King’s reason. And then his meaning in this distinction must be, that there be judgments by reason without statute-law, and judgments neither by statute-law nor by reason, but by custom without reason. For if a custom be reasonable, then, both he and other learned lawyers say, it is common-law; and if unreasonable, no law at all.

L.

I believe Sir Edward Coke’s meaning was no other than yours in this point, but that he inserted the word custom, because there be not many that can distinguish between customs reasonable and unreasonable.

P.

But custom, so far forth as it hath the force of a law, hath more of the nature of a statute, than of the law of reason, especially where the question is not of lands and goods, but of punishments, which are to be defined only by authority. Now to come to particulars, what punishment is due by law for high-treason?

[Omitted is a discussion of customary definitions of crimes, customary punishments, and customs relating to the English aristocracy and the calling of parliament. In each case, Hobbes has the character of the philosopher convince the lawyer that custom is not sufficient justification for law, unless it be backed up by reason, or, better yet, by the will of the King.]