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English common law practitioners and judges borrowed much of the conceptual structure for their body of legal knowledge from the legal culture of continental Europe over the centuries. Their surviving writings show a marked increase in the use of Roman legal classifications in the century before 1600: public and private, criminal and civil, real and personal, property and possession, contract and delict, among other examples.[1] Those who perpetuated the learning of the English royal courts in the sixteenth century had begun fitting it into a framework borrowed from the two great bodies of 'learned law' taught in the universities of Europe: civil (Roman) law and canon law. Common lawyers expressed the need for an 'institutes' of English law, a written introductory work that would survey the whole of the common law in its main classifications, comparable to Justinian's *Institutes* of Roman law (533 AD) and Giovanni Paolo Lancelotti's *Institutes* of canon law (1563). In the decades after 1600, such institutes of common law began to appear.[2]

This paper investigates the common lawyers' attitudes towards canon law and civil law[3] in the period from 1300 to 1600. How much canon law and civil law did

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[1] David J. Seipp, 'The Structure of English Common Law in the Seventeenth Century', in *Legal History in the Making* 61, 61–4 (W. M. Gordon & T. D. Fergus (eds), 1991).

[2] John Cowell, *Institutiones Iuris Anglicani* (Cambridge 1605); Henry Finch, *Nomotexnia: Cestascavoir, un Description del Common Leys Dangleterre Solonque les Rules del Art* (London 1613); Henry Finch, *Law, or a Discourse Thereof* (London 1627). These works are discussed in Seipp, above n 1.

[3] Canon law and civil law are distinct but closely related bodies of law. Particularly in England, university teaching on the two subjects overlapped considerably, as did practice. Canon law sources incorporated a significant amount of Roman law material. See Stephan Kuttner, 'New Studies on the Roman Law in Gratian's Decretum', 11 *Seminar* 12, 17, 20–21 (1950). Medieval canon law and civil law shared many elements of technical vocabulary, legal classification, and styles of reasoning. This paper links the two laws, as common lawyers did, but does not equate them.

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common lawyers know? How much did they think they knew? How did they acquire what knowledge they had of these bodies of law? What use did they make of this knowledge in the common law courts? Did they regard these bodies of sophisticated, text-based, university-taught law as comparable to their own? As superior, inferior, or on a par with their own? And finally, what do their attitudes towards civil law and canon law tell us about how they conceived their own law?

A ready-made set of answers to these questions is supplied by one 'received view' of English legal history, what I call the 'enemy theory'. On this view, the justices, serjeants, and barristers of the common law courts regarded canonists and civilians as their enemies in a struggle for legal and political supremacy within England. They despised Roman law for its association with absolute and arbitrary despotism on the Continent. They despised canon law for its association with the Pope, the Roman Catholic hierarchy, and all that the English Reformation rejected.

T. E. Scrutton, writing more than a century ago, concluded that among English lawyers before 1600 'the Roman law became not only a subject of distrust, owing to the conflict between King and Pope; it even dropped into oblivion'.[4] F. W. Maitland wrote that 'Roman law was by this time [the Tudor age] an unintelligible and outlandish thing, perhaps good enough law for half-starved Frenchmen'[5] but not for the typical common lawyer 'who knew nothing [about] and cared nothing for any system but his own'.[6] Since Maitland's time, W. S. Holdsworth reiterated that fourteenth- and fifteenth-century common lawyers 'became wholly ignorant of that fund of legal principles and material for legal speculation which were stored up in the writings of the civilians and canonists'.[7] Bryce Lyon characterized fifteenth-century English law as 'completely insular',[8] T. F. T. Plucknett described common lawyers, motivated by professional jealousy, 'closing the frontiers to foreign influence',[9] and Raoul van Caenegem agreed that England's common law was 'an island in the Romanist sea'.[10] The 'enemy theory', which I take to be a product of nineteenth-century nationalism, eighteenth-century Whiggism, and seventeenth-century anti-Catholicism, leads us to expect that common lawyers regarded Roman and canon law with a mixture of ignorance, distrust, fear, and loathing.

Recent historians have moderated and limited the 'enemy theory' in several respects. We know from the researches of Charles Donahue, R. H. Helmholz and others that England's ecclesiastical courts administered canon law throughout

[4] Thomas Edward Scrutton, *The Influence of the Roman Law on the Law of England* 194 (Cambridge 1885).

[5] Frederic W. Maitland & Francis C. Montague, *A Sketch of English Legal History* 110 (New York 1915) (articles originally contributed to *Social England*, H. D. Traill (ed) New York 1899).

[6] Frederic William Maitland, 'Why the History of English Law Is Not Written', in 1 *The Collected Papers* 480, 488 (H. A. L. Fisher (ed) Cambridge 1911).

[7] 2 W. S. Holdsworth, *A History of English Law* 287 (3rd ed, London 1923).

[8] Bryce Lyon, *A Constitutional and Legal History of Medieval England* 436 (2nd ed, New York 1980).

[9] T. F. T. Plucknett, 'Relations Between Roman Law and English Common Law down to the Sixteenth Century: A General Survey', 3 *University of Toronto Law Journal* 24, 50 (1939–40).

[10] R. C. van Caenegem, *The Birth of the English Common Law* 105 (2nd ed, Cambridge 1988).

the long period of supposed English 'insularity' in a rough accommodation with the common law courts.[11] J. L. Barton, Peter Stein, and others have explored the influence of Roman law in twelfth- and thirteenth-century England, when the common law was forming.[12] J. H. Baker has brought many new common law sources to light, and has linked up common lawyers' references to canon law and civil law in their case reports with later English doctrines on reception of foreign law.[13] Most recently, in an article in the *Duke Law Journal*, R. H. Helmholz has surveyed the common lawyers' use of civil law and canon law in the periods before 1300 and after 1600.[14]

This paper fills in the story for the middle three centuries of common law development. It shows an abundant and continually increasing amount of attention paid to the rules of civil law and canon law in the reports of common lawyers' arguments. Common lawyers stated their own knowledge of these other laws, reported on their consultations with English canonists and civilians, brought those canonists and civilians into court to advise or make arguments of their own, and occasionally quoted or cited the texts of canon law and civil law from printed sources. Common lawyers paid more attention to canon law than to civil law, and concentrated most particularly on the topics raised by overlapping common law and ecclesiastical court jurisdiction.

By and large, common lawyers showed a respectful attitude towards canon law and civil law. They regarded these bodies of law as comparable to their own in many respects. Each law was conceived as a collection of rules: some rules of civil law and canon law contradicted common law, some were in agreement with common law, and some covered questions that common law had never addressed. It was very rare for common lawyers to try to 'resolve' a conflict between common law and the other law or to justify their adherence to the common law rule. To the extent that civil law and canon law differed from common law in more fundamental respects—in their embodiment in authoritative written texts, in their application of distilled maxims and rules, and in their organization into substantive categories—common lawyers grew to see their own law as essentially similar to these other laws. They moved towards conceiving their own law as an uncompiled 'text' of rules and maxims organized in the same coherent structure.

[11] W. R. Jones, 'Relations of the Two Jurisdictions: Conflict and Cooperation in England during the Thirteenth and Fourteenth Centuries', 7 *Studies in Medieval and Renaissance History* 79 (1970); Charles Donahue, Jr, 'Roman Canon Law in the Medieval English Church: *Stubbs* v *Maitland* Re-examined', 72 *Michigan Law Review* 647 (1985); R. H. Helmholz, *Roman Canon Law in Reformation England* 20–5, 33–4 (Cambridge 1990).

[12] J. L. Barton, *Roman Law in England (Ius Romanum Medii Aevi*, Milan 1971); Ralph V. Turner, 'Roman Law in England Before the Time of Bracton', 15 *Journal of British Studies* 1 (1975); Francis de Zulueta & Peter Stein, *The Teaching of Roman Law in England Around 1200* (Selden Society Supp Series no 6, 1990). And see now Paul Brand, *The Origins of the English Legal Profession* 155–6 (Oxford 1992).

[13] J. H. Baker, 'Ascertainment of Foreign Law: Certification to and by English Courts Prior to 1861', 28 *International and Comparative Law Quarterly* 141, 143–4 (1979).

[14] R. H. Helmholz, 'Continental Law and Common Law: Historical Strangers or Companions?', 1990 *Duke Law Journal* 1207 (1990).

1. *How Often Did Common Lawyers Refer to Canon Law and Civil Law?*

a. *Number*

The surviving records of common law pleading, the Year Books, form a roughly continuous series of case reports beginning about 1300. For this paper I have compiled all the references I could locate to canon law, civil law, canonists, and civilians in printed Year Books and later case reports from 1300 to 1600.[15] I have found more than two hundred such cases in which common lawyers either state propositions of canon law or civil law, or report the opinions of canonists or civilians. The reports leave many of these statements anonymous, but attribute the rest to more than one hundred named common lawyers, most of them justices of the king's courts. Knowledge of canon law and civil law was widely spread among common lawyers.

In compiling this total, I have not counted the many mentions of Latin maxims that derive ultimately from civilian or canonist texts. Common lawyers quickly domesticated these Latin tags. For example, in 1310 Chief Justice Bereford juxtaposed the common law's 'own' maxim *volenti non fit iniuria* with a rule he said was from 'written law' (ie civil law or canon law)—*nemo obligatur ad impossibile*, two maxims that could each be found in both civilian and canonist texts.[16] In more than fifty reports, common lawyers repeated Latin maxims without attributing them to civilian or canonist sources. Readers of such reports—even the speakers themselves—may have been unaware that the maxims came from legal systems other than their own. Only when lawyers expressly ascribed legal maxims to civil law or canon law do their words come within the ambit of this study.

I have also excluded from this total the many reports in which common lawyers limited their remarks to the issue of allocating jurisdiction between their own courts and the ecclesiastical courts. When a common lawyer said merely that the ecclesiastical courts ought to decide whether a parson had rights to tithes or whether a couple were lawfully married, the lawyer was not expressing an understanding of the content of any particular substantive rule of canon law. Only when lawyers stated what the Courts Christian would decide in such cases do their words count as assertions about the content of canon law for purposes of this study.

[15] Many more reports from this period remain in manuscript. The entirety of the printed corpus of Year Book and sixteenth-century case reports may be taken as a 'sample' of recorded courtroom dialogue among royal justices and common lawyers. Later generations of common lawyers relied almost entirely on these printed sources for both legal education and authoritative precedent. The printed record is exhaustive for the first few decades, thanks to the Rolls Series and Selden Society, and sporadic thereafter. Year Book citations are to the 1679 Vulgate edition unless otherwise indicated as RS (Rolls Series), SS (Selden Society), Ames (Ames Society), or Rogers (edited by Ralph V. Rogers, privately printed).

[16] Mich 4 Edw 2, 22 SS 200 (1310) (William de Bereford CJCP) (*volenti* from VI 5.12 de regulis iuris reg 27; Dig 47.10.1.5 (Ulpian ad edictum 56); *nemo obligatur* from VI 5.12 de regulis iuris reg 6; Dig 50.17.185 (Celsus digestorum 8).

This study considers only Year Books and reports of cases from the period between 1300 and 1600. In other types of legal literature published before 1600, more references to canon law and civil law can be found. These include the works of the common lawyers John Fortescue[17] and Christopher St. German,[18] and the civilian Thomas Smith.[19] Other scholars have noted the prominence of canon law and civil law in those works.[20] The two hundred cases considered in this paper demonstrate a broader range of chronology, subject matter, and context than the works of Fortescue, St. German, and Smith.

b. *Frequency*

References to canon law and civil law are rare at the start, numbering from one to six or seven per decade in the voluminous published reports of the fourteenth century (which total more than 1,200 cases per decade). In the next century the frequency increased: the fifteenth-century Year Books contain roughly twice as many references to canon law and civil law, though the total number of cases in print is less than half that of the previous century. There are few published reports for the early sixteenth century, but the reports of the last decades of the century show still more increase: two or three encounters between the common lawyers and the learned laws every year. England's Reformation did little to change the substance of canon law rules applied in ecclesiastical courts,[21] and caused no decrease in the frequency of common lawyers' references to canon law.

Over the period from 1400 to 1600, common lawyers came to invoke these other bodies of law in more and different circumstances. Common lawyers also came into more and more frequent contact with the exponents of those other laws, the doctors of civil law and canon law. This increasing interest in the bodies of law shared with continental Europe is one sign that the community of English common lawyers gradually adopted a more sophisticated, cosmopolitan outlook. Their growing acquaintance with the other laws led English common lawyers to engage in more reflective and comparative study of their own law.[22]

[17] John Fortescue, '*De Natura Legis Naturae*', in *The Works of Sir John Fortescue* (c 1462) (Thomas (Fortescue) Lord Clermont (ed) London 1869); John Fortescue, *De Laudibus Legum Anglie* (c 1470) (ed & trans S. B. Chrimes, Cambridge 1949).

[18] Christopher St German, *Doctor and Student* (1523–31) (Selden Society vol 91, T. F. T. Plucknett & J. L. Barton (eds) London 1974).

[19] Thomas Smith, *De Republica Anglorum* (c 1562–5) (London 1583).

[20] Eg, J. L. Barton, 'Introduction' to *St German's Doctor and Student* 91 SS (T. F. T. Plucknett & J. L. Barton (eds) London 1974); Daniel R. Coquillette, *The Civilian Writers of Doctors' Common, London* 48–63 (Berlin 1988). See also David J. Seipp, 'Method: Institutes and Reports from the Fifteenth to the Seventeenth Century' 35–46, 76–7 (unpublished MS).

[21] See R. H. Helmholz, *Roman Canon Law in Reformation England* 37–8, 40–1 (Cambridge 1990).

[22] See W. S. Holdsworth, 'The Reception of Roman Law in the Sixteenth Century', 27 *Law Quarterly Review* 236, 239 (1912); Peter Stein, 'Continental Influences on English Legal Thought, 1600–1900', in *La Formazione Storica del Diritto Moderno in Europa* 1105, 1107 (Firenze 1977); Wilfrid R. Prest, 'The Art of Law and the Law of God: Sir Henry Finch (1558–1625)', in *Puritans and Revolutionaries* 94, 115–16 (Oxford 1978); David J. Seipp, 'The Structure of English Common Law in the Seventeenth Century', in *Legal History in the Making* 61, 61–2 (W. M. Gordon & T. D. Fergus (eds) 1991).

2. *What Did Common Lawyers Call the Other Laws?*

Before describing what common lawyers claimed to know of canon law and civil law, I think something can be learned from the labels that common lawyers applied to these other laws and to their own. For the most part, their terminology indicated that English common law was comparable to the other laws, neither superior nor inferior. They tended to identify bodies of law more often by the persons who professed expertise in those laws than by jurisprudential sources of authority, territorial scope, or other means.

a. *Written Law, Imperial Law*

Justices of the Common Bench mentioned 'written law' (*ley escrit* or *ley escripte*) three times in the Year Books before 1340 and never thereafter.[23] One reference was to a passage in Justinian's *Codex*,[24] another to a canon law decree of divorce (annulment of marriage) after the death of one spouse,[25] and the third to a maxim found in both canon law and civil law.[26] 'Written law' was more sophisticated, more certain, and more respectable than its obvious counterpart, the 'unwritten law' of the English royal courts. In preambles to the earliest common law treatises, *Glanvill* and *Bracton*, royal court justices and clerks showed their sensitivity to the charge that it would be absurd to call the laws and customs of the king's courts 'written law'.[27] After the mid-fourteenth century, it seems, common lawyers did not think of their own law as 'unwritten' in distinction to these other bodies of law.

In 1313 a Justice made an early and unique reference to 'imperial law' (*lei imperiale*) for a Latin maxim (though one of apparently English origin).[28] Again, common lawyers thereafter seem to have dropped this designation of civil law as legislation of an emperor with lordship over their own king and country. Neither 'written' nor 'imperial', the other laws ordinarily received designations that

[23] Pasch 35 Edw 1, RS 471 (1307) (Hervey de Staunton JCP); Mich 4 Edw 2, 22 SS 200 (1310) (William de Bereford CJCP); Trin 10 Edw 3, pl 24, fol 35 (1336) (John de Shardelow JCP).

[24] Pasch 35 Edw 1, RS 471 (1307) (Hervey de Staunton JCP) (*cogi possessorem*, from Cod 3.31.11). Cf Pasch 5 Edw 2, pl 41, 33 SS 97 (1312) (Walter de Friskeney Sjt). See David J. Seipp, 'Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law', 7 *Law and History Review* 175, 196–7 (1989).

[25] Trin 10 Edw 3, pl 24, fol 35 (1336) (John de Shardelow JCP).

[26] Mich 4 Edw 2, 22 SS 200 (1310) (William de Bereford CJCP) (*nemo obligatur ad impossibile* from VI 5.12 de regulis iuris reg 6; Dig 50.17.185 (Celsus digestorum 8).

[27] *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, prologue, 2 (G. D. G. Hall (ed & trans) London 1965) [hereinafter cited as *Glanvill*, book:chapter (page)]; Henry de Bracton, *On the Laws and Customs of England* fol 1a (2:19) (G. E. Woodbine (ed), S. E. Thorne (trans), Cambridge 1968–77) [hereinafter cited as *Bracton*, folio (volume:page)].

[28] Trin 6 Edw 2, 36 SS 68, 70 (1313) (William Inge JCP) (*possessio fratris facit sororem heredem*). See David J. Seipp, 'Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law', 7 *Law and History Review* 175, 197 (1989).

merely marked them off as laws different from, co-ordinate to, and comparable with the law of the English king's courts.

b. *Law of the Holy Church*

What common lawyers consistently mentioned when they looked beyond their own law from the 1330s to the 1460s was the 'law of the Holy Church' (*ley de seint esglise*). This way of describing canon law focuses on the institution that applied canon law within England. Their term acknowledged that this was the law of the whole Church, an institution that spread far beyond England to every corner of Europe and acknowledged its head to be the pope in Rome.

The common lawyers also referred to prelates, priests, monks and nuns as 'people of the Holy Church' (*gents de seint esglise*) and made mention of canon law as the law particularly governing that group of Englishmen marked out by clerical status.[29] Common lawyers persisted in saying, for the whole period of this study, that canon law was 'their law' (*leur ley*) and common law was 'our law' (*nostre ley*).[30] This usage might be taken to mean that they considered common law and canon law as the 'personal laws' of two different tribes, lay and clerical, intermingling within the same territory.[31] But when common lawyers talked of 'our law' in contrast to canon law or civil law, it seems clear that they did not mean the law of 'we laypersons' (ie not law for clerics) or the law of 'we English' (ie not 'foreign law'). Common lawyers recognized that canon law and common law were 'the two laws' affecting rights in England, and some entitlements, such as the right to present a parson to a church (an advowson), had to be determined 'by both laws'.[32] Common lawyers did not deny that canon law affected the life of practically every lay person in England (governing, for example, marriages and testaments of goods), and they certainly knew that clerics were extremely persistent litigants at common law.

For these common lawyers, 'our law' meant the law of 'we justices and serjeants of the king's courts'. The possessive 'our law', in these contexts, did not mean 'the law to which we are subject'. It meant instead 'the law of which we are the learned expositors'. Common law existed in the minds and speech of justices, serjeants, and apprentices, not in the recorded judgments of the courts or in the books of reports.[33] Common lawyers usually referred to their own learning as 'our law' when comparing it to canon law or civil law, but not always. In early

[29] Eg, Mich 18 Edw 3, RS 41 (1344); Hil 18 Hen 6, pl 3, fol 30, 32 (1440) (Thomas Fulthorpe JCP).

[30] Eg, Mich 39 Edw 3, pl [35], fol 31 (1365) (William de Wynchyngham JCP); Hil 14 Hen 4, pl 4, fol 14 (1413) (William Hankford CJCP); Pasch 34 Hen 6, pl 9, fol 38, 39 (1456) (Thomas Littleton Sjt, Richard Choke Sjt, Robert Danby JCP).

[31] See Simeon L. Guterman, *From Personal to Territorial Law: Aspects of the History and Structure of the Western Legal-Constitutional Tradition* 18, 24–41 (Metuchen, NJ, 1972).

[32] Eg, Pasch 34 Hen 6, pl 9, fol 39, 40 (1456) (Nicholas Aysshton JCP).

[33] See J. H. Baker, 'English Law and the Renaissance', 44 *Cambridge Law Journal* 46, 52–3 (1985); J. H. Baker, 'The Inns of Court and Legal Doctrine', in *Lawyers and Laymen* 274 (T. M. Charles-Edwards *et al* (eds), Cardiff 1986).

cases, they also referred to 'the law of the land',[34] and in later cases to 'common law' or 'the law of England'.[35]

c. *Spiritual Law*

The label that came to replace 'law of the Holy Church' in common lawyers' argument from the 1460s to the 1510s was 'spiritual law' (*ley espirituel*).[36] Calling canon law the 'spiritual law' did not automatically concede its moral or theological superiority over the law of the king's courts. In contrast to the canonists' 'spiritual law', common lawyers called their own law the 'temporal law'.[37] As fifteenth-century common lawyers used these terms, the spiritual power and the temporal power were co-ordinate jurisdictions. Lawyers distinguished the realms of 'spiritualty' and 'temporalty' without any strong connotations of intellectual or practical superiority one way or the other. They were different laws, known to different professions and administered by different courts, differently.

d. *Civil Law*

Common lawyers made a single mention of 'civil law', so called, in the fourteenth century Year Books, and only three scattered references in the fifteenth century.[38] A few more references can be found to 'civilians' and 'doctors of civil law' giving opinions about canon law matters before 1500.[39] In the sixteenth century, especially after 1530, references to 'civil law' and to civilians increased abruptly. Not all of these references are to Roman law or to the *ius commune* common to civilian and canonist learning. The new preferred term for speaking about what we now call canon law became 'civil law'. Rules regarding marriage and divorce, probate of testaments, and induction of parsons to churches all came under the label of 'civil law' and were learned from 'civilians', especially from the 1570s onward.[40] Even when sixteenth-century common lawyers referred back to a Year

[34] Mich 11 Edw 3, RS 223, 233–4 (1337) (William de Shareshull JCP); Mich 18 Edw 3, RS 41 (1344) (John de Stonore CJCP); Mich 39 Edw 3, pl [35], fol 31 (1365) (Robert Belknap Sjt, Robert de Thorp JCP); Trin 12 Hen 7, pl 2, fol 22 (1497) (Thomas Frowyk Sjt); 2 Leonard 169, 170, 74 Eng Rep 450, 451 (1587) (Thomas Walmsley Sjt).

[35] Hil 10 Hen 7, pl 17, fol 17 (1495) (Thomas Bryan CJCP); Trin 12 Hen 7, pl 2, fol 22 (1497) (John Fyneux CJKB); 1 Plowden 125, 75 Eng Rep 193 (1555) (Edward Saunders JCP); 3 Coke 40a, 76 Eng Rep 726 (1592); Brooke NC 8, 9, 73 Eng Rep 850, 851 (16th c).

[36] For earlier references to *ley espirituel*, see Hil 8 Edw 3, pl 43, fol 14 (1334) (William Herle CJCP); Mich 11 Hen 4, pl 20, fol 7, 9 (1409) (Robert Hill JCP); Mich 32 Hen 6, pl 5, fol 31 (1453) (Walter Moyle Sjt).

[37] Eg, Pasch 12 Edw 4, pl 22, fol 8 (1472) (Guy Fairfax Sjt); Hil 22 Edw 4, Fitzherbert Consultation resid 5 (1483) (Thomas Bridges Sjt). See also Pasch 34 Hen 6, pl 9, fol 38 (1456) (Richard Choke Sjt) (temporal judge); Spelman, Provision 1, 93 SS 190, 191 (1529) (temporal authority).

[38] Hil 8 Edw 3, pl 43, fol 14 (1334) (William Herle CJCP); Pasch 7 Hen 4, pl 10, fol 13, 14 (1406) (John Markham Sjt); Mich 37 Hen 6, pl 4, fol 2, 3 (1458) (John Prysot CJCP); Hil 1 Hen 7, pl 3, fol 6 (1486) (William Calow Sjt).

[39] Hil 12 Hen 4, Statham Supersedeas 6 (1411); Mich 14 Hen 4, Fitzherbert, Excommengement 21 (1412); Mich 1 Hen 5, Statham, Testament 5 (1413); Mich 8 Edw 4, pl 9, fol 9, 12 (1468) (William Yelverton JKB).

[40] 3 Dyer 287b, 73 Eng Rep 645 (1570) (headnote); Moore KB 170, 72 Eng Rep 510 (1581); 4 Leonard 211, 74 Eng Rep 827 (1583); Moore KB 226, 72 Eng Rep 546 (1587); 2 Leonard 70, 74 Eng Rep 366 (1587); Moore KB 580, 590, 72 Eng Rep 772, 777 (1599) (Francis Moore); Cro Eliz 719, 78 Eng Rep 953 (1599); 1 Brownl & Goldsb 31, 123 Eng Rep 646 (16th c).

Book discussion of 'law of the holy church' in 1428, they called the subject 'civil law' and the speakers 'civilians'.[41]

The common lawyers probably applied the label 'civil law' to all Continental legal learning in the sixteenth century because the Englishmen they encountered who possessed this knowledge all held degrees in civil law. Henry VIII eliminated canon law faculties at Oxford and Cambridge and established instead Regius Professorships of Civil Law.[42] The only law graduates produced by the English universities thereafter were bachelors and doctors of civil law. They learned quite a bit of canon law before taking their doctorates and practised a great deal more afterward,[43] but for the common lawyers they were 'civilians'.

Sixteenth-century common lawyers thus merged the two laws, civil and canon, under a single term of reference. Indeed, they also lumped together maritime law as administered by the Court of Admiralty and martial law as administered in the Court of the Constable and Marshall, all under the same blanket term 'civil law'.[44] To the extent that common lawyers viewed every body of law other than their own as 'civil law', their usage might at first suggest confusion and misunderstanding. If there were a hint of hostility in these references (and I do not find one), it would suggest a certain degree of paranoia about civilians lurking under every bed, feeding into the 'enemy theory' of insular common law opposition to civil law wherever and however manifested.

On the other hand, civilians did fill many judicial, clerical, and advocacy roles in a number of courts of limited jurisdiction in sixteenth-century England.[45] Civilians introduced their own procedures into the established practice of these courts, to the extent possible. As on the Continent, civil law merged with canon law and local laws into a loose *ius commune* through which civilians, canonists, and national lawyers shared a common vocabulary, methodology, and conceptual grounding. English common lawyers partook of these aspects of the European *ius commune* to a more limited extent than did lawyers of some other courts. When they saw the *ius commune* as practised by others, late sixteenth-century common lawyers learned to lump it all into one 'civil law'.

3. *What Did Common Lawyers Know (or Think They Knew) about Canon Law and Civil Law?*

Four topics loom largest in common lawyers' references to the substance of canon law from 1300 to 1600: legitimacy of children, validity of marriages, installation of clerics as parsons, and administration of testaments for goods. These are the four areas of greatest overlap between royal court and ecclesiastical

[41] Mich 7 Hen 6, pl 36, fol 10, 11 (1428) is mentioned in 1 Plowden 124, 75 Eng Rep 192 (1555); Moore KB 742, 72 Eng Rep 876 (1599); 2 And 208, 123 Eng Rep 623, 624 (1599).

[42] See Daniel R. Coquillette, *The Civilian Writers of Doctors' Common, London* 24 & n 33, 26–7 (Berlin 1988).

[43] See R. H. Helmholz, *Roman Canon Law in Reformation England* 152–4 (Cambridge 1990).

[44] Mich 37 Hen 6, pl 4, fol 2, 3 (1458); Cro Eliz 52, 78 Eng Rep 313 (1587); 2 Leonard 182, 74 Eng Rep 461 (1589–90); Moore KB 297, 72 Eng Rep 590 (1590).

[45] See below text at nn 145–59.

court jurisdictions. In the sixteenth century, common lawyers' attention broadened to many other aspects of canon law and civil law—substantive and procedural, practical and theoretical, contemporary and historical. In each instance, the perceptions of the common lawyers show us something about their conception of the nature of their own law as well.

a. *Legitimacy and Bastardy*

This subject dominated the early references of common lawyers to canon law. Every common lawyer knew well that children born before their parents' marriage were legitimate at canon law and bastard at common law.[46] Centuries after the event, common lawyers recited the barons' stubborn response to the bishops' attempt to conform common law to canon law at the Parliament of Merton (1236): *nolumus leges Angliae mutare*.[47] This was so well settled that some common lawyers made the hasty generalization that anyone fitting the narrower definition of bastard in canon law would certainly be bastard as well in 'our law'.[48] Other common lawyers disagreed. They pointed out that children born to a married woman were presumptively legitimate at common law but could be bastard at canon law if they were conceived in adultery or if their parents entered knowingly into a void marriage.[49]

Legitimacy of children was an issue of crucial importance for litigating disputes over inheritance to land, and the common lawyers made of it an elaborate branch of doctrine.[50] The varying laws on bastardy were so well established and so straightforward that common lawyers rarely mentioned them in the sixteenth century. No other topic demonstrated so clearly that common law and canon law had rules on precisely the same question, rules that stood in direct contradiction to one another. Common lawyers did not simply decide that 'our law' prevailed on this point; they did not insist that common law was 'right' or more 'just'. They made another point. Because each law bastardized some children who were legitimate by the other law's rules, neither common law nor

[46] Eg, Hil 8 Edw 3, pl 43, fol 14 (1334) (William Herle CJCP, John de Shardelow JCP); Mich 11 Edw 3, RS 223, 233–4 (1337) (William de Shareshull JCP); Mich 18 Edw 3, RS 41 (1344) (John de Stonore CJCP); Trin 27 Edw 3, pl 32, fol 6 (1353). The conflict of rules was already apparent in the *Glanvill* and *Bracton* treatises. *Glanvill*, bk 7, ch 15 (p 88); *Bracton*, fols 63–63b (2:186).

[47] Statute of Merton, ch 9 (1236). See Hil 18 Edw 4, pl 28, fol 29, 30 (1479) (Thomas Littleton JCP); Moore KB 120, 72 Eng Rep 479, 480 (1582) (attributing the words to King Henry III rather than to the barons).

[48] Trin 11 Hen 4, pl 32, fol 84 (1410) (Roger Tyrwhit JKB) (also in Statham's, Fitzherbert's, and Brooke's Abridgements under the title Bastardie); Mich 33 Hen 6, pl 35, fol 50 (1454) (John Prysot CJCP).

[49] Trin 27 Edw 3, Fitzherbert, Bastardie 11 (1354); Mich 39 Edw 3, pl [35], fol 31 (1365) (William de Wynchyngham JCP, Robert Belknap Sjt, Robert de Thorp JCP); Trin 43 Edw 3, pl 5, fol 19 (1369) (Roger de Kirkton Sjt, Robert Belknap Sjt); Mich 11 Hen 4, pl 30, fol 13, 14 (1409) (Thomas Rolf, Hugh de Huls JKB); Hil 18 Edw 4, pl 28, fol 29 (1479) (Thomas Littleton JCP, Richard Choke JCP, Thomas Bryan JCP, *et al*); Hil 22 Edw 4, Fitzherbert Consultacion resid 5 (1483) (Thomas Bridges Sjt); Port's Notebook, 102 SS 127, 129 (c 1493). Another report making no comparison with common law is Pasch 19 Edw 3, Fitzherbert, Bastardie 8 (1345).

[50] See, eg, J. L. Barton, 'Nullity of Marriage and Illegitimacy in the England of the Middle Ages', in *Legal History Studies 1972*, at 28–49 (D. Jenkins (ed), Cardiff 1975). In rare pleading contexts at common law, it might be to one's advantage to admit one's own illegitimacy, a tactic which, a common lawyer said, could not be done in Court Christian. Hil 19 Edw 2, pl [8], fol 651, 652 (1326) (John de Cantebrigge Sjt).

canon law could be said to be altogether more lenient or humane. Neither law 'favoured' legitimacy in the way the common law 'favoured' life, liberty, and dower.[51] I suspect that common lawyers brought up the somewhat rare instances in which common law legitimated the canon law's bastards in order to avoid what would otherwise have seemed an unfortunate hard-heartedness in the common law directed toward innocent children. Common lawyers invested their law with many aspects of 'personality' and prided themselves, in other instances, on its rigour.[52]

b. *Marriage and Divorce*

This branch of canon law also attracted the common lawyers' attention on many occasions throughout the period before 1600. Validity of marriage had consequences not only for the legitimacy of children but for widows' rights to dower and guardians' rights to arrange the marriage of their wards. A particular concern was the status of marriages purportedly celebrated between children. Common lawyers understood canon law to provide that children under the age of twelve or fourteen could not lawfully marry, and if promised in marriage could consent or refuse freely when they reached that age, unless the marriage was 'somehow consummated' beforehand.[53] The lawyers disputed whether consent at the appropriate age would 'relate back' to time of the children's purported wedding.[54] Common lawyers also pointed out how canon law allowed a betrothed or wedded spouse to withdraw from the marriage by taking vows to enter a monastery before sexual intercourse between the spouses had 'completed' the marriage.[55]

A Year Book note in 1373 set out five grounds for divorce (what would now be called annulment) at canon law—profession (of monastic vows), pre-contract (betrothal to another), kinship (within the fourth degree), affinity (as godparent or in-law), and impotence—and added that only the first ground left the wife her dower and the children their inheritance.[56] A sentence of divorce could be pronounced even after one or both of the spouses died, and perhaps deprive the

[51] Edward Coke, *The First Part of the Institutes of the Laws of England, or a Commentary upon Littleton* fol 124b (London 1628): 'It is commonly said, that three things be favoured in law; life, liberty, and dower.' Examples of common law rules 'favouring' (ie resolving doubts in favour of presuming) life and liberty can be found throughout the Year Books.

[52] See Norman Doe, *Fundamental Authority in Late Medieval English Law* 99–101, 143, 178 (Cambridge 1990).

[53] Pasch 12 Ric 2, Ames 155 (1388); Mich 11 Hen 4, pl 30, fol 13, 14 (1409) (Thomas Rolf, Robert Tyrwhit JKB); Mich 7 Hen 6, pl 36, fol 10, 11 (1428) (Huls LLB, John Cottesmore Sjt, John Juyn Sjt); Brooke NC 108, 73 Eng Rep 894 (1557–58) (declared by the doctors); 3 Dyer 369a, 73 Eng Rep 826 (1580) (solution of the doctors); 1 Leonard 53, 74 Eng Rep 49 (1587) (Angier); 6 Coke 22b, 77 Eng Rep 287 (1598); Moore KB 742, 72 Eng Rep 876 (1599) (referring to 1428 report); 2 And 208, 123 Eng Rep 623, 624 (1599) (same case). See also 38 Edw 3, Lib Ass pl 29, fol 130 (1364) (William Tank) (similar rule for professing monastic vows under age 14).

[54] Mich 7 Hen 6, pl 36, fol 10, 11 (1428) (John Cokayn CB, John Juyn Sjt).

[55] Hil 18 Hen 6, pl 3, fol 30, 33 (1440) (John Fortescue Sjt); Spelman, Prerogative 16, 93 SS 178, 179 (c 1514) (reading at Gray's Inn).

[56] Mich 47 Edw 3, pl 78, fol 1 (1373) (nota); 2 Leonard 169, 74 Eng Rep 450 (1587) (Richard Shuttleworth Sjt) (repeats the list).

widow of her dower and render the issue illegitimate.[57] Two sixteenth-century cases drove common lawyers to bring in the canonist doctors. In both cases, husband and wife had been divorced on the grounds of impotence. Husband and wife each remarried, and each had issue. Some thought the canon law would force the original couple to resume their marriage, because the church court was deceived on the original matter of divorce.[58] In both cases, the second marriages remained in force.

Common lawyers puzzled further over the availability of licences and dispensations from canon law rules on marriage. A marriage forbidden by the canonical impediments of kinship, affinity, profession, and so forth could be permitted by special licence. But which was the 'law of the holy church': the licence or the original rule?[59] Even the categorical statement that 'a brother and sister could not have an heir between them' required the qualification 'unless it be by dispensation from the Pope'.[60] Dispensations could likewise alter the canon law rules limiting clerics to one parish appointment and income.[61] Such licences and dispensations appeared to change 'the law' in unpredictable ways for unknown reasons in individual circumstances. Common lawyers did not see their own rules operating in this way. The king might pardon a convicted murderer or grant royal officers a 'protection' against civil suits,[62] but these were not imagined to change the common law on homicide or civil liability. Common lawyers appear to have had insufficient acquaintance with the process of obtaining dispensations and licences to understand these as legal processes like their own. A system of rules that could be manipulated by persons other than themselves seemed more manipulable than their own.

c. *Presentment of Parsons to Churches*

Common lawyers litigated many disputes over advowsons. These were rights to present clerics to parish churches left vacant by the death, resignation, or promotion of their parsons. Common lawyers administered their own rules for the exercise of these heritable rights, but they knew that presenting a cleric was just the start of a long process conducted mainly by canonist rules.[63] Bishops

[57] Trin 10 Edw 3, pl 24, fol 35 (1336) (John de Shardelow JCP); Hil 22 Edw 4, Fitzherbert, Consultacion resid 5 (1483) (John Catesby JCP).

[58] 2 Dyer 178b, 73 Eng Rep 394 (1560) (opinion of the doctors); 1 And 185, 123 Eng Rep 421 (1586); 2 Leonard 169, 171, 74 Eng Rep 450, 452 (1587) (Francis Gawdy Sjt, Edmund Anderson CJCP, Francis Rodes JCP) (same case); Moore KB 170, 72 Eng Rep 546 (1587) (same case).

[59] Trin 12 Hen 8, pl 4, fol 5, 6 (1520) (Anthony Fitzherbert Sjt, John Caryll Sjt, John Roo Sjt).

[60] Mich 18 Edw 3, RS 115 (1344) (Roger Hillary JCP).

[61] Hil 5 Edw 3, pl 29, fol 9 (1331) (Robert Parvyng Sjt); Mich 20 Hen 6, pl 17, fol 18 (1441) (William Ayscough JCP); 3 Dyer 312b n 88, 73 Eng Rep 708 (1599). See Mich 20 Edw 3, RS 399 (1346) (Robert de Thorp Sjt); Hil 14 Hen 8, pl 4, fol 16 (1523) (John Roo Sjt, Humfrey Brown Sjt); Cro Eliz 501, 78 Eng Rep 751 (1596); Cro Eliz 719, 78 Eng Rep 953 (1599).

[62] See Naomi D. Hurnard, *The King's Pardon for Homicide before A.D. 1307*, at 28–30 (Oxford 1969); Ralph V. Turner, *The King and His Courts* 77–85, 148–52 (Ithaca 1968).

[63] See W. R. Jones, 'Relations of the Two Jurisdictions: Conflict and Cooperation in England during the Thirteenth and Fourteenth Centuries', 7 *Studies in Medieval and Renaissance History* 79, 116–17 (1970).

initiated enquiries to determine whether the church was vacant, whether the right to present the cleric was undisputed,[64] and whether the cleric presented was properly ordained, innocent of crime, and at least 24 years old.[65] Bishops admitted and instituted qualified clerics to their churches, and archdeacons inducted them.[66] If the patron was duly notified that the church was vacant and presented no candidate within six months, the bishop had six months to present, and if he did not do so then the metropolitan (archbishop) could present.[67]

Once presented, admitted, instituted, and inducted, a parson could be ousted under canon law for holding more than one church at a time, or for leaving his church and residing elsewhere.[68] If unlawfully ousted, the parson had an action for spoliation in the ecclesiastical courts.[69] A bishop could unite two parishes into one, if either parish was unable to sustain a parson on its own, but this affected the rights of the patrons to present clerics, and thus required their consent.[70] At every point, patrons could assert their advowson rights at common law against bishops' actions premised on canon law.

Common lawyers did not develop their own set of rules about whether a cleric was fit to become or to remain a parson. They seem to have concluded that a matter so clearly central to the pastoral mission of the Church, the 'cure of souls', belonged exclusively to canon law.[71] But if common lawyers saw canon law as a body of rules devoted to the salvation of souls, they showed at times an appreciation that their common law had an important mission of its own. Canon law could focus on saving souls only so long as its rules accommodated the rights of advowson holders to present qualified clerics of their own choosing. Advowsons were heritable rights, and common law had as its mission the preservation of each person's rightful inheritance. When canon law rules for church administration threatened to deprive someone of an inheritance, common lawyers intervened.[72]

[64] Trin 19 Edw 3, RS 231 (1345) (John de Gaynesford Sjt); Mich 22 Hen 6, pl 48, fol 30 (1443) (John Markham Sjt); Mich 34 Hen 6, pl 22, fol 11 (1455) (Thomas Littleton Sjt, John Nedeham Sjt); Pasch 34 Hen 6, pl 9, fol 38 (1456) (same case); Pasch 34 Hen 6, pl 10, fol 41 (1456) (John Prysot CJCP) (same case); Mich 35 Hen 6, pl 27, fol 18 (1456) (William Wangford Sjt) (same case).

[65] Hil 19 Hen 6, pl 16, fol 54 (1441); Pasch 34 Hen 6, pl 9, fol 38, 39 (1456) (William Hindstone Sjt, Robert Danby JCP); Trin 34 Hen 6, 51 SS 108 (1456) (John Fortescue CJKB); Hil 39 Hen 6, pl 11, fol 48, 49 (1461) (William Laken Sjt); 3 Dyer 292b, 293a, 73 Eng Rep 657, 658 (1570); Moore KB 226, 72 Eng Rep 546 (1587) (William Peryam JCP) (referring to 1570 case).

[66] Hil 32 Hen 6, pl 21, fol 28 (1454) (William Thorp JUD); Mich 38 Hen 6, pl 14, fol 14, 15 (1460).

[67] Trin 11 Hen 4, pl 22, fol 79, 80 (1410) (William Thirning CJCP); 3 Dyer 327b, 328a, 73 Eng Rep 740, 741 (1573); 3 Dyer 346a, 73 Eng Rep 778 (1576) (opinion of the civilians).

[68] Mich 25 Edw 3, pl 6, fol 92 (1351); Pasch 26 Edw 3, pl 3, fol 1 (same case); Mich 20 Hen 6, pl 17, fol 8 (1441) (William Ayscough JCP); Pasch 5 Edw 4, Long Quinto fol 28, 29 (1465) (Thomas Yonge Sjt); Trin 12 Hen 8, pl 4, fol 5, 6 (1520) (John Roo Sjt); 3 Dyer 273a, 73 Eng Rep 611 (1568); 3 Dyer 312b, 73 Eng Rep 708 (1570); 1 Leonard 316, 74 Eng Rep 287 (1589) (Christopher Wray CJKB); Moore KB 436, 437, 72 Eng Rep 679, 680 (1596) (Francis Moore); 4 Coke 79a, 76 Eng Rep 1055 (1599) (John Popham CJKB); 3 Dyer 312b n 88, 73 Eng Rep 708 (1599).

[69] Trin 19 Edw 3, RS 167 (1345) (William de Skipwyth Sjt); Pasch 21 Edw 4, 64 SS 43, 49 (1481) (Bryan CJCP).

[70] Cro Eliz 501, 78 Eng Rep 751 (1596) (Popham CJKB); Cro Eliz 719, 78 Eng Rep 953 (1599). See also Pasch 32 Hen 6, pl 1, fol 13, 14 (1454) (William Yelverton JKB) (vicarage and parsonage united); Hil 6 Hen 7, pl 2, fol 13, 14 (1491) (Thomas Bryan CJCP) (chapel and college united).

[71] Eg, Trin 34 Hen 6, 51 SS 108 (1456) (William Yelverton JKB); 5 Coke 6a, 77 Eng Rep 7 (1595).

[72] Mich 39 Edw 3, pl [35], fol 31 (1365) (Robert de Thorp CJCP); Trin 34 Hen 6, 51 SS 108 (1456) (John Fortescue CJKB); Trin 11 Hen 4, pl 18, fol 76, 78 (1410) (Robert Hill JCP, William Hankford CJCP).

d. *Testaments and Intestacy*

A fourth topic of canon law that drew the attention of common lawyers before 1600 was the ecclesiastical courts' probate of testaments of goods and administration of intestates' estates. A few common lawyers were aware that most ecclesiastical courts on the Continent did not have exclusive jurisdiction over transmission of goods at death.[73] Common lawyers did not report their impressions of this branch of canon law until the fifteenth and sixteenth centuries. Reports show common lawyers stating miscellaneous aspects of ecclesiastical court process in probate of testaments,[74] appointment of executors,[75] enforcement of legacies,[76] and administration of intestacy.[77] An abridgment of Year Book reports recorded that 'many doctors of the canon and civil law' advised which goods King Henry IV could bequeath by testament and legacy and which he could not.[78]

Common lawyers' first and most frequent concern in this area was the disagreement between canon law and common law in the matter of married women's property. Canon law allowed married women to appoint executors and make testaments to bequeath their 'paraphernalia': clothing, jewels, and certain furniture.[79] Common law accorded all 'property' rights in goods to the husband, and required his consent to any disposition by his wife. By one account, canon law accorded a widow one half of all the goods her husband left at the time of his death.[80] According to other common lawyers, under canon law a widow would receive some of her apparel from the goods of her husband.[81]

As with the differing rules on legitimacy of children, common lawyers may have felt that their law appeared less charitable, humane, or evenhanded in the comparison to canon law on married women's goods. Perhaps to show that common law reciprocated by favouring married women where canon law did not, a serjeant stated in 1456 that canon law allowed a husband to take his wife's goods as his own at the time of betrothal, whereas common law gave him this

[73] Hil 11 Hen 7, pl 1, fol 12 (1495) (John Fyneux CJCP and other justices); 9 Coke 37b, 77 Eng Rep 788 (1599) (citing 1495 case).

[74] Mich 34 Hen 6, pl 26, fol 14 (1455) (John Prysot CJCP); Mich 20 Hen 7, pl 14, fol 4, 5 (1504) (William Hody CB).

[75] Trin 12 Hen 7, pl 2, fol 22 (1497) (Thomas Frowyk Sjt); 3 Dyer 372a, 73 Eng Rep 835 (1580); Cro Eliz 92, 78 Eng Rep 351 (1587); Moore KB 273, 72 Eng Rep 576 (1589); Owen 44, 74 Eng Rep 887 (1589) (same case); 1 Leonard 135, 74 Eng Rep 125 (1590) (same case); Owen 34, 74 Eng Rep 880 (1598).

[76] Mich 37 Hen 6, pl 18, fol 8, 9 (1458) (Nicholas Aysshton JCP); Popham 58, 79 Eng Rep 1174 (1592); Cro Eliz 467, 78 Eng Rep 705 (1596); Moore KB 588, 72 Eng Rep 776, 777 (1599) (Francis Moore).

[77] Trin 7 Hen 4, pl 22, fol 8 (1406) (William Thirning CJCP); Mich 10 Hen 7, pl 22, fol 9, 10 (1494) (Thomas Bryan CJCP); Brooke NC 8, 73 Eng Rep 850 (1544–45); Brooke NC 179, 73 Eng Rep 925 (1545–46); 4 Leonard 211, 74 Eng Rep 827 (1583); Popham 37, 79 Eng Rep 1156 (1594); 5 Coke 29a, 77 Eng Rep 95 (1598); 1 Brownl & Goldsb 31, 123 Eng Rep 646 (16th c).

[78] Mich 1 Hen 5, Statham Testament 5 (1413). Other evidence suggests Henry IV left a personal estate insufficient to pay his debts. 3 James Hamilton Wylie, *History of England under Henry the Fourth* 235 (London 1898, reprint 1969).

[79] Trin 12 Hen 7, pl 2, fol 22, 23 (1497) (Robert Constable Sjt, Richard Heigham Sjt, John Fyneux CJKB); Moore KB 213, 214, 72 Eng Rep 538, 539 (1585) (John Cowper, Richard Lewknor). Cf Mich 18 Edw 4, pl 4, fol 11 (1478) (John Vavasour Sjt).

[80] Trin 4 Hen 6, pl 11, fol 31 (1426) (William Babington CJCP).

[81] Mich 32 Hen 6, pl 5, fol 31 (1453) (Walter Moyle Sjt).

power only after the wedding.[82] Similarly, in an early reference to 'civil law', another serjeant noted that a wife was endowed of her husband's goods and not of his lands under that law, and was endowed of her husband's lands but not goods under 'our law'.[83] These efforts to point out reciprocal advantages of common law and canon or civil law are reminiscent of the common lawyers' emphasis on children who were legitimate under common law and bastard under canon law. The point seems to be that neither body of law should have any claim to greater merit on a scale of values, but what these values were is never expressly stated.

e. *Everything Else*

By 1600, the range of references to canon law and civil law in the common law reports had grown quite broad. Two further topics of ecclesiastical court jurisdiction had become important for common lawyers: breach of faith and defamation.[84] Actions in ecclesiastical courts for breach of faith provided a handy substitute remedy for debt collection and contract enforcement, though common law courts had a process for prohibiting litigation over lay contracts in ecclesiastical courts. Fifteenth-century common lawyers noted that canon law punished the breaking of a pledge of faith, not the failure to pay the underlying debt or to perform the underlying contract.[85] Sixteenth-century common lawyers reported that canon law punished those who called someone an adulterer or a witch, and that civil law did not punish those who called one a knave, but did take into account the status and reputation of the person defamed.[86] In both instances, canon law punished the sin and only indirectly remedied the injury: ecclesiastical courts imposed corporal penances for breach of faith or defamation, and by canon law money payments could then redeem corporal penances.[87] Common law developed actions of trespass on the case for assumpsit and for defamation along the lines earlier travelled by the canonists.[88]

Common lawyers pointed out rules of canon law that common law courts did not follow and that ecclesiastical courts could not enforce. A prime example for common lawyers was the well known rule that no cleric could be impleaded before any temporal judge.[89] Thomas à Becket opposed Henry II on this score,

[82] Pasch 34 Hen 6, pl 9, fol 38 (1456) (Richard Choke Sjt). See also Moore KB 170, 72 Eng Rep 510 (1581) (at betrothal, a woman can take legacies as a 'wife' by civil law).

[83] Pasch 7 Hen 4, pl 10, fol 13, 14 (1406) (John Markham Sjt).

[84] See R. H. Helmholz, *Roman Canon Law in Reformation England* 24–5 (Cambridge 1990).

[85] Pasch 8 Edw 4, pl 11, fol 4 (1468); Mich 20 Edw 4, pl 9, fol 10 (1480) (Thomas Bridges Sjt).

[86] Spelman Misc [10], 93 SS 238 (1529–30); Moore KB 29, 72 Eng Rep 418 (1561); 4 Leonard 92, 74 Eng Rep 751 (1587) (Christopher Wray JKB); Cro Eliz 192, 78 Eng Rep 448 (1590) (Thomas Egerton QS).

[87] Trin 12 Hen 7, pl 2, fol 22 (1497) (Thomas Tremayle JKB).

[88] C. H. S. Fifoot, *History and Sources of the Common Law: Tort and Contract* 304–7 (London 1949); J. H. Baker, *An Introduction to English Legal History* 495–8 (3rd ed, London 1990).

[89] Pasch 34 Hen 6, pl 9, fol 38 (1456) (Richard Choke Sjt); Hil 10 Hen 7, pl 17, fol 17 (1495) (Thomas Frowyck Sjt).

with memorably tragic consequences. In the 1370s the papal court in Rome pronounced unequivocally that England's common law courts had no jurisdiction over clerics.[90] On the eve of the Reformation, a statute of Henry VIII withdrawing benefit of clergy for certain murders caused a storm of protest from church authorities.[91] For their part, common law judges could not imagine being arrested by a bishop's officer and called to answer in ecclesiastical court for passing judgment on a writ against a cleric.[92] Common lawyers were confident that determining the bounds of ecclesiastical court jurisdiction was a matter of common law.[93]

Other differences between common law and canon law may have inspired common lawyers to pursue the canonists' model. From 1410 to 1468, several common lawyers compared their own law's requirement that prescriptive rights (adverse possession) be proved from a fixed date in the far-receding past (3 September 1189) with canon law's calculation of prescription proved over a fixed period of years—though whether the fixed period was 10, 20, 40, 50, or 100 years, they did not know.[94] In 1540, Parliament adopted fixed 30, 50, and 60-year periods of limitation for real actions at common law.[95]

According to sixteenth-century lawyers, common law and civil law agreed on many points, from rules for descent of inheritance,[96] to the division of use and ownership of land,[97] to the reasonable number of unobstructed windows for a house.[98] One common lawyer credited canon law with the principle that ignorance of the law was no excuse.[99] Another cited from civil law a principle tending in the opposite direction, *communis error facit ius*.[100] Canon law held its ground alone on other matters: there was no common law to contradict it on

[90] See R. H. Helmholz, *Roman Canon Law in Reformation England* 10 (Cambridge 1990) and sources cited therein at n 23.

[91] Keilway 180, 181, 72 Eng Rep 357 (1515).

[92] Hil 10 Hen 7, pl 17, fol 17 (1495) (Thomas Frowyck Sjt).

[93] See R. H. Helmholz, *Roman Canon Law in Reformation England* 21–2, 172–3 (Cambridge 1990).

[94] Trin 11 Hen 4, pl 34, fol 84 (1410) (William Hankford JCP); Hil 20 Hen 6, pl 8, fol 17 (1442) (Richard Newton JCP); Mich 6 Edw 4, pl 7, fol 3 (1466) (William Jenney Sjt); Mich 8 Edw 4, pl 13, fol 13, 14 (1468) (Richard Choke JCP). The *Bracton* treatise similarly gave several limitation periods. *Bracton*, fol 45b (2:140) (10 years), fol 422 (4:313) (10, 20, 30 years).

[95] 32 Hen 8, ch 2, §§ 1–5 (1540).

[96] Brooke NC 8, 9, 73 Eng Rep 850, 851 (16th c); 3 Dyer 314a, 314b, 73 Eng Rep 712 (1572) (John Jeffrey Sjt); 2 Plowden 451, 75 Eng Rep 678 (1573); Noy 160, 74 Eng Rep 1120 (c 1590s) (Fleming QS). Cf 3 Coke 40a, 76 Eng Rep 726 (1592) (common law and civil law differ).

[97] 2 Leon 14 & MSS (1575) (Richard Harpur JCP, James Dyer CJCP) in J. H. Baker & S. F. C. Milsom, *Sources of English Legal History* 135, 139 (London 1986).

[98] Hale's Case (1569) (Roger Manwood Sjt) in J. H. Baker & S. F. C. Milsom, *Sources of English Legal History* 592, 596 (London 1986).

[99] Pasch 12 Hen 7, pl 1, fol 15, 18 (1497) (John Fyneux CJCP). For the maxim, see VI 5.12 de regulis iuris, reg 13; gloss *Qui Sciens* to Cod 2.11(12).15 (end); Dig 17.1.29.1 (Ulpian disputationum 7); C 1, q 4, pc 12. The maxim is also quoted, without reference to canon law or civil law, in Pasch 14 Hen 8, pl 7, fol 25, 26 (1523) (Anthony Fitzherbert JCP & Robert Brooke JCP); 2 Leonard 76, 74 Eng Rep 370 (1589) (Edward Coke); Gouldsb 33, 34, 75 Eng Rep 976 (1587).

[100] Pasch 27 Hen 8, pl 22, fol 7 (1535) (Edward Mountague Sjt). For the maxim, see gloss *Omnium consensu* to Inst 2.10.7; gloss *Reprobari* to Dig 1.14.3 (Ulpian ad Sabinum 3). The maxim is also quoted, without reference to canon law or civil law, in 2 Leonard 15, 74 Eng Rep 321 (1583); 4 Leonard 15, 74 Eng Rep 791 (1591).

matters of tithing,[101] privileges of sanctuary,[102] and days of religious observance.[103]

How ecclesiastical courts proceeded to their determinations in trial or examination, said a common lawyer in 1587, was of no concern to common law.[104] Common lawyers had much more to say about substantive canonist and civilian rules than about procedure, but they did express their impressions on a few procedural aspects.[105] Common lawyers compared the civilians' trial by examination of witnesses (at least two) unfavorably with common law trial by a jury of twelve.[106] They compared civilian judging 'upon probabilities' unfavorably with common law judging (presumably upon certainties).[107] On the other hand, common lawyers recommended following the canonists' and civilians' practice in committing the construction of statutes to judges[108] and in resorting to natural law (*ley de nature*) in disputes arising for the first time.[109]

One aspect of canon law procedure that attracted special attention from common lawyers was the appeal. Canon law established a process of appeal through the hierarchy of ecclesiastical courts leading ultimately to the papal court at Rome.[110] Common lawyers noted on many occasions that if an appeal was timely taken from an ecclesiastical court's sentence, that sentence was stayed pending final determination of the appeal.[111] Thus a spouse who appealed a sentence of divorce remained married until the appeal was concluded. A parson who appealed a sentence depriving him of his parish remained in his church. To complicate matters further, appeals could remain pending for as long as twenty years, if we are to believe the complaint of a Chief Justice of Common Pleas in 1365.[112] Common law had no process of appeal (until much later), and its only near analogies, writs of error and attaint, did not suspend a judgment pending their determination.[113]

[101] 2 Leonard 70, 74 Eng Rep 366 (1587).

[102] Keilw 190, 72 Eng Rep 368 (1516).

[103] Pasch 12 Edw 4, pl 22, fol 8 (1472) (Guy Fairfax Sjt); Mich 21 Edw 4, pl 6, fol 44, 45 (1481) (John Vavasour Sjt); Keilw 74, 75, 72 Eng Rep 236 (1505) (Thomas Frowyck CJCP).

[104] Moore KB 226, 72 Eng Rep 546 (1587) (Thomas Walmsley Sjt). See 5 Coke 6a, 77 Eng Rep 7 (1595).

[105] Eg, 14 Edw 3, RS 157 (1340) (William de Thorp Sjt); Pasch 32 Hen 6, pl 1, fol 13, 14 (1454); Mich 8 Edw 4, pl 9, fol 9, 10 (1468) (William Yelverton JKB); Port's Notebook, Consultation 17, 102 SS 17, 18 (1499); 1 Leonard 278, 74 Eng Rep 253 (1584).

[106] 1 Plowden 12, 75 Eng Rep 18 (1551) (Robert Brooke); 1 Plowden 125, 75 Eng Rep 193 (1555) (Edward Saunders JCP); Brooke NC 51, 73 Eng Rep 869 (1556) (Serjeants' Inn). Cf Pasch 5 Edw 2, 31 SS 123 (1312) (*vox unius quam nullius*, from gloss *Sermones* to Cod 2.55.4.5). Another common lawyer ascribed the two-witness rule to the law of God. 1 Plowden 8, 75 Eng Rep 12 (1554) (presumably Deuteronomy 19:15).

[107] 3 Leonard 255, 74 Eng Rep 668 (1589) (Francis Beaumont Sjt).

[108] Brooke NC 186, 73 Eng Rep 928 (1541–42).

[109] Mich 8 Edw 4, pl 9, fol 9, 12 (1468) (William Yelverton JKB).

[110] Eg, 2 Leonard 176, 74 Eng Rep 456 (1588) (William Peryam JCP).

[111] Mich 2 Rich 2, Fitzherbert Quare Impedit 143 (1378) (Robert Belknap CJCP); Pasch 20 Hen 6, pl 12, fol 25 (1442) (Richard Newton JCP, William Paston JCP); Trin 27 Hen 6, Fitzherbert, Garde 118 (1449) (Richard Pole Sjt); 1 Plowden 125, 75 Eng Rep 193 (Edward Saunders JCP). But see 1 Dyer 13a, 73 Eng Rep 28 (1536) (William Shelley JCP) (spiritual court judgment binds until it is reversed).

[112] Mich 39 Edw 3, pl [35], fol 31 (1365) (Robert de Thorp CJCP).

[113] See David Millon, 'Positivism in the Historiography of the Common Law', 1989 *Wisconsin Law Review* 669, 679, 685–700.

Common lawyers recognized that canon law had a history of its own, that it changed over time and owed its origin to papal decrees and conciliar constitutions.[114] On four widely separated occasions, common lawyers noted that before the Lateran Council of 1180 lay persons could pay their tithes to any parson they chose, but that the Council ordained that all must pay tithes to the parson of the parish where they resided.[115] In a case argued in Exchequer Chamber in 1456, Chief Justice Fortescue suggested that a rule of canon law made within time of memory (since 1189) should not bar the application of common law rules.[116] Fortescue's assumption seems to be that canon law could be pleaded, as a local custom or prescriptive right could, only when the rule of canon law could be shown to date from 'time immemorial'.

Common lawyers were less concerned to account for the origins of their own law. One said common law existed from the creation of the world,[117] others that it was grounded on sacred scripture,[118] another that it was older than Roman law,[119] another that it was founded on 'imperial law',[120] another that it was originally founded on civil law but was replaced by William the Conqueror,[121] and another that it was originally modelled on Greek law but revised by King Alfred based on the laws of the pope and the emperor.[122] Common lawyers do not seem to have been very interested in the ultimate origins of their professional learning.

For the most part, common lawyers were stubbornly practical, and their contact with canon law and civil law stretched their powers of generalization. They tried to conceive of canon law as a body of rules much like their own common law. But common lawyers also appreciated that canonists and civilians possessed techniques and devices of legal thought substantially different from their own. Sometimes common lawyers explicitly referred to canon law or civil law when they took such innovations into common law. For example, sixteenth-century common lawyers identified canonist and civilian sources for definitions of terms—legal and non-legal,[123] and for distinctions: five grounds for divorce,

[114] Mich 25 Edw 3, pl 6, fol 92 (1351); Mich 20 Hen 6, pl 25, fol 12, 13, 51 SS 86, 87 (1441) (Richard Newton JCP); Mich 21 Edw 4, pl 6, fol 44, 45 (1481) (John Vavasour Sjt); 4 Leonard 211, 74 Eng Rep 827 (1583); Moore KB 436, 437, 72 Eng Rep 679, 680 (1596) (Francis Moore); 4 Coke 79a, 76 Eng Rep 1055 (1599).

[115] Hil 7 Edw 3, pl 7, fol 4, 5 (1333) (Robert Parvyng Sjt); Hil 10 Hen 7, pl 17, fol 17 (1495) (Thomas Kebell Sjt); 1 Dyer 83a, 84b, 73 Eng Rep 184 (1553); Moore KB 530, 72 Eng Rep 738 (1598).

[116] Trin 34 Hen 6, 51 SS 108 (1456).

[117] Pasch 10 Edw 4, pl 9, fol 4 (1470) (John Catesby Sjt).

[118] Pasch 34 Hen 6, pl 9, fol 40 (Prisot CJ); John Hales, *Oration in Commendation of the Laws of England* (c 1540), cited in J. H. Baker, 'Introduction' to *The Reports of Sir John Spelman*, 94 SS 33.

[119] John Fortescue, *De Laudibus Legum Anglie* 38–40 (c 1470) (ed & trans S. B. Chrimes, Cambridge 1949).

[120] Trin 6 Edw 2, pl 20, 36 SS 70 (1313) (Inge J).

[121] Morgan Kydwelly, Inner Temple reading (1483), MS cited in J. H. Baker, 'Introduction' to *The Reports of Sir John Spelman*, 94 SS 33.

[122] Port's Notebook, 102 SS 135 (early 16th c).

[123] 43 Edw 3, Lib Ass pl 35, fol 275 (1369) (Robert Belknap Sjt) (*'hac vice'*); 1 Dyer 14b, 73 Eng Rep 32 (1535) (Edward Mountague Sjt) (*'tunc'*); 1 Plowden 124, 126, 75 Eng Rep 192, 194 (1555) (*'licet'*); 1 Plowden 280, 75 Eng Rep 428 (1565) (John Walsh JCP & James Dyer CJCP) ('insinuation' & 'approbation'); 1 Plowden 309, 75 Eng Rep 472 (1565) (*'nudum pactum'*); 3 Dyer 294a–b, 73 Eng Rep 660 (1570) (*'resignare'* & other terms); Moore KB 103, 72 Eng Rep 470 (1575) (*'puer'*); Owen 64, 74 Eng Rep 902 (1575) (Edmund Plowden) ('heirs'); 8 Coke 37a, 77 Eng Rep 529 (1588) (*'barrataria'*); 1 Leonard 135, 74 Eng Rep 125 (1590) (Edmund Anderson CJCP) (*'haeres'*); Cro Eliz 387, 78 Eng Rep 633 (1595) (John Popham CJKB & John Clench JKB) (*'bona'*).

two aspects of marriage, three degrees of spiritual office, three kinds of bigamy, and four kinds of impotence.[124]

In contrast, common lawyers freely and frequently adopted canon law and civil law maxims, usually without even mentioning their source.[125] Perhaps all the serjeants and justices who heard these Latin maxims understood that they came from canon law and civil law texts, as everyone undoubtedly identified Latin quotations from the Bible without citation.[126] Perhaps common lawyers understood these simple legal maxims to be universal principles shared by every body of law, as justices stated on two occasions.[127] Perhaps maxims carried their own persuasive appeal, while narrower and more specific rules required identification as canon law or civil law.

Just as common lawyers adopted so many civilian and canonist maxims, so they took over the broad classifications of canon law and civil law, again without identifying any source. Common lawyers had always used the real-personal distinction.[128] In the period before 1600, they made increasing use of other classificatory terms from canonist and civilian texts. Some of those terms are now familiar elements of the structure of common law discourse: natural and human law, private and public law, civil law and criminal law, contractual and delictual obligations, possessory and proprietary actions.[129] Other terms borrowed in the fifteenth and sixteenth centuries are no longer familiar to common lawyers: 'popular' actions, 'pecuniary' causes, 'praedial' things.[130] While common lawyers did not indicate canon law or civil law as a source of these structural elements in the Year Books and reports, their many explicit references to specific rules of canon law and civil law indicate the importance and influence of those sources.

4. *Where Did Common Lawyers Get Their Knowledge of the Other Laws?*

From 1400 onward, the principal means by which common lawyers gained their knowledge of canon law and civil law was personal contact with 'the doctors',

[124] Mich 47 Edw 3, pl 78, fol 1 (1373) (divorce); Mich 7 Hen 6, pl 36, fol 10, 11 (1428) (John Cokayn CB) (marriage); Spelman Vidue pl 1, 93 SS 223 (16th c) (bigamy); 2 Leonard 169, 74 Eng Rep 450 (1587) (Richard Shuttleworth Sjt) (divorce again); Moore KB 226, 72 Eng Rep 546 (1587) (impotence); Cro Eliz 663, 78 Eng Rep 902 (1599) (spiritual functions).

[125] See above at nn 16, 26–8. See generally Peter Stein, *Regulae Iuris* 154–62 (Edinburgh 1966).

[126] See, eg, Middx Eyre 22 Edw 1, RS 437 (1294) (John de Mutford quoting Luke 11:27); Mich 5 Edw 3, pl 75, fol 55 (1331) (Robert de Malberthorpe JCP quoting Luke 11:23); Mich 20 Edw 3, 2 RS 307 (1346) (Richard Willoughby JCP quoting Matthew 14:31); 34 Edw 3, Lib Ass pl 11, fol 207, 208 (1360) (Robert de Thorp JCP quoting Matthew 22:21); Mich 9 Hen 5, pl 29, Rogers 23 (1420) (William Hankford CJCP quoting 1 Corinth 7:4); Mich 9 Hen 6, pl 2, fol 32 (1430) (John Cottesmore JCP quoting Matthew 14:31).

[127] 7 Hen 5, pl 3, fol 5, 7 (1417–18) (Robert Norton CJCP); 1 Plowden 18, 75 Eng Rep 30 (1550).

[128] See David J. Seipp, 'Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law', 7 *Law and History Review* 175, 188–202 (1989).

[129] See David J. Seipp, 'Method: Institutes and Reports from the Fifteenth to the Seventeenth Century' 13–68 (unpublished MS).

[130] See Mich 9 Hen 6, pl 37, fol 53 (1430); Mich 5 Edw 4, Long Quinto fol 141 (1465); John Rastell, *An Exposition of Certaine Difficult and Obscure Wordes and Termes of the Lawes of this Realm* (London 1579); William Lambarde, *Eirenarcha* 132 (London 1581).

English practitioners of these laws who held advanced university degrees testifying to their expertise. The king's courts had long used processes of 'certification' and 'consultation' to send written inquiries to judges of the ecclesiastical courts on individual matters.[131] The first named churchman I have found in the Year Books offering information about canon law is Master John Shepey. In 1385, as prebendary of Nassington in Lincoln Cathedral, he was a plaintiff in a case pending in the Court of Common Pleas. He spoke up in a different case to explain to Chief Justice Robert Belknap 'their law' (ie, canon law) on the foundation of chantries.[132] The report does not give Shepey his proper title of 'Doctor' and does not say whether he was prompted to speak by a question from the Chief Justice or by an arrangement with a serjeant or his client.

In the Court of King's Bench in 1409, a common lawyer named Thomas Rolf stated in argument that he had spoken with a doctor of canon law who said it was clear by their law that a second marriage, at issue in that case, was valid.[133] Rolf was a colourful character whose novel forms of argument in later cases included animal noises ('Baw-waw for thy reason'),[134] a snatch of a popular ballad ('Robin Hood in Barnesdale stood'),[135] and a fable about the pope who condemned himself to death for heresy ('*Judico me cremari*').[136]

Within a few years of Rolf's 1409 experiment, Doctors of Civil Law and of Canon Law were 'arguing' in the Court of Common Pleas, and justices were reporting what doctors had told them outside of court on questions of jurisdiction, excommunication, and a variety of other matters.[137] A Year Book report from 1428 states that a Bachelor of Both Laws (LLB) named Huls 'argued much in Latin'. The reporter copied down part of Huls's argument, which was about consent by children to an arranged marriage.[138] The justices and serjeants used a good deal of Latin themselves in the ensuing argument. Later common lawyers noted this occurrence as something of a precedent for bringing canon law and civil law into the king's courts.[139] Eight more reports in the 1440s and 1450s show doctors speaking at the bar of King's Bench, Common Pleas, and Exchequer Chamber, or serjeants and justices reporting their communications with the

[131] Eg, 43 Edw 3, pl 35, fol 275 (1369). See W. R. Jones, 'Relations of the Two Jurisdictions: Conflict and Cooperation in England during the Thirteenth and Fourteenth Centuries, 7 *Studies in Medieval and Renaissance History* 79, 84 (1970).

[132] Hil 8 Rich 2, pl 33, Ames 257 (1385). John Shepey was a Doctor of Civil Law who bequeathed his *Corpus Iuris Civilis* to New College at his death in 1412. Notes of his lectures on the *Decretals* can be found in BL Royal MS 9.E.viii. 3 A. B. Emden, *A Biographical Register of the University of Oxford to A.D. 1500*, at 1683–4 (Oxford 1959). Prof Cynthia Neville has kindly supplied me with references to Shepey's many diplomatic missions to Scotland between 1383 and 1398.

[133] Mich 11 Hen 4, pl 30, fol 13, 14 (1409) (Thomas Rolf).

[134] Hil 8 Hen 6, pl 7, fol 21, 23 (1430) (Thomas Rolf Sjt).

[135] Pasch 7 Hen 6, pl 45, fol 37 (1429) (Thomas Rolf Sjt).

[136] Hil 8 Hen 6, pl 6, fol 18, 20 (1430) (Thomas Rolf Sjt).

[137] Hil 12 Hen 4, Statham, Supersedeas 6 (1411); Mich 14 Hen 4, Fitzherbert, Excommengement 21 (1412) (William Hankford JCP); Mich 1 Hen 5, Statham, Testament 5 (1413).

[138] Mich 7 Hen 6, pl 36, fol 10, 11 (1428).

[139] 1 Plowden 124, 75 Eng Rep 192 (1555); Moore KB 742, 72 Eng Rep 876 (1599); 2 And 208, 123 Eng Rep 623, 624 (1599).

doctors outside of court.[140] A Year Book note of 1454 is simply a report of what Master William Thorp, 'Doctor utriusque Juris', said about admitting parsons to parish churches and instituting them in office.[141] In the 1480s and 1490s, two Justices of Common Pleas resumed reporting what 'the doctors' told them, or expressed the intention to consult the doctors in the future on some point of canon law.[142]

Of the doctors and bachelors of civil law and canon law mentioned in fifteenth-century Year Books, only three are named. Thus far, two have eluded further identification, though it is intriguing that all three bear the same surnames as royal justices who had died one or more generations before they made their appearances.[143] Huls LLB is Andrew Huls or Holes, a younger son of Justice Hugh de Huls. After his brief appearance in the Year Books, he took a doctorate at Padua, served as the king's proctor at the papal court, helped found Eton College, and ended as Keeper of the Privy Seal.[144] His father's service as a Justice of King's Bench probably helped both to motivate Andrew Huls to argue before the king's justices and to persuade the justices to hear him.

One of the anonymous doctors was described as a Master of Chancery.[145] The twelve Masters of Chancery supervised the issuance of novel writs and letters patent, and by the sixteenth century handled much judicial work for the Chancellor.[146] Mark Bielby has shown that civilians occupied important positions in the Chancery first in the period 1377 to 1382 and again from 1448 onward. By 1515, all the Chancery masters were civilians.[147] From the 1490s, canonists and civilians could be found gathered at their own 'Doctors' Commons', comparable to the four Inns of Court and two Serjeants' Inns where common lawyers met.[148]

[140] Hil 18 Hen 6, pl 3, fol 30, 32 (1440) (John Fulthorpe JCP); Pasch 20 Hen 6, pl 12, fol 25 (1442) (Richard Newton CJCP); Mich 22 Hen 6, pl 48, fol 30 (1443) (John Markham Sjt); Trin 27 Hen 6, Fitzherbert, Garde 118 (1443) (Ralph Pole Sjt); Pasch 32 Hen 6, pl 1, fol 13, 14 (1454); Mich 34 Hen 6, pl 26, fol 14 (1455) (John Prysot CJCP); Mich 34 Hen 6, pl 22, fol 11 (1455) (Thomas Littleton Sjt); Pasch 34 Hen 6, pl 9, fol 38, 39 (1456) (same case) (Robert Danby JCP); Trin 34 Hen 6, 51 SS 108 (1456) (same case).

[141] Hil 33 Hen 6, pl 21, fol 28 (1454).

[142] Pasch 21 Edw 4, 64 SS 43, 49 (1481) (Bryan CJCP); Hil 22 Edw 4, Fitzherbert, Consultacion resid 5 (1483) (John Catesby JCP); Hil 6 Hen 7, pl 2, fol 13, 14 (1491) (Thomas Bryan CJCP); Hil 10 Hen 7, pl 17, fol 17 (1495) (Thomas Bryan CJCP).

[143] Huls LLB in 1428 and Hugh de Huls JKB (died 1415); Dr Newton in 1454 and Richard Newton CJCP (died 1448); William Thorp DUJ in 1454 and Robert de Thorp CJCP, LC (died 1371), William de Thorp CJKB (died 1361). I welcome any information about a Dr Newton and a Dr William Thorp, both active in 1454.

[144] See C. T. Allmand, 'The Civil Lawyers', in *Profession, Vocation, and Culture in Later Medieval England* 155, 162–3 (Cecil H. Clough (ed), Liverpool 1982); J. W. Bennett, 'Andrew Holes: A Neglected Harbinger of the English Renaissance', 19 *Speculum* 314, 314–55 (1944). Huls left Oxford with his LLB in 1427, and was described as a 'gentleman of the King' in 1428, presumably in attendance at the palace.

[145] Pasch 32 Hen 6, pl 1, fol 13, 14 (1454). Perhaps this was Richard Welton DCL, who had been 'principal of the civil law school at Oxford, a royal commissioner in appeals arising from the court of Admiralty, and a diplomat who had treated with the ambassadors of the Duke of Burgundy' when he was appointed a master in 1448. Mark Beilby, 'The Profits of Expertise: The Rise of the Civil Lawyers and Chancery Equity', in *Profit, Piety and the Professions in Later Medieval England* 72, 83 (Michael Hicks (ed), Gloucester 1990). Only a few civilians held office in Chancery in the half-century before Welton's appointment. Id at 75.

[146] W. J. Jones, *The Elizabethan Court of Chancery* 103–5 (Oxford 1967).

[147] Bielby, above n 145, at 82.

[148] See F. Donald Logan, 'Doctors' Commons in the Early Sixteenth Century: A Society of Many Talents', 61 *Historical Research* 151, 151–2 (1988); G. D. Squibb, *Doctors' Commons: A History of the College of Advocates and Doctors of Law* 5–22 (Oxford 1977).

In the sixteenth century, despite substantial gaps in the printed series of case reports, common law courts learned the opinions of experts on civil law or canon law on at least forty-five occasions, twenty-seven of them in the last two decades of the century. Common lawyers ordinarily called these experts the 'doctors' or the 'civilians', but occasionally spoke of 'professors of civil law' or those 'learned' or 'well-versed' in canon law.[149]

Practices varied widely. Sometimes the Justices of Common Pleas and King's Bench conferred with the doctors outside of Court.[150] One Justice in 1555 proposed a question at dinner at Doctors' Commons and reported back what the doctors had all agreed.[151] At other times, the Justices called for doctors to come into court and confer openly with them.[152] In other instances, the justices or the serjeants obtained written opinions from the doctors, comparable to the *consilia* delivered by Continental jurists; sometimes as many as fourteen or fifteen doctors signed a statement of canon law or civil law positions.[153] On still other occasions, the justices instructed the parties or their counsel to find and retain civilian or canonist doctors to argue differing positions in the king's courts.[154] Finally, some cases were argued by doctors on both sides without any mention that the justices called for civilian argument.[155] After one particularly full report of a doctor's argument in 1590, the reporter states that 'no professor of the civil law would be retained to argue the contrary'.[156]

Even when doctors of civil law lined up on opposing sides to argue a point of their law, the common law reports emphasized the agreement the civilians reached.[157] Common lawyers seem to have had little patience for open disputes in these other disciplines. They wanted answers from civil law and canon law, not more questions. In the Year Books and reports, students of common law can read in enormous detail how argument proceeded among serjeants and justices, but can learn nearly nothing about how civilians and canonists disputed.

Sixteenth-century reports of common law cases name some forty doctors of civil law or canon law, all but four of whom can be identified in the records of

[149] 1 Plowden 125, 75 Eng Rep 193 (1555) (Edward Saunders JCP); 2 Leonard 169, 171, 74 Eng Rep 450, 452 (1587) (Edmund Anderson CJCP); 1 Leonard 135, 74 Eng Rep 125 (1590).

[150] 1 Plowden 125, 75 Eng Rep 193 (1555) (Edward Saunders JCP); 2 Dyer 209a, 73 Eng Rep 461 (1561) (Anthony Browne JCP & Richard Weston JCP); 1 Leonard 316, 74 Eng Rep 287 (1589) (Christopher Wray CJQB).

[151] 1 Plowden 124, 126, 75 Eng Rep 192, 194 (1555) (Edward Saunders JCP).

[152] Moore KB 170, 72 Eng Rep 510 (1581); 4 Leonard 211, 74 Eng Rep 827 (1583); Moore KB 273, 72 Eng Rep 576 (1589); Cro Eliz 501, 78 Eng Rep 751 (1596); 5 Coke 29a, 77 Eng Rep 95 (1598); 6 Coke 22b, 77 Eng Rep 287 (1598); Owen 87, 74 Eng Rep 919 (1599).

[153] 3 Dyer 287b, 73 Eng Rep 645 (1570); 3 Dyer 292b, 293a, 73 Eng Rep 657, 658 (1570); 3 Dyer 313a, 313b, 73 Eng Rep 709, 710 (1576); 3 Dyer 369a, 73 Eng Rep 826 (1580); 5 Coke 67b, 77 Eng Rep 157 (1589); Owen 12, 13, 74 Eng Rep 864 (1594). See R. H. Helmholz, *Roman Canon Law in Reformation England* 142–4 (Cambridge 1990).

[154] 1 And 185, 123 Eng Rep 421 (1586); 2 Leonard 169, 171, 74 Eng Rep 450, 452 (1587); Cro Eliz 501, 78 Eng Rep 751 (1596).

[155] Eg, 2 And 208, 123 Eng Rep 623, 624 (1599). It may have been clear from the outset, as it was much later, that civilians and canonists had no right of audience in the common law courts and could only be received as *amici curiae* on invitation from the justices. *Collier* v *Hicks*, 2 B & Ad 663, 669, 109 Eng Rep 1290, 1292 (1831) (Lord Tenterden CJ). See J. H. Baker, 'Ascertainment of Foreign Law: Certification to and by English Courts Prior to 1861', 28 *International and Comparative Law Quarterly* 141, 144 (1979); J. H. Baker, *The Order of Serjeants at Law* 54–5 (London 1985).

[156] 1 Leonard 135, 74 Eng Rep 125 (1590).

[157] Eg, 3 Dyer 294a, 294b, 73 Eng Rep 660 (1570); Cro Eliz 501, 78 Eng Rep 751 (1596).

Doctors' Commons and the Courts of Chancery, Admiralty, Requests, and High Commission.[158] Most held the Oxford DCL or Cambridge LLD, but some held doctorates from Bologna, Bourges, Louvain, Orleans, Padua, and Paris. Most of these doctors held many offices concurrently, each of which could bring him into close contact with common lawyers. Of the thirty-six I can trace, nearly all were members of Doctors' Commons, and twenty-one held ecclesiastical offices with judicial duties, as Deans, Archdeacons, Chancellors, Judges of the Court of Delegates, Judges of High Commission, or Bishops. Thirteen were Masters of the Chancery, six were Judges of the Court of Requests, four were Members of Parliament, four were Judges of the High Court of Admiralty, and two served as Ambassadors. Five of the doctors were related by kinship, and two married the widows of other doctors in the group. In addition, two were Professors of Civil Law (both at Oxford), and two had honorary memberships at Inns of Court.

Serjeants considered their own position a 'degree' of equivalent distinction to the civilians' doctorates. Serjeants and doctors of civil law were close enough in social status and prestige to quarrel about precedence in procession, speaking, and seating at formal occasions.[159] During the sixteenth century, an increasing number of common lawyers spent some time at Oxford or Cambridge before coming to the Inns of Court.[160]

Common lawyers ordinarily learned about the other laws by consulting the practitioners rather than by studying the books. There is relatively little evidence in the Year Books and case reports that common lawyers consulted civilian or canonist texts. A Justice of Common Pleas (probably university educated) cited a *lex* of Justinian's *Codex* in 1307,[161] and a Year Book reporter in 1441 quoted 'the Gloss' on a canonical rule that silence implies consent.[162] Beginning in the 1560s, one finds common lawyers quoting a 'text' or 'rule' of the civil law, without citation to any specific source.[163]

From the 1570s to 1600, common lawyers included in their reports a few specific references to civilian and canonist texts. William Lyndwood's *Provinciale*, a gloss from 1430 on the provincial constitutions of the Archbishops of Canterbury and one of the few works of canon law produced in England during

[158] The main prosopographic resources are I. S. Leadam, 'Introduction' to *Select Cases in the Court of Requests, A.D. 1497–1569*, 12 SS cii–cxxiv (1898); Brian P. Levack, *The Civil Lawyers in England, 1603–1641: A Political Study* 204–82 (Oxford 1973); Ronald A. Marchant, *The Church under the Law* 247–54 (Cambridge 1969); G. D. Squibb, *Doctors' Commons: A History of the College of Advocates and Doctors of Law* 116–209 (Oxford 1977); Roland G. Usher, *The Rise and Fall of the High Commission* 345–61 (Oxford 1913). The summary in the text is based on these sources and W. J. Jones, *The Elizabethan Court of Chancery* (Oxford 1967).

[159] John Fortescue, *De Laudibus Legum Anglie* 120 (c 1470) (ed & trans S. B. Chrimes, Cambridge 1949). See J. H. Baker, *The Order of Serjeants at Law* 54–5 (London 1985).

[160] See Richard J. Schoeck, 'Lawyers and Rhetoric in Sixteenth-Century England', in *Renaissance Eloquence* 274, 277 (James J. Murphy (ed), Berkeley 1983) and sources cited therein at n 7.

[161] Pasch 35 Edw 1, RS 471 (1307) (Hervey de Staunton JCP) (apparently citing Cod 3.31.11).

[162] Mich 20 Hen 6, pl 25, fol 12, 13, 51 SS 86, 87 (1441) (gloss on VI 5.12 de regulis iuris reg 43, cf Dig 19.2.13.11 (*Ulpian ad edictum* 32)).

[163] 2 Dyer 179a, 73 Eng Rep 394 (1560); 1 Plowden 368, 75 Eng Rep 559 (1562) (Anthony Browne JCP); 1 Plowden 336, 75 Eng Rep 511 (1568) (Richard Weston JCP); Cro Eliz 192, 78 Eng Rep 448 (1590) (Thomas Egerton QS); Cro Eliz 501, 78 Eng Rep 751 (1596); Moore KB 580, 72 Eng Rep 777 (1599) (Edward Coke AG).

this period, is cited four times.[164] Justinian's *Institutes*, the elementary work in the *Corpus Iuris Civilis*, has three late sixteenth-century citations in the common law reports,[165] as have the *Decretals*, the authoritative compilations of papal decrees.[166] There are also one reference each to the gloss on Gratian's *Decretum*, to the canonist *commentaria* of Niccolò de Tedeschi (Panormitanus), to *summae* of Baptista de Salis and Silvestro Mazzolini, to Lancelotti's *Institutiones iuris canonici* (1563), to the first law dictionary of the *ius commune*, the *Vocabularius utriusque iuris*, and to the *Jurisprudentiae Romanae* (1586) of Johannes Althusius.[167] In many instances, these citations and quotations were supplied by the doctors arguing in the common law courts, rather than by the common lawyers themselves.

The evidence of the Year Books and case reports strongly suggests that most English common lawyers came by their knowledge of canon law and civil law by acquaintance with the practitioners and judges of those laws, the doctors, rather than by direct reference to the texts. Historians have tried to trace the education of justices and serjeants to see whether any of them studied civil law or canon law in the universities before coming to the Inns of Court. Although an increasing number of students at the Inns had some university training by 1600,[168] there is no trace of a common lawyer with a university law degree before James Whitelock, who became a serjeant in 1620.[169]

Common lawyers maintained their own body of law as a living oral tradition, a common learning passed down to new entrants through courtroom attendance, lectures on statutes, and moot court exercises.[170] Texts of statutes and Year Book reports were a means of preserving bits of the ancient oral wisdom, but they were not themselves 'the common law'. Common lawyers seem to have regarded canon law and civil law as comparable bodies of law maintained and passed down by their counterpart professions in much the same way. They expected the

[164] 3 Dyer 292b, 293a, 73 Eng Rep 657, 658 (1570); Moore KB 214, 72 Eng Rep 538 (1585) (John Cowper); Moore KB 436, 437, 72 Eng Rep 679, 680 (1596) (Francis Moore); 9 Coke 37b, 77 Eng Rep 788 (1599).

[165] 2 Leonard 169, 171, 74 Eng Rep 450, 452 (1587); 3 Dyer 314a, 314b, 73 Eng Rep 712 (1572) (John Jeffreys Sjt); 3 Dyer 326b, 73 Eng Rep 738 (1573); 1 Leonard 53, 74 Eng Rep 49 (1587) (Angier).

[166] Moore KB 436, 437, 72 Eng Rep 679, 680 (1596) (citing X 3.5.28); 4 Coke 79a, 76 Eng Rep 1055 (1599).

[167] 3 Dyer 294a, 294b, 73 Eng Rep 660 (1570) (quoting *Vocabularius Iuris Utriusque* [86] sv *canonia* [Basel, 1475]; Moore KB 215, 72 Eng Rep 539 (1585) (John Cowper, quoting Baptista de Salis, *Summa Casuum Utilissima* fol 185, sv *Parafrena* [Nuremberg 1488]; 1 Leonard 53, 74 Eng Rep 49 (1587) (Angier, quoting Ioannes Althusius, *Iurisprudentiae Romanae*, bk 1, ch 38 (Basil 1586)); 2 Leonard 169, 171, 74 Eng Rep 450, 452–3 (1587) (quoting Niccolo de Tedeschi, *Commentaria in Quinque Decretalium Libros* on X 4.15.6 (*fraternitatis*) nn 18, 1 (15th c) (Lugdini 1522)); 9 Coke 32b, 77 Eng Rep 779 (1591) (quoting gloss *Vulgaris purgatio* to *Decretum* C 2, q 5, c 7); Moore KB 436, 437, 72 Eng Rep 679, 680 (1596) (Francis Moore).

[168] See Louis A. Knafla, 'The Matriculation Revolution and Education at the Inns of Court in Renaissance England', in *Tudor Men and Institutions: Studies in English Law and Government* 232, 247 (Arthur J. Slavin (ed), Baton Rouge 1972); Wilfrid R. Prest, *The Rise of the Barristers* 110–13 (Oxford 1986).

[169] Whitelocke took the BCL degree and was briefly a fellow at Oxford while keeping his terms at Middle Temple. Edward Foss, *Biographica Juridica: A Biographical Dictionary of the Judges of England* 720 (London 1870); *The Diary of Bulstrode Whitelocke, 1605–1675*, at 66 (Ruth Spalding (ed), Oxford 1990). In 1444, Justice Paston made arrangements for his son to study dialectics and civil law before coming to the Inns of Court. The son died, so we do not know how the experiment would have come out. J. H. Baker, 'Introduction' to *The Reports of Sir John Spelman*, 94 SS 125 (London 1978).

[170] See J. H. Baker, 'English Law and the Renaissance', 44 *Cambridge Law Journal* 46, 52–3 (1985); J. H. Baker, 'The Inns of Court and Legal Doctrine', in *Lawyers and Laymen* 274 (T. M. Charles-Edwards *et al* (eds), Cardiff 1986).

doctors of civil law and canon law to tell them what their common learning was. Common lawyers do not seem to have imagined that the *Corpus Iuris Civilis* and *Corpus Iuris Canonici* contained the whole of these other laws or spoke with greater authority than the living generation of practitioners.[171]

5. *Did the Common Lawyers Get It Right?*

More than a century ago, T. E. Scrutton surveyed the references to civil law and canon law in Sir Edward Coke's *Institutes of the Laws of England*, and found them wanting. He faulted Coke for misquoting the Roman texts, and for giving the label 'civil law' to rules and practices found nowhere in the *Corpus Iuris Civilis*.[172] On this basis, Scrutton concluded that Coke compared civil law to common law 'with such inaccuracy as to show that his knowledge of the Civil law was slight'.[173] On the basis of this evidence, he summed up more broadly that 'in the Common law, the influence of Roman law has rather retrograded than advanced since the time of Bracton'.[174] Scrutton had a rather low opinion of the *Bracton* author's attainments as a Romanist too. Coke would have earned better marks, perhaps, if his statements had been assessed in relation to the works of contemporary civilians and canonists rather than to the best modern editions of the ancient texts. Then again, canon law 'in the books' often differed from canon law as practised in England's ecclesiastical courts.[175]

Common lawyers 'used' statements of civil law and canon law to reach conclusions on common law disputes. Many of these disputes had no analogue in canon law or civil law contexts, and thus the 'correctness' of such applications cannot be tested. How, for example, would one decide whether common lawyers 'correctly' applied the civilian and canonist maxim *volenti non fit iniuria* in an action of trespass or covenant at common law? Leaving aside the context of actual applications, one can nevertheless ask whether the statements of civil law and canon law found in the Year Books were accurate in and of themselves.

I can begin to answer these questions for the two hundred some cases I have located. What common lawyers announced to be the rule of canon law or civil law on some topic can nearly always be found in the voluminous writings of Continental canonists and civilians at the time. On the other hand, common lawyers did not confine their statements to the settled *communis opinio* on which every reputable canonist or civilian would agree. Common lawyers often

[171] Canonists and civilians may have had a quite different view of their own laws, much more tied to the 'ideal law' taught in the universities and embodied in the texts. See R. H. Helmholz, *Roman Canon Law in Reformation England* 12 n 34 (Cambridge 1990). Cf C. T. Allmand, 'The Civil Lawyers', in *Profession, Vocation, and Culture in Later Medieval England* 155, 166 (Cecil H. Clough (ed), Liverpool 1982) (English civilians regarded civil law as 'living law').

[172] Thomas Edward Scrutton, *The Influence of Roman Law on the Law of England* 130–3 (Cambridge 1885). Thus Coke 'misquotes *meretur* for *patitur*' in Dig 48.19.18, and 'says of the *Regiam Majestatem*, "so called because it beginneth *as Justinian's Institutes do*, with these words," which is incorrect, as the words are *Imperatoriam Majestatem*'. Id at 130 n 7.

[173] Id at 133.

[174] Id.

[175] R. H. Helmholz, *Roman Canon Law in Reformation England* 11 (Cambridge 1990).

simplified matters, and rarely mentioned the disputes and uncertainties in canon law and civil law, although after 1600 some common lawyers criticized these laws for their indeterminacy.[176]

A few examples may suffice. On matters of legitimacy, common lawyers stated the canon law with fair accuracy. Alexander III decreed in the late twelfth century that children became legitimate by the subsequent marriage of their parents and that children conceived in adultery were illegitimate.[177] Canon law did not ordinarily bastardize the offspring of marriages annulled by divorce, but common lawyers may have had canonist authority for the proposition that children would be illegitimate if both parents knew of the impediment before marrying.[178] Common lawyers did not mention in any of these cases the many circumstances in which divorce left the children legitimate at canon law.

On matters of marriage and divorce, common lawyers left out more of the detail. Male children could generally consent or refuse a contracted marriage at age fourteen, and female children at age twelve, and consummation was generally evidence of consent, but there were important exceptions in many respects.[179] All five of the grounds listed by common lawyers were indeed impediments to marriage, but their list omitted the important impediments of infancy, duress, and crime, as well as error of person, error of condition, and disparity of cult (marriage to a person not baptized).[180] Canonists quarrelled, as common lawyers noted, whether spouses who remarried others and had issue after a divorce for impotence should be forced to reunite.[181]

Common lawyers could find good canonical authority for their references to such basic propositions as the obligation to pay tithes where one resided,[182] the requirement of two witnesses,[183] the suspension of sentences pending appeal,[184] and the ecclesiastical courts' claim of exclusive jurisdiction over clergy.[185] In their references to prescription, common lawyers were understandably vague about the time limits. Canon law and civil law had a variety of periods for the

[176] Edward Coke, *Proeme* to *The Second Part of the Institutes of the Laws of England* [6th p] (London 1642): 'Upon the text of the civil law, there be so many glosses and interpretations, and again upon those so many commentaries, and all these written by doctors of equal degree and authority, and therein so many diversities of opinion as they do rather increase than resolve doubts and uncertainties, and the professors of that noble science say that it is like a sea full of waves.' See R. H. Helmholz, *Roman Canon Law in Reformation England* 14–16 (Cambridge 1990).

[177] X 4.17.4, 4.17.9. See James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* 344, 544 (Chicago 1987).

[178] X 4.17.2. See James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* 344 (Chicago 1987). Cf Mich 39 Edw 3, pl [35], fol 31 (1365) (Robert de Thorp JCP).

[179] X 4.2.14; William Lyndwood, *Provinciale Seu Constitutiones Angliae* 272, gloss *non pervenerit* (c 1430) (Oxford 1679). See James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* 357 (Chicago 1987); R. H. Helmholz, *Roman Canon Law in Reformation England* 98–9, 199–200 (Cambridge 1990). A common lawyer correctly applied the same ages for profession of monastic vows. X 3.31.8, 3.31.12. See n 53 above.

[180] See R. H. Helmholz, *Roman Canon Law in Reformation England* 90–100 (Cambridge 1990).

[181] See James A. Brundage, 'The Problem of Impotence', in *Sexual Practices and the Medieval Church* 135–40 (Vern L. Bullough & James Brundage (eds), Buffalo 1982); James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* 377–8 (Chicago 1987) and sources quoted therein; Pierre Darmon, *Trial by Impotence: Virility and Marriage in Pre-Revolutionary France* 15–16 (tr Paul Keegan, London 1985).

[182] X 3.10.7.

[183] X 2.20.28.

[184] X 2.28.

[185] X 2.1.8.

acquisition of prescription: ten, twenty, thirty, and forty years in various circumstances.[186] Errors begin to appear at the level of detail: English civilians would, contrary to a common lawyer's statement, give an action for defamation for calling one a 'knave'.[187]

A few times, common lawyers can be found making wildly inaccurate statements about canon law and civil law. In 1486, Serjeant Calow stated that 'by the law of the holy Church', if a husband finds a priest in adultery with his wife, he can kill the priest and the wife for the wrong done to him, without subjecting himself to punishment.[188] I expect no fifteenth-century canonist could be found taking this view of ecclesiastical law, one which Gratian's *Decretum* emphatically rejected.[189] After Serjeant Calow confounded 'written law' with the Unwritten Law, he went on to reach the same result under 'civil law', this time quoting for support a passage from the Old Testament.[190] In 1458, Chief Justice Prysot asserted that 'civil law' afforded accused persons the opportunity to challenge their accusers to trial by battle.[191] Trial by battle had no place in Roman or canon law.[192] In neither case was the lawyer challenged for the accuracy of his statement.

6. *What Did Common Lawyers Reveal about Their Attitudes toward Civil Law and Canon Law?*

Two hundred case reports accumulating with increasing frequency over the course of three centuries are enough to show that English common lawyers were not uniformly hostile to civil law and canon law. They did not all join in isolating themselves from these other bodies of law. Individual common lawyers tried every available argument to support the positions they advanced, and arguments from civil law and canon law became increasingly 'available' in a wider and wider variety of contexts. Common lawyers sought out doctors of civil law and canon law to advise them and to argue beside them in the central royal courts. All the evidence reviewed thus far shows greater receptivity to civil law and canon law than legal historians' accounts of English insularity and hostility would predict.

Common lawyers pointed out the differences between their own law and canon law or civil law more often than they mentioned the similarities. When common lawyers focused on the differences, they did not treat canon law and civil law as superior authorities, nor did they express criticism of the common law rule,

[186] See Thomas O. Martin, *Adverse Possession, Prescription and the Limitation of Actions: The Canonical 'Praescriptio'* 3 (Catholic University of America Canon Law Studies No 202, Washington 1944).

[187] See R. H. Helmholz, *Roman Canon Law in Reformation England* 59, 179 (Cambridge 1990). Cf Spelman Misc [10], 93 SS 238 (1529–30); text at n 86 above.

[188] Hil 1 Hen 7, pl 3, fol 6 (1486) (William Calow Sjt).

[189] C 23, q 5, c 40; C 33, q 2, c 9. See James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* 248 (Chicago 1987). Professor Joseph McKnight has kindly informed me that secular legal codes in Spain left an adulterer at the mercy of the wronged husband.

[190] Hil 1 Hen 7, pl 3, fol 6 (1486) (William Calow Sjt) (quoting Numbers 25:6–8).

[191] Mich 37 Hen 6, pl 4, fol 2, 3 (1458) (John Prysot CJCP).

[192] See, eg, George Nielson, *Trial by Combat* 2 (New York 1891).

though this is sometimes the clear implication.[193] On a few occasions, common lawyers called their own rule the 'wiser' one,[194] but more often they simply said that 'our courts' would follow 'our law'. There were still other occasions on which common law courts felt compelled to give effect to judgments of ecclesiastical courts even though their own law would have reached the opposite result.[195]

There is no way of knowing how often common lawyers could have invoked canon law or civil law and did not do so. One cannot tell what common lawyers knew about canon law or civil law but did not say because the argument would not have been appropriate in court. When there was a mention of these other bodies of law, it was by no means always successful, but it usually went unchallenged. A handful of Year Book cases, however, do record the objections of serjeants and justices that they should not have to take cognizance of a body of law of which they were ignorant.[196] In 1428, when Huls LLB 'argued much in Latin' before the Court of Common Pleas, Justice Strangeways said the common law court should have nothing to do with canon law, but Serjeant Juyn disagreed.[197] A serjeant protested in 1520 that to show what canon law was (on the subject of lawful matrimony) 'would be a huge thing, and too long to plead' and in any case was 'not part of our erudition'.[198]

In 1456, a bishop who was accused of interfering with the presentation of a cleric to a parish church 'pleaded' a rule of canon law as his defence. He pleaded that two competing candidates were presented for the parish, and that canon law did not obligate him to inquire who was rightfully entitled to present a candidate unless one of the parties paid the cost of the inquiry, which no one did. This led to the widest variety of comments from common lawyers in any single case about whether and how to argue canon law in their court.

Serjeant Nedeham, for the plaintiff, contested whether the bishop's statement of canon law was accurate, and argued that Common Pleas could either decide the disputed issue of canon law or ignore canon law and decide the bishop's liability solely as a matter of common law.[199] Serjeant Littleton, for the bishop, observed that canon law and common law often agreed, and argued that the Court should adjudge the canon law such as it was 'by common law and reason'.[200] Serjeant Hindstone, taking the bishop's side as well, argued that even when canon law and common law were opposite, canon law could properly be 'certified' to the Court and the Court would accept and follow it. In this instance, Hindstone thought, the Court could accept what the bishop pleaded 'by reason'

[193] Eg, Trin 4 Hen 6, pl 11, fol 31 (1426) (William Babington CJCP).
[194] Mich 39 Edw 3, pl [35], fol 31 (1365) (William de Wychyngham JCP).
[195] Eg, Mich 34 Hen 6, pl 26, fol 14 (1455) (John Prysot CJCP).
[196] Hil 5 Edw 3, pl 29, fol 9 (1331) (Robert Parvyng Sjt); Mich 20 Hen 6, pl 17, fol 8, 51 SS 81, 83–4 (1441) (William Ayscough JCP & Portyngton); Trin 12 Hen 7, pl 2, fol 22 (1497) (Thomas Frowyk Sjt); Mich 20 Hen 7, pl 14, fol 4, 5 (1504) (Hody CB). Cf Hil 18 Edw 4, pl 28, fol 29 (1479) (John Catesby Sjt) (saying the common law must take notice of canon law).
[197] Mich 7 Hen 6, pl 36, fol 10, 11 (1428) (James Strangeways JCP, John Juyn Sjt).
[198] Trin 12 Hen 8, pl 4, fol 5, 6 (1520) (John Newdegate Sjt).
[199] Pasch 34 Hen 6, pl 9, fol 38 (1456) (John Nedeham Sjt).
[200] Id (Thomas Littleton Sjt).

as good canon law and good common law too.[201] Serjeant Choke, taking the plaintiff's side, added more examples of canon law differing from common law, and said that this Court should judge solely according to 'the law used here', common law.[202]

Chief Justice Prysot and Justice Moyle took the view that they would have to determine the point of canon law for themselves; it would be inappropriate to submit a disputed rule of canon law as an issue of fact for trial by a jury.[203] Justice Danby said that they should 'speak with impartial Doctors of the Church' and Justice Aysshton agreed that 'we are not truly learned in their Law, before we have inquired of those who are learned and graduates of the same Law'.[204] Chief Justice Prysot added his view that those rules of canon law that were found in the Bible must be followed, because Holy Scripture was the 'common law' on which all manner of laws were founded. Otherwise, he said, common law courts were under the same obligation to acknowledge canon law as bound ecclesiastical courts to observe common law.[205]

The case came to Exchequer Chamber to be argued by all the common law justices. Justice Yelverton of King's Bench put Prysot's point somewhat differently, stating that they were bound to maintain and observe all canon laws that pertained to their baptism and faith, but should not give effect to a canon law that would result in their disinheritance.[206] (Common lawyers encountered canonist doctrines on theology and sacraments in their capacity as practising Christians, of course, but as practising lawyers they made no reference to those topics of canon law.) Chief Justice Fortescue thought that a rule of canon law a mere 150 years old should not prevail over immemorial common law.[207] Prysot and the Justices of Common Pleas resolved that the bishop had a good defence at common law merely by alleging that two candidates had been presented, and that everything the bishop had pleaded about canon law was mere 'surplusage': it had no effect and the Court took no regard of it in passing judgment.[208]

In 1555, Justice Saunders summed up the common law courts' receptivity to canon law, civil law, and other 'sciences or faculties'. He recounted that when Huls LLB came to the bar of his Court in 1428, 'the Judges were well content to hear' and 'were not above being instructed and made wiser by him'.[209] Saunders cited other instances in which common lawyers were informed of canon law, and found this no different from the instances he cited of medical doctors telling the Court whether a wound was grave enough to bring prosecution of mayhem,[210] of

[201] Id at fols 38–9 (William Hindstone Sjt). Serjeant William Laken also argued that the Court was obliged to follow canon law here.

[202] Id at fol 39 (Richard Choke Sjt).

[203] Id at fols 39–40 (John Prysot CJCP, Walter Moyle JCP).

[204] Id at fols 39–40 (Robert Danby JCP, Nicholas Aysshton JCP).

[205] Id at fol 40 (John Prysot CJCP). See Cro Eliz 467, 78 Eng Rep 704 (1596).

[206] Trin 34 Hen 6, 51 SS 108, 109 (1456) (William Yelverton JKB).

[207] Id at 108 (John Fortescue CJKB).

[208] Pasch 34 Hen 6, pl 10, fol 41 (1456) (John Prysot CJCP); Mich 35 Hen 6, pl 27, fol 18 (1456) (Walter Moyle JCP, Nicholas Aysshton JCP).

[209] 1 Plowden 124, 75 Eng Rep 192 (1555) (Edmund Saunders JCP).

[210] Trin 28 Edw 3, pl 1, fol 18 (1354); 28 Edw 3, Lib Ass pl 5, fol 145 (1354). Cf 2 Dyer 178b, 73 Eng Rep 394 (1560) (impotence adjudged by physicians in ecclesiastical court).

logicians invoked to point out false reasoning,[211] and of grammarians consulted on the meanings of words.[212] Saunders correctly described the other bodies of knowledge—all university subjects—for which common lawyers turned to experts. The references to canon law and civil law far outnumber those to medicine, logic, or grammar. Saunders praised common lawyers for receiving learned law and other sciences. But it was not all clear sailing.

In 1586, Serjeant Walmsley argued that his client, the lessor of a flock of sheep, ought to own the lambs that were born during the term of the lease. He said that the opinion of 'all the civil lawyers' supported his position. The report states that 'the Court was angry and rebuked him, that he did in such manner cross their opinions, and that he cited the opinions of civilians in our law'.[213] The Court of Common Pleas reached the opposite conclusion and awarded the lambs to the lessee of the flock.[214] A year later, Serjeant Walmsley advised fellow common lawyers not to meddle with canonist or civilian procedure,[215] and soon after Serjeant Beaumont warned that judging 'upon probabilities', as the civilians did, would 'many times minister injustice in place of justice'.[216]

This muted ambivalence failed to stop or slow common lawyers' reference to civil law and canon law in their arguments. Doctors of civil law continued to appear at the bars of Common Pleas and King's Bench. It is hard to estimate whether the few instances of resistance to canonist and civilian learning represent general principled opposition to the creeping influence of canon law and civil law, or short-term litigation strategy. The Court's outburst against Serjeant Walmsley in 1586 may indicate that some branches of common law were so well settled that attempts to upset the doctrine by appeals to civil law were truly offensive to common lawyers. This would still leave many other areas of overlapping jurisdiction, longstanding dispute, ambiguity, and gaps in common law, where reference to canon law and civil law was appropriate. Certainly the expressions of resistance in the reports did not increase in proportion to the rising number of references to the other laws.

Common lawyers' attitudes towards canon law were necessarily complicated by political and religious dimensions of the English king's relations with the

[211] Pasch 15 Edw 4, pl 5, fol 24 (1475) (Thomas Littleton JCP); Trin 11 Hen 7, pl 1, fol 23 (1496) (Thomas Bryan CJCP); 3 Dyer 271a, 73 Eng Rep 603 (1568); 2 Coke 51a, 76 Eng Rep 530 (1597). Cf Mich 7 Hen 6, 51 SS 38, 39 (1428) (Thomas Rolf Sjt) (proof by syllogism); Pasch 5 Edw 4, Long Quinto fol 20 (1465) (pointing out false syllogism).

[212] Trin 9 Hen 6, pl 30, fol 27, 28, 51 SS 58, 61 (1431) (William Paston); Mich 35 Hen 6, pl 17, fol 11 (1456) (Thomas Littleton Sjt, Walter Moyle JCP); Mich 35 Hen 6, pl 25, fol 15 (1456) (Walter Moyle JCP, John Prysot CJCP) (same case); Hil 9 Hen 7, pl 8, fol 16 (1494); Pasch 14 Hen 8, pl 7, fol 25, 26 (1523) (Anthony Fitzherbert JCP); 1 Plowden 125, 127, 75 Eng Rep 193–4, 196–7 (1555) (Edward Saunders JCP; Anthony Browne JCP); 2 Dyer 154a, 73 Eng Rep 334 (1557); 2 Leonard 217, 74 Eng Rep 491 (1574) (Thomas Gawdy JKB; Christopher Wray CJKB); Moore KB 103, 72 Eng Rep 470 (1575); 2 Leonard 94, 74 Eng Rep 563 (1584); Cro Eliz 59, 78 Eng Rep 320 (1587); 1 Leonard 147, 74 Eng Rep 136 (1589) (Christopher Wray CJKB); Cro Eliz 177, 78 Eng Rep 433 (1590) (Christopher Wray CJKB); 1 Leonard 241, 74 Eng Rep 220 (1590) (Francis Gawdy JKB); 2 And 117, 123 Eng Rep 576 (1598).

[213] Godbolt 113, 78 Eng Rep 69 (1586).

[214] Nearly 400 years later, the Court of Appeal reached the same result, but found civilian authority in agreement. *Tucker* v *Farm and General Investment Trust Ltd*, [1966] 2 QB 421, [1966] 2 All ER 508, [1966] 2 WLR 1241 (CA).

[215] Moore KB 226, 72 Eng Rep 546 (1587) (Thomas Walmsley Sjt).

[216] 3 Leonard 255, 74 Eng Rep 668 (1589) (Francis Beaumont Sjt).

pope, the source and supreme arbiter of canon law authority. Common lawyers displayed a strongly secular, pragmatic attitude in many respects, not least in their occasional oaths and invocations of the devil.[217] They opposed the pope most prominently in the matter of excommunication. The king's courts respected an English bishop's sentence of excommunication and would not permit an excommunicated litigant to plead. But the courts resolutely refused to take cognizance of a sentence of excommunication from the papal court at Rome. The ostensible reason was that the justices could send to an English bishop to find out the cause for a litigant's excommunication or to request absolution, but could not send to the pope for such purposes.[218] Common lawyers disputed whether the pope could grant the privilege of sanctuary to a place in England, allowing felons to escape arrest: Justice Townsend certainly overstated his case when he asserted in 1486 that 'the Pope can do nothing within this Realm'.[219]

On other occasions, common lawyers argued that the pope could do anything (*papa omnia potest*),[220] that he was the 'great and high Sovereign from whom all have their power',[221] and that he was supreme head and general vicar of the holy Church.[222] They asserted that the pope could raise a tax on the people of England,[223] and wondered whether he could cause an heir to be disinherited,[224] could compel a man to marry a wife or compel him to become a priest,[225] or could change the law of England.[226] Before the Reformation, common lawyers did not display uniform resistance to expressions of papal power and prerogative.

The diversity of common lawyers' comments about the pope repeats in miniature the range of their attitudes towards canon law and civil law in general. Common lawyers followed their own rules in thousands of reported cases before 1600 without making any mention of canon law or civil law. They exercised their own jurisdiction to its fullest limit and steadily resisted encroachments of ecclesiastical court jurisdiction. Historians have led us to expect that common lawyers would either avoid mention of the rules of canon law and civil law altogether, or express their disapproval of those laws whenever possible.

The evidence summarized in this paper suggests quite another attitude. Common lawyers invoked canon law and civil law more frequently than is

[217] Eg, Hil 5 Edw 2, 31 SS 77 (1311) (Bereford CJCP); Hil 29 Edw 3, pl [39], fol 13, 14 (1356) (William de Skipwyth Sjt); Mich 43 Edw 3, pl 43, fol 33, 34 (1369) (John de Moubray JCP). See also Mich 38 Edw 3, pl [24], fol 25 (1364) (William de Skipwyth CB) (ironic reference to the Trinity).

[218] 30 Edw 3, Lib Ass pl 19, fol 177 (1356) (William de Thorp B) (referring to practice under Edward I); Mich 12 Edw 4, pl 18, fol 15 (1472) (Thomas Littleton JCP, John Catesby JCP); Mich 2 Rich 3, pl 51, fol 22 (1484) (John Vavasour Sjt); Trin 4 Hen 7, pl 12, fol 13, 15 (1489) (Guy Fairfax JKB, William Huse CJKB).

[219] Trin 1 Hen 7, pl 1, fol 25 (1486) (Roger Townsend JCP); Keilway 190, 72 Eng Rep 368 (1516); Port's Notebook, 102 SS 41 (c 1519). Cf 2 Leonard 170, 74 Eng Rep 451 (1587) (Thomas Walmsley Sjt) (the pope is not a competent judge within this realm).

[220] Mich 11 Hen 4, pl 67, fol 37 (1409) (William Hankford JCP).

[221] Trin 11 Hen 4, pl 18, fol 76 (1410) (Robert Hill JCP). See also Trin 19 Edw 3, RS 169 (1345) (Richard Willoughby JCP) (invoking the pope's prerogative).

[222] Hil 21 Hen 7, pl 1, fol 1, 2 (1507) (John Kingsmill JCP); Pasch 13 Hen 8, pl 2, fol 12, 15 (1522) (Robert Brudenell CJCP); Pasch 14 Hen 8, pl 8, fol 29, 31 (1523) (Robert Brudenell CJCP).

[223] Trin 7 Edw 4, 64 SS 11 (1467) (Richard Choke JCP).

[224] Trin 11 Hen 4, pl 18, fol 76, 76–8 (1410) (William Hankford JCP, Robert Hill JCP).

[225] Hil 32 Hen 6, pl 23, fol 28, 29 (1454) (Walter Moyle Sjt).

[226] Mich 11 Hen 4, pl 67, fol 37, 38 (1409) (William Thirning CJCP).

commonly supposed, for a multitude of reasons and in a wide variety of contexts. They very rarely criticized the content of those laws and very rarely criticized each other for mentioning them. Justices of the common law courts welcomed civilians and canonists into their midst and allowed them to argue at the bar. They administered rules that gave effect, in many circumstances, to the sentences of ecclesiastical judges. Serjeants pointed to canon law and civil law analogies to bolster their arguments, and quoted maxims, definitions, and distinctions from those laws to elucidate their own positions on common law.

It is clear that common lawyers never merged or confused canon law or civil law with their own law. They did not treat those laws as superior sources of authority, or as 'background' rules underpinning common law, or as models guiding the application of common law rules. Differences between common law and canon law or civil law did not require justification or resolution. It is equally clear that canon law and civil law were the most important sources for introducing new forms of legal thought into the common law. Common lawyers in the decades leading up to 1600 were more receptive to the influence of canon law and civil law than they had been at any time since the thirteenth century.

Common lawyers acknowledged the prestige that canon law and civil law possessed. Canon law and civil law were the 'learned' laws, known throughout the continent of Europe, taught by university faculties, and bound in expensive volumes. Common lawyers invested their own law with a share of that prestige by treating it on a par with these laws, as they always did. The comparison worked in two directions at once, with contrary tendencies. On the one hand, common lawyers tended to view canon law and civil law as bodies of law essentially similar to common law in important respects: as fundamentally oral learning transmitted personally through the association of professionals. On the other hand, common lawyers were learning to view their own body of law as similar to canon law and civil law in at least one aspect: as a body of law organized into substantive classifications that could be conceived as chapters of a vast unwritten text. Common lawyers' contacts with canon law and civil law over the centuries before 1600 prepared the way for the structured treatises of the seventeenth and eighteenth centuries: John Cowell's *Institutes*, Henry Finch's *Nomotexnia*, Matthew Hale's *Analysis*, Thomas Wood's *Institutes*, and William Blackstone's *Commentaries on the Laws of England*.

Conclusion

This study draws the curtain at 1600. Common lawyers continued to refer to canon law and civil law with great frequency in the decades after 1600,[227] continued to report their discussions with doctors of civil law out of court,[228] and

[227] Eg, Gouldsb 119, 75 Eng Rep 1036 (1601) (Thomas Egerton LK); 6 Coke 67b, 77 Eng Rep 357 (1606); 8 Coke 101a, 77 Eng Rep 631 (1610); Godbolt 215, 78 Eng Rep 131 (1613) (Edward Coke CJCP) (citing William Lyndwood).

[228] Eg, 5 Coke 51b, 77 Eng Rep 133 (1604); Noy 100, 74 Eng Rep 1066 (1602).

continued to receive the doctors to argue at the bar of their courts.[229] They continued to commend themselves for receiving the learning of civilians, grammarians, and experts in other sciences.[230] This study concludes at the date 1600 in order to show how receptive English common lawyers were to continental legal learning at just the moment when a new form of legal literature appeared in England, *Institutes* of English common law.

In 1605, a civilian named John Cowell, Regius Professor of Civil Law at Cambridge University, published his *Institutiones Iuris Anglicani* in Cambridge. Cowell fitted a Latin restatement of common law rules into the order of the book and title headings of Justinian's *Institutes*. The book was reprinted several times in the seventeenth century, including two editions translated into English. In 1613, a common lawyer named Henry Finch published a work in law French entitled *Nomotexnia*, the 'art' of law. In 1627, an English version was published as *Law, or a Discourse Thereof*. Each was an extremely elaborate web of divisions and distinctions into which Finch meticulously divided English law. Though his terminology departed from Cowell's and Justinian's *Institutes*, his basic structure did not.

No comparable work can be found in English legal literature from the prior three centuries. Recent scholars have expressed considerable doubt that English common lawyers would have found any use for such an *Institutes* setting out common law in civilian categories.[231] The evidence summarized in this paper demonstrates that common lawyers had an established practice of looking to civil law and canon law for specific rules of law, for definitions of terms, for broadly applicable maxims, and for elementary categories and distinctions. Their frequent recourse to the learned laws suggests that common lawyers most likely understood the purpose of an *Institutes* of common law and welcomed the arrangement of common law rules and principles in an apt and influential framework.

Common lawyers in the fifteenth and sixteenth centuries were thus neither 'wholly ignorant' of civil law and canon law nor 'completely insular' in their professional outlook. Eminent legal historians' generalizations about the supposed hostility of common lawyers towards the civil law and canon law have discouraged researchers from seeking out specific points of canonist or civilian influence on common law doctrine, procedure, or reasoning. The Year Books and early case reports afford ample evidence that channels of influence were open and that common lawyers sought out knowledge of canon law and civil law for many purposes on many occasions.

[229] Eg, Moore KB 665, 72 Eng Rep 826 (1602); Cro Eliz 908, 78 Eng Rep 1130 (1602); Moore KB 777, 72 Eng Rep 900 (1605); Godbolt 260, 78 Eng Rep 152 (1612); Moore KB 850, 72 Eng Rep 947 (1616).

[230] Eg, Moore KB 791, 72 Eng Rep 909 (1606) (Francis Bacon); 7 Coke 27b, 28a, 77 Eng Rep 410 (1608).

[231] Daniel R. Coquillette, *The Civilian Writers of Doctors' Common, London* 80–1 (Berlin 1988); Jocelyn Simon, 'Dr Cowell', 26 *Cambridge Law Journal* 260, 262–3 (1968).