ELIZABETHAN LEGALISTS

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ABSTRACT

ELIZABETHAN LEGALISTS

By

Richard James Terrill

Throughout the fifteenth, sixteenth, and seventeenth centuries, there emerged in western Europe a new intellectual climate that enabled philosophical reasoning to transcend theological speculation. This movement was affected by a variety of factors. The pressure of significant events on the status quo, such as the Renaissance and the Reformation, was a striking influence. The slow deliberate change in political theories and legal issues brought about by the rise of the nation states, voyages of discovery, and the Reception of the Roman law was another. The purpose of this study is to consider what were the effects of this change on the legal community of Elizabethan England.

When dealing with Elizabethan legal scholarship, historians have inevitably, and almost exclusively, concentrated on the works of Francis Bacon and Edward Coke. Bacon and Coke sought to resolve the conflicts that were plaguing the legal community. Based on their philosophical interests, they reacted in different ways. Bacon

concentrated his efforts on the future by developing a new approach, a scientific method. Coke looked to the past and utilized historical precedents to defend the unique position that the common law held in the commonwealth. These men were not alone in their concern for the state of the law in Elizabethan England. Other lawyers were equally conscious of the changing nature of the intellectual climate. This concern motivated them to publish their opinions. These are the lesser known legalists. They were neither part of a school of legal thought nor the nucleus of a particular party. They did have three common roots: all lived in the Elizabethan period; all had studied law; and all were concerned with the law and made a contribution to legal scholarship.

Without invading the rather closed law faculties at the Inns of Court, the humanist movement was able to have an indirect but significant impact upon the priorities and assumptions of the Elizabethan legalists that was reflected in the choice of their scholarly works. The legalists realized that the medieval view was no longer applicable to the present. By their acceptance of this fact, they sought to resolve the conflicts of their age that had been created by the decline in the theory of medieval universalism and by the emergence of the events of the sixteenth century. Each provided a personal approach and interpretation. William Lambarde employed the use of history. William Fulbecke and Thomas Ridley utilized the comparative method.

Alberico Gentili focused his attention on developing a new field of international law. John Dodderidge examined the system of legal education.

The Elizabethan legalists responded to the challenge to examine critically the conflicts created as a result of the change in the intellectual climate of the sixteenth century and to reshape the common assumptions of their age.

ELIZABETHAN LEGALISTS

By

Richard James Terrill

A DISSERTATION

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To

My Bride and Parents

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INTRODUCTION

A number of years ago Professor Franklin L. Baumer suggested that an effort should be made by intellectual historians to analyze the relationship between the great books and minor works of a particular period.[1] Although some attempts have been made to rectify this deficiency in historical scholarship, there remain numerous areas where this method has not been applied. A case in point is the study of English legal history. The marked presence of the treatises of Bracton, Fortescue, Coke, Blackstone, and Austin frequently causes one to forget the contributions of their lesser known contemporaries. The intellectual historian should be attentive to this problem, for his primary concern is to discover the climate of opinion that exists in a particular period of history. Presumably, each age has a climate of opinion or an intellectual dimension that distinguishes it from any other period. Classical, medieval, and romantic are terms employed by historians to underline such distinctions. One's perception of the intellectual framework, however, becomes short-sighted when it is based on the ideas of a few men or on the philosophy adopted by a

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[1]Franklin L. Baumer, "Intellectual History and Its Problems," The Journal of Modern History, XXI, (1949), p. 192.

particular group. They are often viewed as representing the homogeneity of the age. It is possible, of course, that a small group does indeed exhibit in their works the thought patterns, assumptions, and priorities that are unique to a particular period of history. Nevertheless, in such circumstances the possibility for the existence of elasticity in the intellectual framework is left wanting.

The purpose of this study is to improve our understanding of the climate of opinion in Elizabethan England. Certain restrictions on the scope of the work were obviously necessary. As a result, this essay focuses on the legal community of Elizabethan England. Prior to explaining the reasons for choosing this particular period and discussing the approach employed to the problem, it is important to clarify briefly what is meant by the term Elizabethan in the parlance of intellectual history.

The Elizabethan period did not end on March 24, 1603 with the death of the Queen; rather it continued on, much to the chagrin of some early Stuart enthusiasts. Elizabethan, for the intellectual historian, connotes an attitude of mind that existed in the late sixteenth and early seventeenth centuries.[2] Underlying the Elizabethan milieu was a cognisance of and concern for a dying order. This attitude

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[2]I am using as my point of reference the fact that some of Elizabethan England's most eminent literary men produced some of their more important works after the Queens' death. Shakespeare's Othello, Macbeth, and King Lear; Jonson's Volpone and The Alchemist; Donne's "First and Second Anniversaries;" and some of Bacon's works are examples.

was expressed in many ways in poetry, plays, and theological and philosophical writings representative of the more significant genres. The next chapter is addressed to the reasons for this attitude developing. It is sufficient here to point out that this concern for a dying order created a mood of anxiety and tension. The anxiety was precipitated by a gradual change throughout the fifteenth, sixteenth, and seventeenth centuries in the basis of thought. Medieval thinking, which was dominated by a theological and mythical approach, was being replaced by a scientific, analytical method. The mythical versus the analytical approach to thinking created a dilemma for many people. They were being asked to grasp reality in a way that was foreign to them. As a result, a state of flux developed. Where the medieval cosmology had explained man's relationship to his God, nature, fellow man, and government, there now existed a void of uncertainty and skepticism. The gradual questioning and final destruction of the medieval cosmology thus created this feeling of anxiety and tension.

In England the late sixteenth and early seventeenth centuries act as a bench mark in this shift. The thought patterns, assumptions, and priorities that developed during this period were the result of significant events that occurred at the time. For much of Europe, this was the age of the Renaissance and Reformation and the beginning of the scientific revolution and voyages of discovery. These profound events, occurring simultaneously, and the ideas

emerging from them signaled the demise of the medieval world view and commenced to establish what we call the modern era.

Two concerns influenced my choice for examining the intellectual climate of Elizabethan England. Although this period does not suffer from a lack of such scholarship, it appears that the scope of these works is to a degree limited.[3] Obviously the Renaissance, Reformation, and scientific revolution lend themselves to such studies. Scholars of English history often cite Thomas More, Thomas Smith, and Richard Hooker as their representatives. But the studies concerned with England have curiously neglected the role the legal community played in formulating the intellectual climate. Legal scholars have usually concentrated on administrative, constitutional, procedural, and substantive law. Few attempts, if any, have been made to study the ideas emerging from important movements, such as the Renaissance and Reformation, and to analyze how these ideas influenced the concerns of and approaches to legal scholarship. Recently, Professor William Bouwsma has indicated his recognition of this need.[4] He points out that historians have been remiss in not

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[3]Six of the more important works are J.W. Allen, A History of Political Thought in the Sixteenth Century, (London, 1928); Herbert Butterfield, The Origins of Modern Science, (New York, 1957); Arthur B. Ferguson, The Articulate Citizen and the English Renaissance, (Durham, N.C., 1965); Harold J. Grimm, The Reformation Era 1500-1650, (New York, 1954); Hiram Hayden, The Counter-Renaissance, (New York, 1950), and Theodore Spencer, Shakespeare and the Nature of Man, (New York, 1942).

[4]William J. Bouwsma, "Lawyers in Early Modern Culture," American Historical Review, LXXVIII, (1973), pp. 303-27.

analyzing the contributions certain "occupational groups" have made in identifying the causes for shifts in attitudes and values. Lawyers in early modern Europe, he suggests, invite such analysis. Therefore, in narrowing the scope of my work the focus was directed to a significant but neglected "occupational group" that did articulate their concern for the climate of opinion existing in the Elizabethan period.[5]

My second concern, of course, involves analyzing the relationship between the great books and minor treatises produced during the age. When dealing with Elizabethan legal scholarship, historians have inevitably, and almost exclusively, concentrated on the works of Francis Bacon and Edward Coke. Both men attempted to cope with the tensions that were affecting the law. Their personalities, thoughts, and eventually their published works commanded the attention of the legal community. Contemporaries of these judicial scholars attested to this fact, and legal historians, such as F.W. Maitland, W.S. Holdsworth, and Theodore F.T. Plucknett, have substantiated this further.

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[5]Recently, there have been a few books published that have dealt with the role of lawyers in Elizabethan society. These books tend to emphasize their political influence, however: John Dykstra Eusden, Puritans, Lawyers, and Politics in Early Seventeenth-Century England, (New Haven, 1958); W.J. Jones, Politics and the Bench the Judges and the Origins of the English Civil War, (London, 1971); Brian P. Levack, The Civil Lawyers in England 1603-1641 A Political Study, (London, 1973), and David Little, Religion, Order, and Law: A Study in Pre-Revolutionary England, (New York, 1969).

Francis Bacon is a disturbing figure. Energetic in his search for a new system of knowledge to replace the discredited medieval approach, he was England's leading exponent of the inductive empirical method for understanding nature, man, and the law. This search for knowledge, however, was tempered by a practical motivation for power and money. A philosopher by nature and a lawyer by profession, Bacon had an insatiable desire to become the premier statesman of James I. Throughout his life at court, a succession of equally ambitious men, Robert Cecil, Robert Carr, and George Villiers in particular, were persistent obstacles in the path to Bacon's goal.

Born at York House on January 22, 1561 Francis Bacon was the son of Nicholas, Queen Elizabeth's Lord Keeper. His family had long been in the service of the House of Tudor. His father was a distinguished lawyer, who along with Thomas Denton and Robert Cary was commissioned by Henry VIII to propose reforms in the legal education conducted at the Inns of Court.[6] His uncle, William Cecil, was Lord Burghley, Queen Elizabeth's principal minister until his death in 1598. And Burghley's son, Robert, held a similar position with James I.

At the age of twelve Francis entered Trinity College, Cambridge. He left the University two years later without obtaining a degree and entered Gray's Inn to pursue a career

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[6]See Edward Waterhouse, Fortescue Illustratus, (London, 1663), pp. 539-46, or English Historical Documents 1485-1558, ed. C.H. Williams, (New York, 1967), V, pp. 563-73 for Nicholas Bacon's Report.

in the law. Admitted an utter barrister on June 27, 1582, Bacon pursued a diversified career as a lawyer, a writer of philosophy and history, an unsuccessful courtier, and as a theoretical judicial reformer. After years of wandering in the political wilderness, he became in quick succession Solicitor General, Attorney General, a privy councillor, Lord Keeper, and Chancellor of England. Within six months of his appointment as Lord Chancellor, Bacon was elevated to the peerage as Baron Verulam on July 12, 1618, and three years later he was created Viscount St. Albans.

Having been appointed Chancellor, Bacon realized a life long ambition of becoming a member of the King's inner council. Whatever elation the new Chancellor may have felt over his good fortune was soon diminished. Like all men, who have climbed to high estate, Bacon had acquired a number of enemies. A sufficient number of them were members of Parliament, who proceeded to bring a questionable bribery charge against him. Finding the charges difficult to answer and suffering from poor health, he was forced to relinquish the Great Seal on May 1, 1620, two years and four months after accepting the position. Tried, convicted, and for a short time imprisoned, Bacon remained hereafter on the periphery of the political stage. Until his death on April 9, 1626 from bronchitis, he devoted much of his time to his philosophical writings.

With the intellectual mood in the late sixteenth century in a state of flux, Bacon undertook a quest to find order in the universe. Heretofore, the medieval theories,

that explained the universe and man's place in it, were replete with metaphysical explanations. This concern for ultimate abstract principles and primary causes obviously raised questions that asked why. With the advent of the scientific revolution, however, physics replaced metaphysics. Interest gradually shifted from primary questions to secondary questions. Intellectuals no longer asked why questions but how questions. Scientists, for instance, were more concerned about how objects fell than with why they fell. One approach to answering such secondary questions was the inductive, empirical method. In The Advancement of Learning (1605) and especially in The Great Instauration (1620), Bacon supported this method for acquiring knowledge, that was applicable to all fields of interest. Essential to Bacon's inductive method was the need to discover the predictability of natural phenomena through systematic and scientific analysis. This could be attained by a thorough inquiry into the particulars of nature. Only by first gathering empirical data and secondly testing that information could one make an accurate generalization about anything, Bacon argued.[7] Through his inductive method, he believed that man could learn about all areas of inquiry and that this knowledge would be consistent, certain, and complete. An example of his insistence on the need for world wide

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[7]Francis Bacon, The Great Instauration, in The Works of Francis Bacon, ed. James Spedding, Robert Leslie Ellis, and Douglas Denton Heath, (Boston, 1890), VIII, pp. 40-43.

collections of natural history was Sylva Sylvarum (1627) published posthumously by Dr. Rawley, Bacon's chaplain. Bacon's scientific method, therefore, was an attempt to attain credibility in understanding natural phenomena.

This endeavor to acquire certitude was also apparent in his legal treatises. The recurring theme in his legal tracts was the need to refine the laws of England. Bacon was not a lone voice in this enterprise. Many lawyers felt the common law was too cumbersome and at times contradictory. Unfortunately, the political climate was such that a revision of the laws was highly unlikely. Lawyers, who were members of Parliament and who were antagonistic toward James, used the law to curtail the King from implementing his theory of kingship as it appeared in his treatise, The Trew Law of Free Monarchies. Thus, they would have voiced their disapproval at any attempts to change the law. Bacon, however, was a loyal supporter of the King, and to a large extent he shared James's views on the place of the Crown in the Constitution. He, therefore, had a practical reason for wanting to reassess the judicial status quo that was encumbering his King. He was also a legal scholar who had a firm grasp of legal principles and the theory of law in general. Bacon was one of a small group of men in England who had attempted to analyze the law scientifically. Besides the laws of England, he had studied continental legal systems. Disenchanted with what was, Bacon sought to formulate what ought to be.

With the exception of the eighth book of The Advancement of Learning, Bacon's legal treatises were published posthumously by Dr. Rawley. Despite this fact, Bacon's views on the need to revise the laws were well known in the legal community and at Court. In addition to The Advancement of Learning, his theory of jurisprudence was explained in two other works: Maxims of the Law and "A Proposition to His Majesty Touching the Compiling and Amendment of the Laws of England."

The Maxims of the Law, first published in 1630, was one of Bacon's early philosophical efforts at proposing a new approach to law reform. It has been suggested that Bacon had compiled three hundred legal maxims.[8] Only twenty-five were presented to Queen Elizabeth, however; these have remained the only maxims extant to this day. The purpose for such a project and the benefits to be derived from it were stated in the preface.

> I do not find that, by mine own travel (sic), without the help of authority, I can in any kind confer so profitable an addition unto that science, as by collecting the rules and grounds dispersed throughout the body of the same laws:...Neither will the use hereof be only in deciding of doubts, and helping soundness of judgment, but further in gracing of argument; in correcting unprofitable sublety, and reducing the same to a more sound and substantial sense of law; in reclaiming vulgar errors, and generally in the amendment in some measure of the very nature and complexion of the whole law.[9]

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[8]Paul H. Kocher, "Francis Bacon on the Science of Jurisprudence," Journal of the History of Ideas, XVIII, (1957), p. 5.

[9]Bacon, Works, Maxims of the Law, XIV, pp. 179-80.

Bacon implied that this endeavor would most likely be utilized by students and professors of the law. Employing the inductive approach to the laws of England, he formulated his legal rules. This was a unique and provocative idea, for each was based on specific legal situations. After each maxim, cases were cited to support the validity and authenticity of the rule. Thus, the Maxims of the Law was an extension of Bacon's use of the inductive, scientific method in the field of jurisprudence. Moreover, he suggested in this work that natural or fundamental law could be rationally induced from positive law. Equating the law of reason with the law of nature was not unusual in the sixteenth century. Sir John Fortescue, Thomas Starkey, Christopher St. Germain, and Sir Thomas Smith has already established this opinion in their works.[10] What was new was Bacon's contention that man could understand a superior law through a systematic analysis of an inferior law.

The ninety-seven aphorisms, that appear in the eighth book of The Advancement of Learning, were another attempt by Bacon to analyze positive law. In this treatise the emphasis was placed on the current doctrine of case law. Troubled by

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[10]See Sir John Fortescue, On the Governance of England, ed. Charles Plummer, (London, 1885); E.F. Jacob, Sir John Fortescue and the Law of Nature, (Manchester, 1934); Sir John Fortescue, De Laudibus Legum Anglie, ed. and tr. S.B. Chrimes, (London, 1942); Thomas Starkey, A Dialogue Between Reginald Pole & Thomas Lupset, ed. Kathleen M. Burton, (London, 1948); Christopher St. Germain, Doctor and Student, 16th. ed., (London, 1761), and Sir Thomas Smith, De Republica Anglorum, ed. L. Alston, (London, 1906).

the obscurity of the law, he suggested, a method by which credibility in case law could be attained. The causes for this obscurity arising were cited as: an excessive compilation of laws both obsolete and relevant, an ambiguity in their composition, an improper interpretation of laws, and an inconsistency in judicial pronouncements.[11] He proposed that a new digest of laws be compiled by legislators and legal scholars. Their efforts should be addressed to expunging obsolete laws, reducing the number of antinomies, eliminating redundancy by retaining only the most perfect laws, removing laws that only raised questions and decided nothing, and abridging those laws that were too verbose.[12] Through this process, Bacon argued, the ambiguity and obscurity, that created uncertainty in the laws, would be eliminated. And the element of certainty, which is essential to just laws, would be realized.

Bacon was particularly concerned with the habit of employing ancient cases in support of contemporary judicial decisions. This was a popular practice used by opponents of the Crown, but it had often been misused. Reliance upon these ancient cases created confusion in attempting to grapple with current problems. Bacon maintained, "Examples are to be used for advice, not for rules and orders. Wherefore let them be so employed as to turn the authority of

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[11]Bacon, Works, The Advancement of Learning, IX, p. 326.

[12]Ibid., p. 329.

the past to the use of the present."[13] He suggested further that reason and not custom must determine cases. Caution, therefore, was essential in using old cases to support current judicial decisions.

The organizational plan for Bacon's new digest of laws was based on the need for the production of an efficient digest. He proposed that the common law and statute laws be placed side by side. This would facilitate making judicial decisions, for the common and statute laws often differed in both interpretation and implementation. Emphasis was also placed on the need to transcribe the laws exactly as they appeared. Bacon pointed out that it was the authority of the law that was being drawn upon and that the style, in which the law was written, was of little concern. Therefore, if ancient cases were to be cited, authenticity was essential.

The rationale for the digest and its organizational plan was thus another example of Bacon employing his inductive method to implement his legal philosophy. The method for interpreting the laws in the digest was also characteristic of the scientific, empirical approach. He suggested that reports of judgments should be recorded precisely by reporters who were selected from learned counsellors-at-law. The object was to prevent judges from possibly distorting the reports. The reports would appear in chronological order so that they would be a history of the law. Finally, the

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[13] Ibid., p. 320.

commentaries on the laws should be limited to a few authors. This was suggested because of the number of such commentators. Few had been authentic, and the multitude of such books only perplexed the judges.

In 1613, while serving as Attorney General, Bacon expanded upon his idea for a digest of English laws. This new effort was entitled "A Proposition to His Majesty Touching the Compiling and Amendment of the Laws of England." Bacon reiterated his concern over the "great uncertainties, and variety of opinions, delays, and evasions" that existed in the law and in court proceedings.[14] At the beginning he stressed, "what I shall propound is not to the matter of the laws, but to the manner of their registry, expression, and tradition: so that it giveth them rather light than any new nature."[15] Citing past and recent history, he invoked the names of Justinian, Louis XI of France, and Edgar the Saxon king as men who had refined the laws of their kingdoms. He also mentioned Henry VIII's appointment of thirty-two temporal and spiritual commissioners to revise the canon law after the King's break with the Catholic Church.

Bacon was particularly concerned about the penal laws. He was of the opinion that many were obsolete, too harsh, and too numerous. Such inequities, he argued, could have an

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[14]Francis Bacon, "A Proposition to His Majesty Touching the Compiling and Amendment of the Laws of England," in The Works of Lord Bacon, ed. Henry G. Bohn, (London, 1854), I, p. 667.

[15]Ibid.

adverse effect upon just laws. People would become disrespectful of all laws irrespective of their merits. His opponents, nevertheless, were fearful that a purging of the laws would remove not only the chaff but also the wheat. In an attempt to surmount such fears, Bacon reemphasized the goal of his project, "The work, which I propound, tendeth to pruning and grafting of the law, and not to plowing up and planting it again; for such a remove I should hold for a perilous innovation."[16]

After attempting to refute any objections that he foresaw, the Attorney General outlined his plan for compiling and amending the laws of England. Once again, the use of his inductive method served as the essential means to this end. Revising the common law consisted of compiling a book, De antiquitatibus juris. This involved searching through all the ancient legal records available and organizing the most important selections in chronological order. "These are to be used," Bacon suggested, "for reverend precedents, but not for binding authorities."[17] The common law was to be refined by a selective compilation of the Year Books from Edward I to the present. The guidelines for this selection process were identical to those proposed in The Advancement of Learning.[18] And the preparation of auxiliary books would enhance the study and development of the law. These books

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[16]Ibid., p. 668.

[17]Ibid., p. 669.

[18]Supra., p. 11.

consisted of three types: on legal institutions, on legal rules, and on legal terms. The digest also involved reforming statute law by clearing the statute books of obsolete laws, repealing laws of little use, reducing the harsh penalties of certain statutes, and synthesizing concurrent laws.[19]

Thus, a search for certitude in England's laws was central to Bacon's jurisprudence. The Maxims of the Law represented his attempt to formulate specific rules for the laws of England. The ninety-seven aphorisms in The Advancement of Learning attempted to clarify the obscurity that existed in case law. Finally, "A Proposition" was a plan to compile and amend the common and statute laws of the realm into a digest.

Bacon's quest for knowledge of the universe was based on a search for materialistic knowledge through the inductive, empirical method. A child of both the Renaissance and Reformation, which prompted a concern for the humanity and individuality of mankind, and the scientific revolution, which was replacing the medieval mythical approach with a modern scientific method, Bacon became a leading opponent of metaphysical explanations for natural phenomena. He advocated a logical use of both human faculties and natural reason in collecting and analyzing information. Following this process, general axioms, that were consistent, certain,

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[19]Bacon, op. cit., p. 670.

and complete, could be established. By adopting this process, Francis Bacon became England's leading publicist in separating philosophical studies from the domain of revealed theology.

Whether Bacon sincerely believed that his legal reforms would be adopted in his lifetime is a matter of speculation. He was aware of the opposition toward the King in the Commons and among some of the judges at Westminister. Members of the Commons, especially the lawyers, questioned the King's prerogative to levy impositions and to grant monopolies. Common law judges had attempted to restrict the jurisdictional limits of the King's prerogative courts. Any revision of the laws of the realm would have to have the approval of Parliament and the Bench. Bacon, of course, was a practical man. He may have considered his proposals first as a way of ingratiating himself to his King. Once in a position of power, he could consider a suitable manner for implementing his plan. Unfortunately, when he did reach the pinnacle of judical power as Lord Chancellor, political opposition and ill health impeded his ability to implement his ideas.

In 1593 Bacon, with the support of Robert Devereux, Earl of Essex, had sought the position of Attorney General. Opposition from his uncle, Lord Burghley, and Queen Elizabeth prevented the appointment, however. Instead of Bacon, the Queen chose Edward Coke, a successful London lawyer and the speaker of the House of Commons in 1592-1593. The eighteenth-century jurist, Sir William Blackstone, viewed

Coke as "a man of infinite learning in his profession;"[20] while the nineteenth-century historian, Thomas Babington Macaulay, referred to him as "that narrow-minded, bad-hearted pedant."[21] There exists in these divergent, but not mutually exclusive, views the complexity of evaluating Coke's place in English legal history. He was without a doubt the most controversial jurist of his age. Combining judicial scholarship with practical court room experience, he matched wits throughout his career with the theoretical Bacon and King James I over the legal authority of the Crown. On the other hand, his quick temper and antagonistic manner, which he exhibited as a prosecutor and judge, displayed another side of his character which has adversely affected many estimates of his career.

Edward Coke was born on February 1, 1552, the only son among Robert and Winifred Coke's eight children. His father, who died unexpectedly when Edward was nine, was a barrister with practices in London and Norfolk. Edward was a precocious child who entered Trinity College, Cambridge, in the autumn of 1567. While he was at Cambridge, tragedy once again struck the Coke family. Edward's mother died leaving him at seventeen head of the family. After three and one half years at the University, he journeyed to London to study

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[20]Sir William Blackstone, Commentaries on the Laws of England, (London, 1836), I, p. 71.

[21]Thomas Babington Macaulay, The Life and Works of Lord Macaulay, (London, 1897), VI, p. 157.

law. There is no record of Coke receiving a university degree. He entered Clifford's Inn on January 21, 1571, and a year later he began his studies at the Inner Temple. Coke was an industrious student and his hard work and judicial prowess enabled him to complete his legal education in seven years, one less than the norm. He was called to the bar on April 20, 1578. The promise that his teachers held for him was reflected in the status of his sponsors, Father Alvey, the Chaplain and Master of the Temple, and Sir Thomas Bromley, Queen Elizabeth's Solicitor General. Further proof of his superiors' confidence in his abilities was expressed in the following year, when Coke was appointed a reader at Lyon's Inn. Such positions were generally held by barristers, who had established themselves over a ten or twelve year period.

Coke's career is divided into two distant segments with his appointment as Chief Justice of Common Pleas in 1606 acting as the point of division. Prior to 1606, Coke held a number of important offices: recorder of Coventry, Norwich, and London; bencher, reader, and treasurer of the Inner Temple; speaker of the House of Commons; and Solicitor General and Attorney General to the Queen. The notice that he gained as defender of the Crown in the treason trials of Essex, Raleigh, and the Gunpowder Plot, was obviously instrumental in his appointment to the Bench. James believed that Coke's previous defence of the Crown would make him a useful supporter of the royal prerogative. The King's assessment of the prosecutor's utility in defending the royal will

proved incorrect, however. Coke was to become one of the King's principal antagonists.

On the surface, Coke's change appears illogical and even unethical. Here was a man who had gained a reputation as an upholder of the Queen's prerogative and who had prosecuted vigorously three important treason trials. No sooner had he put on the judicial robes than he became the Crown's leading critic. One need not look too deeply, however, for the rationale and justification for such a reversal. Stuart England in many respects was not Tudor England. During Elizabeth's reign, England was almost constantly under the threat of attack from continental Catholic powers. The extraordinary political situation sometimes increased the use of discretionary power on the part of the Crown. Coke was cognisant of the ominous political climate, and he accepted the necessity of occasional legal compromises. No doubt Coke, like most Englishmen, was also enamored by the personality of the Queen. She had a shrewd mind like her grandfather, Henry VII, who had brought stability to England after years of civil war. She also possessed a temper like her father, Henry VIII, who broke with the papacy and established a national church. Both her shrewdness and temperament enabled her to thwart the continental threat during her reign. These political successes during her reign merely increased the endearment the people already held for the House of Tudor.

At the time of the accession of the Scottish House of Stuart, the situation had changed. England was no longer threatened by the continental powers. Thus, the extraordinary use of discretionary power by the Crown was no longer viable. England would return, Coke believed, to a government that ruled within the confines of the common law as she had done for centuries past. It became evident, however, around the time of Coke's elevation to the Bench that James intended to rule England as he had attempted to rule Scotland. Employing the divine right theory that was popular on the continent, James saw himself above both the state and the law. Statements that appeared in his political tract, A Trew Law of Free Monarchies, were indicative of the King's threat to the common law. He said in his preface to the reader, "consider rightly that I onely lay downe herein the trew grounds (of the commonwealth), to teach you the right-way, without wasting time upon refuting the adversaries."[22] Using Scotland as his example, he said, "And so it followes of necessitie, that the Kings were the authors and makers of the Lawes, and not the Lawes of the Kings."[23] Finally, he went on to point out, "a good King, although hee be above the Law, will subiect and frame his actions thereto, for examples sake to his subiects, and of his owne freewill,

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[22]James I, The Trew Law of Free Monarchies, in The Workes of the Most High and Mightie Prince, Iames, ed. James Montagu, (London, 1616), p. 191.

[23]Ibid., p. 201.

but not as subiect or bound thereto."[24] Neither the tone nor the content of these statements endeared James to his subjects as Elizabeth had to hers. Moreover, the small opposition group in the Commons, that had developed in Elizabeth's later years, had continued to grow. This group, which would no longer acquiesce to the wishes of the Privy Council and the House of Lords, was a vocal element to be reckoned with. It is from this perspective, in part, that Coke's apparent reversal must be judged.

Besides the political climate, it is also imperative to understand Coke's legal philosophy. What problems, in particular, did he consider needed immediate attention? Coke felt that the foremost legal problem was the conversion from one constitutional theory to another. The Reformation had established the constitutional theory of the sovereignty of the King in Parliament.[25] James, however, was espousing a theory of complete sovereignty for the Crown. Coke was fearful of the possible implementation of this theory, for it threatened the one legal principle that he had maintained consistently throughout his life, that is, the common law was superior to other types of law in England and essential to the well being of the commonwealth. In his Institutes, he succinctly summarized his opinion.

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[24]Ibid., p. 203.

[25]See in particular Statutes of the Realm: 24 Henry VIII, c. 12 and 25 Henry VIII, c. 21.

> Here our common Laws are aptly and properly called the Laws of England, because they are appropriated to this Kingdome of England as most apt and fit for the government thereof, and have no dependency upon any foreine Law whatsoever, no not upon the Civil or Canon Law, other then in cases allowed by the Laws of England.[26]

This statement reflected the traditionalist insular attitude of Coke toward the law. And it was understandable why the King's continental theory threatened his principle. The constitutional theory that James espoused was in keeping with the current constitutional trends, while Coke's conservative position was on reactionary departure; he was deviating from the sixteenth century norm. But he was not alone, his fear of the dissolution of the medieval legal universe was similar to that of another Elizabethan, Richard Hooker. Whereas Hooker's defense was a metaphysical one, based on the natural harmony that existed in Elizabethan Anglicanism; Coke maintained that the medieval constitution exhibited a stability and consistency that was essential to the rights and liberties of Englishmen. He attempted, as a judge, to defend the medieval supremacy of the law over James's supremacy of the King above the law.

Central to Coke's defense was the dual role played by the common law and judicial reason. The common law for Coke was not simply the substantive law of property and contract; it was the foundation of the constitution; it defined the respective functions of the King and Parliament; as a result,

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[26]Edward Coke, The Second Part of the Institutes of the Laws of England, (London, 1669), p. 98.

it was above both King and Parliament. Moreover, the independence of the judges was essential to perpetuating the supremacy of the common law, for they were the guardians of the law. It was their duty to interpret and explain the law through the judicial reason they had acquired from years of study and experience on the Bench. This assertion of the supremacy of judicial reason was, of course, at cross purposes with James's concept of the supremacy of the King. And it explains why Coke referred to himself as Chief Justice of England rather than as Chief Justice of King's Bench.

Coke's specific method for curtailing the King's power was his reliance upon judicial precedents. Despite the fact the Year Books had been compiled throughout the fourteenth, fifteenth, and early sixteenth centuries, they were not used as binding authorities. It was not until Coke persistently utilized the Year Books and his own reports, along with those of Edmund Plowden and James Dyer, that previous judicial decisions were employed as authorities for deciding cases. Throughout his career on the Bench, first as Chief Justice of Common Pleas (1606-1613) and then as Chief Justice of King's Bench (1613-1616), Coke relied upon historical precedents in formulating his judicial decisions. There was a significant drawback, however, in the Chief Justice's use of this method. Objectivity was often lacking in the choice of precedents. Coke would read into the past what he wanted to see. One reason for his apparent lack of objectivity was that his opinions were more than just responses to particular points of law. They also reflected the political suspicion that

Coke felt toward James's divine right theory. Coke, after all, espoused the legalist philosophy of kingship, that is, law is primary and monarchy is secondary, because monarchy was derived from law. The law, therefore, placed limitations on the monarch's authority. James, on the other hand, adopted the naturalist philosophy, that is, monarchy was a natural institution from which laws had evolved. This philosophy viewed the monarch as the supreme authority in the state above all laws. The King's divine right theory originated from and was synonymous with this naturalist philosophy. If adopted, the King would rule by prerogative power unencumbered by Parliament, the courts, and the common law. England's theory of shared political responsibility, the King in Parliament, would be replaced by the King ruling alone. Fearful of its adoption in England, as it had been in so many continental countries, Coke attempted to repudiate the theory in the manner he knew best, utilizing the ancient common law.

Coke began to annoy the King shortly after his elevation to the Bench. In Fuller's Case (1607), the Puritan barrister, Nicholas Fuller was defending two Puritans on a contempt charge before the Court of High Commission. In the course of their defense, the indiscreet Fuller insulted the bishops. He was arrested and charged with schism and heresy. Fuller applied for a writ of prohibition, arguing that his conduct as a barrister in a court was a lay matter. For over nineteen months the case fluctuated between King's Bench and High Commission. Coke acted as a mediator between the two Courts, but in the course of his duties, he clearly sided

with the authority of King's Bench. Fuller was eventually found guilty, fined, and imprisoned. It was a defeat for Coke and the common law. At issue had been the jurisdictional question of lay and ecclesiastical courts, a controversy that had existed for over fifteen years. More specific was the assertion on the part of the common law courts to issue writs of prohibition, which prevented ecclesiastical and civil law courts from hearing certain cases. The issuance of such writs was becoming a constant nuisance for James, and Coke's support of them merely increased the King's irritation. Coke did not wish to abandon the use of either the civil law or the prerogative courts of England. He maintained that they had a traditional and legitimate place in the judicial hierarchy. In the preface to the fourth part of the Institutes, he clarified his position.

> Of Jurisdictions some be Ecclesiastical, and some Civil or Temporal. Of both these some be primitive or ordinary without commission; some derivative or delegate by commission. Of all these, some be of record, and some not of record; some to enquire, hear and determine, some to enquire only; some guide by one law, some by another, the bounds of all and every several Courts being most necessary to be known. For as the body of man is best ordered when every particular member exerciseth his proper duty: so the body of the Commonwealth is best governed when every several Court of Justice executeth his proper jurisdiction.[27]

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[27]Edward Coke, The Fourth Part of the Institutes of the Laws of England, (London, 1648), preface, unpaginated.

Thus, these courts were essential for the perpetuation of Coke's harmonious medieval constitution. But, he further indicated that, "if one Court should usurp or incroach upon another, it would introduce incertainty, subvert Justice, and bring all things in the end to confusion."[28] Coke feared, if the ecclesiastical and civil courts were not checked by the common law courts, they would become tools of a King, whose theory of law threatened English liberty.

Despite this initial setback, the new Chief Justice continued to defend the authority of the common law. He questioned the judicial authority of the Councils of Wales and the North. He also declared, along with eight of his colleagues, that it was illegal to grant to royal commissions of inquiry the power of oyer and terminer. Obviously, the King grew increasingly weary of Coke's opposition. James thought his Chief Justice was threatening his prerogative power. Coke disagreed. "Common law hath so admeasured the prerogatives of the king," he said, "that they should not take away nor prejudice the inheritance of any: and the best inheritance that the Subject hath, is the Law of the Realm."[29] He accepted the authority of the King's prerogative as it was stated in the ancient laws. Such power could be used only within specific areas, like foreign policy, and on certain occasions, such as levying war.

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[28] Ibid.

[29] Coke, The Second Part of the Institutes, p. 63.

For ten years James endured the opposition of Coke. On November 10, 1616, he finally dismissed him from his position as Chief Justice of King's Bench. Bacon, who was Attorney General at the time, summarized the King's reasons for his action.

> His Majesty had noted in him a perpetual turbulent carriage, first towards the liberties of his church and the state ecclesiastical; then towards his prerogative royal, and the branches thereof; and likewise towards all the settled jurisdictions of his other courts, the High Commission, the Star Chamber, the Chancery, the Provinvial Councils, the Admiralty, the Duchy, the Court of Requests, the Commission of Sewers, the new boroughs of Ireland; in all which he hath raised troubles and new questions; and lastly, in that which might concern the safety of his royal person, by his exposition of the laws in case of high treason.[30]

The last concern, for the King's safety, was a response to the opinion Coke handed down in the Case of Edmund Peacham (1615). Peacham was a Puritan sympathizer who had been imprisoned for insulting the Bishop of Bath and Wells. During his imprisonment, his house was searched and some notes were found suggesting the threat of rebellion if new taxes were imposed. James, who had a neurotic fear of being assassinated, issued a warrant that transferred Peacham to the Tower and charged him with high treason. Although his thoughts were disgraceful, Coke argued, Peacham did not attempt to harm the King. Coke, therefore, maintained that

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[30]Francis Bacon, "Remembrances of His Majesty's Declarative Touching the Lord Coke," in The Letters and the Life of Francis Bacon, ed. James Spedding, (London, 1872), VI, p. 95.

Peacham was innocent of the treason charge. As a result of his stand, Coke was subsequently dismissed as Chief Justice.

Despite his removal from the Bench, Coke continued his attack upon the excesses of the royal prerogative until his death on June 9, 1634. Realizing that an independent judiciary was impossible so long as the courts were subject to royal control, Coke shifted his approach of checking royal power from the Bench to Parliament. With the support of his friends in the commons, he renewed his defense of the supremacy of the common law, and at the age of seventy-eight, he introduced a bill of liberties that was eventually the basis for the Petition of Right.

Coke not only distinguished himself as a prosecutor, judge, and parliamentarian, but he was also a prolific writer. His scholarship differed in approach, content, and style from that of Bacon. Bacon was a theorist, who employed a philosophical approach and a scientific methodology in his legal treatises. Hence, his writings extended beyond the purview of the common law. Coke, however, limited his intellectual scope to the common law, and in the process, became its leading authority during the Elizabethan period. His most important contributions were his Reports (1600-1615) and Institutes (1628-1641).

The Reports were a compilation of cases gleaned from the Year Books, the works of other reporters, and from his own experience as an advocate and judge. They were arranged in thirteen parts, with eleven appearing in print between 1600

and 1615. Unlike his immediate predecessors, Plowden and Dyer, Coke did not arrange his cases in chronological order. Moreover, his lengthy commentary created a problem of distinguishing his remarks on a particular case from those of the presiding judge. The lack of an orderly presentation and his extensive remarks were characteristic of Coke's style. Nevertheless, the Reports were recognized in his lifetime as a significant contribution toward clarifying the disjointed common law and as essential reference books for students and practitioners. Bacon acknowledged this fact when he said, "had it not been for Sir Edward Coke's Reports, ...the law by this time had been almost like a ship without ballast."[31]

Coke's Institutes of the Laws of England consisted of four books: a commentary on Littleton's Tenures, Magna Carta and other medieval statutes, the criminal law, and a history of courts and their jurisdictions. He stated in the preface to the first book his purpose for writing this work.

> Our hope is, that the young Student, who heretofore meeting at the first and wrastling with as difficult termes and matter, as in many years after, was at the first discouraged, as many have been, may be reading these Institutes, have the difficulty and darknesse both of the Matter, and of the Termes & words of Art in the beginnings of his study cheerfully, and with delight; and therefore I have termed them institutes, because my desire is,

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[31]Bacon, "A Proposition," p. 668.

> they should institute and instruct the studious, and guide him in a ready way to the knowledge of the nationall Lawes of England.[32]

The popularity of the Institutes extended beyond the interests of students of the law. The first book was published in 1628. Because it dealt with the whole range of England's complex land law, it was obviously popular among the gentry, who had financial reasons for wanting to understand this difficult and confusing branch of the common law. Although the second and third books were completed about the same time as the first, they were not published until 1641, along with the fourth book. Written in a style that exemplified the qualities of a seasoned advocate, books two and three displayed the historic continuity and supremacy of the common law as Coke understood it. Political expendiency prevented him from publishing the books in his lifetime. Despite this fact, Coke's views on the supremacy of the common law had been well established during the course of his tempestuous career. These treatises were a written testament to Coke's position. Appropriately, they were published just as the parliamentarians, the allies of Coke, embarked upon that extended campaign to curb the excesses of royal power, which resulted in civil war.

In times of anxiety, people tend to look forward or backward in time in hope of satisfying their belief that things can be or have been better. Aware of the rapidly changing nature of the insular English society that was

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[32]Edward Coke, The First Part of the Institutes of the Laws of England, (London, 1656), preface, unpaginated.

brought about by the influx of new ideas emanating from various sixteenth century intellectual movements, Bacon and Coke sought to resolve the conflicts that were plaguing the legal community. Based on their own philosophical interests, assumptions, and priorities, they reacted to the problem in different ways. Bacon concentrated his efforts on the future by developing a new approach, a scientific method, for resolving the conflict that he viewed as current in English legal thought, namely the need to refine the laws of England. Coke looked to the past and utilized historical precedents to defend as he saw it, the unique position that the common law held in the commonwealth against the increased use of royal prerogative power. The treatises that these men wrote articulating their respective concerns are considered classics in English legal scholarship. Furthermore, their lives have received considerable attention due to their persistent characters and distinguished careers. Nevertheless, they were not alone in their concern for the state of the law in Elizabethan England. Other lawyers were equally conscious of the changing nature of the world they lived in. Like Bacon and Coke, this concern motivated them to publish their opinions. These men are the lesser known legalists, whose lives and works have never commanded the attention of modern legal scholars.

Since this essay is concerned with focusing our attention on the Elizabethan period and comprehending its intellectual climate, it is essential to examine the concerns and

opinions these men articulated. They were part of the intellectual framework of the sixteenth century, and their thought patterns, moods, assumptions, and priorities were a reflection of that design. The purpose of this study, therefore, is to examine a group of lesser known legalists. Our specific concern is addressed to exploring the origins, nature, and quality of the ideas expressed in their treatises, and to discover whether these men were either formulators or products or both of the intellectual milieu of the Elizabethan period. Another interest is determining whether or not these men and their treatises reflect a similarity of purpose and method with those of Bacon and Coke. Their names were William Lambarde, William Fulbecke, Thomas Ridley, Alberico Gentili, and John Dodderidge. They were neither part of a school of legal thought nor the nucleus of a particular party. They did have three common roots: all lived in the Elizabethan period; all had studied law; and all were concerned with the law and made a contribution to legal scholarship.

Before these men and their works are examined, it is important to understand the intellectual mood of the period in which they lived. What were the qualities that marked the intellectual climate that distinguished this age from any other period? This is the subject of the first chapter.

1 AN AGE OF RESTATEMENT

The poet John Donne, writing in 1611, seemed to express the prevailing mood that existed in the late sixteenth and early seventeenth centuries:

> And new Philosophy calls all in doubt,
> The Element of fire is quite put out;
> The Sun is lost, and th'earth, and no mans wit
> Can well direct him where to looke for it.
> And freely men confesse that this world's spent,
> When in the Planets, and the Firmament
> They seeks so many new; then see that this
> Is crumbled out againe to his Atomies.
> 'Tis all in pieces, all coherence gone;[1]

Donne's sense of anxiety over the changing nature of the intellectual climate was addressed, in particular, to the new astronomical theory suggested by Nicholas Copernicus. Although Copernicus's heliocentric theory of the universe, De revolutionibus orbium coelestium, had been published in 1543, it did not receive considerable attention in England until the last two decades of the sixteenth century. Scientific theory, however, were not the only ideas that contributed to the creation of the 'new Philosophy.' The sixteenth century was uniquely rich in the number of events that produced changes in the intellectual framework. It was during this century that the Renaissance and Reformation had

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[1]John Donne, "An Anatomie of the World," in Complete Poetry and Selected Prose, ed. John Hayward, (London, 1930), p. 202.

a pervasive impact throughout Europe. It was also the period that gave rise to the formation of the nation states and the Reception of the Roman law. The gradual diffusion of ideas emanating from these events suggested, indeed, often imposed a new approach to looking at things. Eventually, this resulted in the replacement of the medieval world view with that of a modern one.

When Donne spoke of a lack of coherence, he was lamenting the dissolution of the medieval world view. Central to this view was a concern for the redemption and salvation of man. Everything was somehow connected and intertwined with man's moral state and his eventual salvation. To this end the physical and spiritual worlds were depicted as being highly regulated by God. The existence of God and his role as creator and overseer of man and the universe were essential and incontestable articles of faith. In order to make this faith more credible, medieval scholars attempted to provide an elaborate and logical rationalization for the existence of God and the universe he had created. The result was an intellectual climate characterized by a qualitative view of nature, a dualistic explanation for spiritual and physical phenomena, and a pronounced emphasis on the importance of theological knowledge. Throughout the medieval period these interrelated features explained the total medieval cosmology.

Theology was essential to this climate, for it was the basis of medieval authority and the cornerstone of Christendom. Revelation, dogma, and church doctrines were

the sources used to establish medieval assumptions about authority. The natural law, for instance, that medieval thinkers believed applied to all men, was considered to be of divine origin.[2] Even the indigenous customs and traditions, found in the common laws of the various feudal principalities, were influenced by the preponderance of theology. And the church, along with the secular authorities, administered the justice that these local laws provided. Furthermore, revealed theology was synthesized with the philosophical views of Aristotle, who was revered throughout much of the middle ages. The thirteenth century scholastic philosopher, Thomas Aquinas, was most successful in uniting the reason of Aristotle with the revelation of the Bible in two of his works, the Summa contra Gentiles and the Summa Theologica. The widespread acceptance of Thomistic philosophy enhanced further the position of theology within the intellectual climate.

The attention directed toward understanding the nature of God and the universe also led to the development of a dualistic system of reasoning. It was, most likely, an unconscious effort at first that eventually became a conscious obsession with the scholastic philosophers. This form of rationalization created a dualistic explanation for all

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[2]The thirteenth century English lawyer, Henry de Bracton defined natural law as "that which nature, that is, God himself, taught all living things." See George E. Woodbine, ed., Bracton on the Laws and Customs of England, tr. Samuel Thorne, (Cambridge, Mass., 1968), II, p. 26.

phenomena. It explained the interrelationship of the physical and spiritual worlds and gave further credence to the total medieval cosmology. In the study of astronomy, for instance, the Ptolemaic theory, which placed the earth at the center of the universe, was widely accepted in the medieval period. Ptolemy taught that spheres surrounded the earth with each sphere associated with a particular astronomical fact. Ten of the more important spheres controlled the moon, the sun, each of the known planets, the stars, the movement from east to west, and the unknown outer region. The preponderance of theology in the medieval metaphysic added a spiritual response to this scientific or physical explanation of the universe. Through the use of allegory, for example, the Italian poet, Dante, believed the ten spheres were regulated by a superior intelligence, that is, each of the nine spheres closest to the earth was controlled by one of the nine choirs of angels and the last sphere was the domain of God. Dualistic explanations were not limited to associating physical reality with spiritual reality, however. Spiritual reality could be made physical. The most obvious example of this was the doctrine of the eucharist. Furthermore, the medieval political and social structure recognized a dual sovereignty. The Church and the temporal rulers shared political power and social control, with the church usually recognized in theory as the superior in this relationship.

Finally, the emphasis placed on the qualitative view of nature produced a stratified society. Natural law, custom,

and tradition were all influential in determining one's place in society. The medieval theory of society was based on a hierarchy of estates or classes that had certain functions and special privileges associated with their place in the Christian commonwealth. To illustrate, the church hierarchy consisted of a pope, bishops, priests, and the laity, while its secular counterpart was composed of kings, nobles, and the common man. Qualitative values were even reflected in the celestial hierarchy. The nine choirs of angels, referred to above, possessed varying degrees of perfection. The most perfect were closest to God, while the least perfect were closest to man. Like the angels, it was impossible for man to move upward in the social hierarchy. The feudal system had clearly defined the extent of one's liberty and station in life.

By the fifteenth century the medieval climate, which was dependent upon this theological and mythical form of reasoning, had become suspect. A series of events, some interrelated and others seemingly unrelated, created a mood of doubt. The people associated with these events and the ideas that evolved from them contributed to the initial questioning and final dissolution of the medieval climate of opinion. The rise of the nation states, the Renaissance, the Reformation, the scientific revolution, and the Reception of the Roman law were events that in particular influenced this change in mental atmosphere from medieval to modern.

Although there were distinctions in race, language, and in some cases natural territorial boundaries, medieval kingdoms lacked a legal and political autonomy that is commonly ascribed to a state. It is, therefore, an anachronism to apply the term 'state' to medieval principalities. During this period, emphasis was placed on the similarities rather than on the differences of the people of western Christendom, and this was reflected in the practical application of the medieval theory of order. Christians acknowledged the universal supremacy of natural law and of the Catholic church. These universals, creations of an omnipotent God, provided the middle ages with a social and spiritual cohesiveness that transcended race, language, and natural boundaries. Furthermore, the Holy Roman Emperor, although the title was rapidly becoming a misnomer, still wielded extensive power and influence on the continent. Medieval kings, therefore, were limited in their governing powers by the law, church, and feudal rights. In discussing the reasons for the existence of kings, the thirteenth-century English lawyer, Henry de Bracton, emphasized this quality.

> The King, since he is the vicar of God on earth, must distinguish jus from injuria, equity from iniquity, that all his subjects may live uprightly, none injure another, and by a just award each be restored to that which is his own.[3]

Thus, the primary obligation of the medieval king was to administer justice.

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[3]Woodbine, op. cit., p. 305.

By the fifteenth century, faith in the medieval theory of order had been seriously threatened by political, social, and economic factors. The papacy, which wielded considerable political and legal influence over the Christian commonwealth, had been undermined by the Babylonian Captivity (1305-1378) and the Great Schism (1378-1415). It attempted to reclaim its lost splendor during the Italian Renaissance, but hopes of regaining a hegemony over Europe similar to that of Gregory VII or Innocent III were mere delusions. Feudalism, the system of social control which enabled the stratified classes of medieval Europe to function effectively, was also becoming discredited. The continued existence of baronial wars was causing havoc in the medieval principalities. The barons, by the very nature of their social status, were supposed to assist the king in maintaining order and in administering justice. Instead, they were often the instigators of much of the disorder and injustice. Finally, the expansion of commercial ports in the northern kingdoms to rival those centered in Italy produced additional negative consequences for the medieval status quo. People began to move from the agrarian feudal estates to the non-feudal municipal centers. The success of the merchants created a wealthy non-feudal middle class, who petitioned the king to control the unruly barons from disrupting their successful businesses.

Each of these events had a debilitating effect upon the practical application of the medieval theory of order. Many of the political, social, and legal common denominators

that had once united Christendom were discredited. This in turn created a power vacuum. But by the latter half of the fifteenth century, the political climate fortuitously shifted. Each of the three major western European kingdoms had an intelligent and shrewd king on its throne. Spain's Ferdinand of Aragon, France's Louis XI, and England's Henry VII were able to arrest the baronial upheavals through a concerted effort to centralize their kingdoms. Through a process of consolidating the lands of deceased and disinherited barons they not only quelled the disorder but also filled the power void left by the Papacy and the Holy Roman Emperor. Fortunately, their efforts were augmented in the early sixteenth century by equally able men, such as Charles V, Francis I, and Henry VIII. This process of consolidation was the foundation for the creation of the nation states.

The growth of state sovereignty on the continent had some essential differences from that in England. Continental states utilized Roman legal theories that appeared in the Institutes of the Emperor Justinian in 533. These legal principles, that stressed centralization of authority, had the effect of legitimatizing the development of a cohesive state. Moreover, political theorists were developing new political ideas based in part on Roman legal principles. Early in the sixteenth century, for example, Niccolo Machiavelli played an important role in initiating a change in political philosophy through the publication of The Prince.

Having received papal approval, it was first published in 1532 and went through twenty-seven editions in twenty-five years before the Church condemned the book. Concerned specifically with the disorders in the Italian city-states, Machiavelli dismissed the medieval emphasis on the ideal, on what ought to be, and directed his efforts toward explaining the political realities of what was. He relied upon the past, especially Roman history, as his model for political behavior. By this empirical approach, Machiavelli concluded that only a forceful monarch could prevent anarchy and chaos in the state. To accomplish this end, he placed a greater emphasis on the positive law, the commands of the law-giver, rather than on the law of nature. The law-giver or prince, Machiavelli believed, would be the personification of a strong state. His philosophy differed significantly from that of medieval political thinkers, for he stressed the will of the state rather than the will of God.

By the second half of the century a French political theorist, Jean Bodin, was clarifying further the importance of authority vested in the state. Like Machiavelli, Bodin was addressing himself to a particular need that existed in his country. France was in disarray due to warring religious sects and political factions. And like Machiavelli, Bodin believed the state and sovereign were synonymous. The only true form of sovereignty, he maintained, was when it was vested in one man who had supreme power over all unrestrained by law. Bodin differed from Machiavelli, however, in that his sovereign was bound by the laws of God

and nature. But even this restriction was negligible because the sovereign was answerable only to God for transgressions of the law. Bodin urged that the sovereign be made supreme to insure peace and order, and he specifically stated five functions of the sovereign that would bring this about.

> One, and it is the principal one, is creating the most important magistrates and defining the office of each one; the second, proclaiming and annulling laws; the third, declaring war and peace; the fourth, receiving final appeal from all magistrates; the last, the power of life and death when the law itself leaves no room for extenuation or grace.[4]

Bodin's contribution to sixteenth century political thought was his succinct definition of sovereignty. Furthermore, this definition facilitated the growth of royal absolutism which was the popular form of sovereignty adopted by the nation states on the continent.

In England a new territorial state was also developing but with a difference. Because of its geographical remoteness from Rome, medieval England had been left isolated from many continental influences. As a result, it was able to evolve an indigenous common law and institutions, such as Parliament and the law courts, while still remaining a part of the Christian commonwealth. Even its spiritual dependence on Rome had been negligible, and when it was

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[4]Jean Bodin, Method for the Easy Comprehension of History, tr. Beatrice Reynolds, (New York, 1945), pp. 172-73. The Method was first published in 1566, for a comprehensive treatment of Bodin's political philosophy see The Six Books of the Republic (1576).

imposed, it was vigorously challenged. Following the weakening of papal power and the culmination of the English baronial upheavals with the Wars of the Roses, the English monarchs realized consolidation of political power was imperative in order to meet the needs and demands of the new age. But there was no desire to abandon completely the established medieval institutions. Although many had not worked well during the disorders of the fifteenth century, they were still functional. Besides, nothing had operated effectively during this time of crisis. English efforts, therefore, to consolidate were applied with caution and a judicious mixture of old and new methods of government. They supplemented the common law and the medieval institutions with a strong centralized authority in the person of the king. Although the Crown was the predominant partner in this arrangement, it lacked the absolute authority that continental theorists were claiming was necessary.

One of the primary reasons for England developing a strong centralized government was the demand voiced by the middle and lower classes to return to a society based on law and order. The ruling House of Tudor was attuned to this request. Moreover, since they had been political unknowns until Henry, Earl of Richmond, became King Henry VII in 1485, their support was minimal among the nobility. As a result, they were largely dependent upon the support of other classes, especially the new wealthy merchant class.

Through the utilization of conciliar government, the Tudors were able to centralize their power base. The Tudor

council consisted primarily of middle-class men from rather obscure origins who possessed legal, financial, or diplomatic skills. The council had two functions: it advised the king and it adjudicated cases. The judicial powers will be discussed when the Reception of the Roman law is explained. It is sufficient here to point out that the council utilized its power to develop jurisdictions in areas not administered by Parliament or the common law courts. The council's ventures into this area created a number of prerogative courts for the king and further accelerated the Crown's efforts to centralized authority. The council also enhanced, on a wider scale, its function of advising the king on policy matters and in implementing approved policy. This was a marked and fundamental difference from medieval times in the degree to which the council asserted its authority. The Crown could now wield sufficient authority over local politics to make its will prevail. This obviously restricted the power and control of the barons while augmenting that of the king. Thus, the medieval notion of local baronial control was being abandoned for a centrally administered state that could assure peace and tranquillity throughout the realm.

Medieval methods of governing were not completely discarded, however. It was pointed out earlier that the Tudors judiciously mixed old and new ideas in establishing their nation state. Using the council as an administrative unit of government, but increasing its effectiveness was an example of this. But the wisdom of this approach was particularly evident when the Tudors retained and utilized

what was by far the most important institution created during the medieval period, Parliament. Representatives of the House of Commons were usually members of the middle class that were sympathetic to Tudor efforts to insure law and order. In their capacity as representatives of the people, they could become effective tools for assuring stability without hampering Tudor efforts to centralize authority. The most thoroughly documented example of the Tudors' utilization of Parliament for this end was during the sessions of the Reformation Parliament.[5] The Crown's efforts to repudiate papal authority and to establish a national church were overwhelmingly supported by Parliament. Furthermore, the medieval idea of an international Christian commonwealth was abandoned and replaced by the notion of the commonwealth of England that united church and state at the national level under the headship of the monarch.

Despite the practical successes at consolidating their authority, the Tudors were not without theories to justify the abandonment of the medieval theory of order. Yet unlike some continental theorists, the English neither limited their tracts to political thought nor did they advance a theory of absolute authority for the king. Instead, they retained certain principles of medieval thought and synthesized

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[5]See in particular Statutes of the Realm: 23 Henry VIII, c. 20; 24 Henry VIII, c. 12; 25 Henry VIII, c. 19; 25 Henry VIII, c. 20; 25 Henry VIII, c. 21; 26 Henry VIII, c. 1; 27 Henry VIII, c. 28; 28 Henry VIII, c. 10; 31 Henry VIII, c. 13; and 31 Henry VIII, c. 14.

them with the political, social, and legal realities of the sixteenth century. Of particular concern during the first half of the century was the desire on the part of Henry VIII and his principal minister, Thomas Cromwell, to popularize the new religious settlement. For example, Christopher St. Germain, a barrister from the Inner Temple, addressed himself to clarifying the distribution of authority within the English church. He maintained that all jurisdictional powers formerly wielded by the Pope and the English clergy were now in the possession of the King in Parliament.

> The king/ by that he is recognised by the parliament to be the supreme head under God upon earth/ of the church of England/ hath as I take it no newe power given him in any thing but that like as before that recognision made/ he had all such power over his subiects spiritual and temporal as to a king belongeth by the law of God: so after the said recognision he had the same power without alteration/ an none other but that.[6]

The duties of the clergy were limited "to minister the sacraments to the people and to preach and teach them how to please God and keep his commandments."[7] St. Germain retained the medieval notion that the king was under God and the law while suggesting the modern idea of the supremacy of the king in Parliament.

In an effort to enunciate the king's supremacy following the Reformation and to prevent a foreign invasion in

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[6]Christopher St. Germain, "An answere to a letter," (London, n.d.), unpaginated.

[7]Ibid., unpaginated.

name of the religious crusade from the continent, a number of Tudor pamphleteers popularized the doctrine of non-resistance to the king. That the king was God's viceregent on earth responsible to him for the temporal well-being of the people was an established medieval notion. The fact that an act of Parliament made the king responsible for their spiritual welfare as well was a new but generally accepted idea. Nevertheless, there was some potential opposition to the king's position as head of the English church, and the doctrine of non-resistance was directed at that opposition. During Elizabeth's reign, when the threat of foreign invasion became a reality with the Spanish Armada and when opposition to the Elizabethan religious settlement came from both Catholics and Puritans, non-resistance proved vital to the security of England. Obviously, it also had the effect of augmenting the importance of the monarch's authority.

Although some of the theorists devoted much of their time to discussing the nature of monarchial authority, others attempted to present a more balanced and realistic assessment as they understood it. Thomas Starkey, a humanist at the court of Henry VIII, belongs to this group. He opposed those political principles found in the Roman law that stressed monarchial authority; he believed the people were the source of authority not the prince, and he favored a limited monarchy. He warned in 1538.

> it is to the state of the common weal to restrain from the prince such high authority, committing that only to the

> common counsel of the ream (sic) and parliament assembled here in our country. For such prerogative in power granted to princes is the destruction of all laws and policy.[8]

While supporting the idea of a strong centralized government, he believed government action must ultimately rest with the people, because "laws are made for the people and for the order of them, and not the people for the laws."[9] Writing thirty years later, the English scholar and diplomat, Sir Thomas Smith, supported Starkey's view with this summation.

> the parliament of Englande, which representeth and hath the power of the whole realme both the head and the bodie. For everie Englishman is extended to bee there present, either in person or by procuration and attornies, of what preheminence, state, dignitie, or qualitie soever he be, from the Prince (be he King or Queene) to the lowest person of Englande. And the consent of the Parliament is taken to be everie mans consent.[10]

Both Starkey and Smith had recognized the need for a strong monarch who could prevent disorder within the realm, and if necessary, thwart any attempts at foreign intervention. Yet each retained the medieval idea that the king was under the law, and in this sense, they were referring to the important role Parliament played as a law-making body.

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[8]Thomas Starkey, A Dialogue Between Reginald Pole & Thomas Lupset, ed. Kathleen M. Burton, (London, 1948), p. 100.

[9]Ibid., p. 106.

[10]Sir Thomas Smith, De Republica Anglorum, (1583 ed.), ed. L. Aston, (London, 1906), p. 106.

By consolidating authority in the Crown, the Tudors had built a strong nation state. Yet while the English theorists supported the Crown's efforts, they actively stressed that state authority was a shared responsibility. Tudor England was, as Charles H. McIlwain persuaded us a number of years ago, an "organic state."[11] Neither individuals nor institutions were raised above the state or the law. The Tudors, therefore, had created a nation state, a modern state, along medieval lines.

Yet it could not be denied that the increased emphasis on the monarch's authority was a potential if not a real threat to this notion of shared responsibility. Certainly, his centralized government and prerogative powers undermined, to some extent, the practical application of the commonwealth theory of shared power and authority. By the end of the century, parliamentary opposition had developed regarding the monarch's authority, because attempts had not been made to define the extent of his supremacy or the limits of his prerogative power. Despite the opposition, the majority of people did not feel threatened by this ambiguity so long as the Tudors were on the throne. But the reign of the last Tudor, Elizabeth, was obviously drawing to a close. The more astute political observers were concerned about the consequences, because the most likely candidate to succeed the old Queen was the pedantic James Stuart of Scotland. James

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[11]Charles H. McIlwain, The High Court of Parliament and Its Supremacy, (New Haven, 1910), p. 336.

was king of a country that employed the Roman legal system, and he was a disciple of the doctrine of royal absolutism that this law generated. Compounding the problem was the increased interest by some Englishmen in the political ideas of Machiavelli and Bodin. Their political philosophies, grounded in Roman law, stressed the primacy of the monarch and the ancillary importance of the law within the state. This philosophy was in direct opposition to the political philosophy that had evolved throughout the century in England.

James Stuart arrived late in 1603 to claim the throne of England left vacant upon the death of Elizabeth. He was uncompromising from the beginning in his attempt to establish himself as an absolute monarch above both state and law. The issue of authority, that the Tudors had left unanswered, had reached an impasse under the first Stuart. It was to become the fundamental question that needed answering during the age, and, as a result, royalist and parliamentary factions developed over the issue. It has already been pointed out the extent to which Francis Bacon and Edward Coke played leading roles in this controversy.[12] The legal community in general was obviously drawn into the debate. For some lawyers, who were members of the House of Commons, it naturally aroused their interest and required their attention. Still others, particularly the English civil lawyers, attempted to assist in resolving the constitutional dispute with arguments

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[12]Supra., pp. 7-16 and 18-30.

that they published in the form of legal treatises. Thus, the issue of authority within the evolving nation state had become a preeminent concern of the Elizabethan legalists.

The Renaissance, like the rise of the nation states, also transcended territorial boundaries. It began in the Italian city-states during the fourteenth century and gradually moved northward where it reached its final splendor in England late in the sixteenth century. A complex heterogenous period, the Renaissance does not lend itself to a simple precise definition because of the time span, geographical area, and intermixture of cultural elements that it encompassed. It did dominate, however, the intellectual climate of Europe during this period; it produced a mood that was highly critical of the medieval world view, but it did not attempt radically to displace the medieval status quo. Criticism of the medieval period was led by a group of intellectuals known as humanists. It was their philosophy with its priorities and assumptions that established the intellectual mood of the Renaissance, and the widespread acceptance of their philosophy eventually contributed to the dissolution of the medieval world view.

Although the Renaissance was a complex period, the humanist movement did possess three fairly consistent characteristics. The humanists were conscious of living in a new age that was represented by their unique efforts at enhancing a belief in the total value of man. This differed significantly from the medieval view with its emphasis on

God as creator of the universe and overseer of mankind, and man as the contrite sinner transfixed in his notch by a static society. Renaissance scholars still believed that God was the creator and overseer of the universe, but they placed a greater faith in and emphasis on man's reason and personal wisdom to order his own life. For example, the humanists were particularly concerned with the corruption that existed in governmental institutions, but they possessed an optimistic belief that society could reform itself. Following their assessment, they set about proposing a highly utilitarian approach for resolving society's problems. Reform in education was fundamental to this approach. The humanists departed from the scholastic method with its emphasis for theology and proposed a new learning that was based on a concern for ethics and rhetorical eloquence. Central to this new learning was the critical study of moral philosophy, history, and philosogy. The humanists believed that such an approach to education would produce the necessary climate that would facilitate reform in government.

Humanism was a broadly based intellectual movement in which scholars and artists engaged in rediscovering and imitating the ancients of Greece and Rome. Interest in the ancient world and its rich intellectual tradition had been precipitated in part by the fall of Constantinople. When the capital of the eastern empire was seized by the Sultan Mohammed II on May 29, 1453, Greek scholars fled to western Europe, and they brought with them many valuable manuscripts. The study of these works provided western scholars with a

new perspective of their classical heritage, a heritage that had been largely displaced during the advent of the Christian movement and subsequent establishment of the Christian commonwealth. Humanists viewed the ancient world as a dynamic world that could be utilized as a model. It had completed the cycle of human experience, and it was also concerned with the temporal life of man rather than a celestial after-life. Classical history and philosophy were especially popular in providing the humanists with a sense of the classical environment. This reverence for the ancient past, particularly the writings of Plato and Cicero, led to an intense and sensitive criticism of the immediate past. And the static world view of the scholastic philosophers was especially singled out for condemnation.

Finally, there were two phases to the Renaissance. It was first an elitist movement that had close ties with the universities. Universities were the obvious centers for advancing any new intellectual movement. Italian humanists imparted the new learning to their colleagues in the north while on visiting professorships. Students became acquainted with the movement either through these visiting professors or by attending one of the Italian universities. These students, in turn, became tutors to the children of the nobility or procured positions at court in the service of the king. With the rise of the nation states, monarchs were eager to employ qualified laymen who could read and write and who could serve as financial, legal, and diplomatic aides. Moreover, they were also conscious of the need to display a degree of royal splendor but of a different sort. Kings could no

longer rely solely on their military expertise. That notion had died with feudalism. The new national monarch had to project an image, real or illusory, of a man who possessed a diverse educational background and who surrounded himself with men of similar talents. The intellectual interests of the humanists provided that need. Once its popularity was established at court, the new learning began to affect a larger number of people, for it spread to the middle class. This brought about the second phase of the humanist movement, a phase that because of its broadly based popularity tended to associate itself with the indigenous institutions, characteristics, and needs of each country. Whereas the elitist phase was international in scope and concentrated on a desire to imitate the ancients, the second phase was marked by its nationalism and its exuberance, for it represented a period of encouraging creativity in all endeavors as they related to the interests of particular countries.

As an intellectual movement, the humanists were an intensely cohesive group united in a common cause, the advancement of man's understanding of his personal worth and value to society. This bond was acutely evident in the formation and application of their philosophy of education. Although they were critical of the medieval educational approach, they did not attempt to displace the medieval trivium and quadrivium with a new curriculum.[13] Instead, new ideas were

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[13]The medieval curriculum consisted of the seven liberal arts: the trivium - dialectic, grammar, and rhetoric and the quadrivium - music, arithmetic, geometry, and astronomy.

introduced within the context of established norms; these subsequently altered the status quo, which created significant ramifications for the educational community throughout the sixteenth and early seventeenth centuries.

According to the humanists, the medieval educational process had been unnecessarily long, because the speed and efficiency with which one could master an art had not been a serious concern among educators. Moreover, it was inexpedient from their point of view, because the scholastic approach was based on an unsystematic exegetical study of texts. The humanists believed a person could master an art in a shorter period of time if a system of prescribed guidelines and rules were devised.[14] The development of a method for mastering an art quickly and efficiently became their credo. Method in the humanistic use of the term did not mean, however, a sophisticated methodology; it was simply an elementary outline that would enable a person to master a body of knowledge, and it oftentimes explained how this knowledge could be applied to one's situation in life. Through the utilization of the printing press, a proliferation of method books of a variety of types became tremendously popular throughout the sixteenth century. Two of the early and more famous examples of humanist method books, that were indicative of the elitist phase of their movement, were

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[14]Professor Gilbert suggests that this concern for speed was a result of a "time-conscious" element that had not existed in previous ages. See Neal W. Gilbert, Renaissance Concepts of Method, (New York, 1960), p. 66.

Baldassare Castiglione's The Book of the Courtier (1528) and Sir Thomas Elyot's The Book Named the Governor (1531). Roger Ascham's Schoolmaster (1570), on the other hand, was representative of the exuberant phase of the humanist movement in that his book was more universally applicable to members of England's various classes. With a rapidly developing nation state, increasingly dependent upon sophisticated laymen, the significance of this philosophy enabled society to reap the benefits of its educated citizenry sooner. Furthermore, it enabled a larger portion of the community to participate in the educational process. This was obviously a new assumption that contributed to undermining the static social theory of the medieval period.

The humanists also made some specific and significant contributions toward enhancing the value of education. Throughout the Renaissance, they claimed the pursuit of eloquence in writing and speaking was essential. The extensive appeal to classical literature as a model to be imitated helped to foster this view. The ancients had shown a concern for and sought solutions to problems found in the city-state by utilizing ethics, moral philosophy, and rhetoric. This differed significantly from the scholastic philosophers who had emphasized a deep concern for spiritual questions, at the expense of social problems, and who exhibited a preoccupation with theology, metaphysics, and syllogistic reasoning. Belief in the necessity to pursue eloquence had led the humanists originally to propose reforms in education,

and rhetorical skills were especially emphasized. The Ciceronian orator was resurrected and refubished as the Renaissance ideal. Uniting a mastery of eloquence, the humanists maintained, with practical human experience would enable the Renaissance orator to lead men toward civic responsibility, thus improving the quality of life in the Renaissance state.

Because of the interest in rhetoric, a number of humanists were encouraged to devote their scholarly pursuits to philological studies. These efforts were also precipitated by the humanist desire to study critically the classical sources for which they had such a high regard. In the late medieval period, scholars had been in the habit of producing numerous commentaries or interpretations of the ancient texts. This resulted in a preoccupation by students and scholars alike with comparative studies of the various commentaries and detracted from a critical reading of the actual texts. Highly critical of this approach, the humanists urged a return to the study of the original sources. Obviously, philology was considered a useful tool in this endeavor.

The humanists also encouraged the reading and writing of history as an important educational pursuit. If experience was as vital an attribute of a Renaissance orator as the humanists claimed, then history could certainly illuminate an important part of life's experiences. As a result, a significant selection of humanist writings was devoted to

historical scholarship. During the Italian Renaissance, court and city historiographers were common as were historians of famous ruling families. These historians were either educated in or acquainted with the humanist philosophy, and their histories were characterized by the humanist influence. For instance, the preponderance of a mythical element, commonly associated with classical and medieval histories, was considerably reduced, and the theological rationale, an obvious component of medieval histories, was usually avoided. Instead, documentary evidence was utilized and stressed to support various contentions about the past. A significant characteristic of classical histories, that was retained, was the use of ficticious speeches as a vehicle to praise, blame, or eulogize. These were employed, no doubt, because they were viewed as an important learning device that would lead men to civic responsibility. This was, after all, one of the primary aims of the humanists.

The humanist philosophy of education affected not only the seven liberal arts but it also had important consequences for some of the established disciplines, such as philosophy, theology, and law. Most fittingly, the humanist movement had a considerable impact upon sixteenth century legal communities, since many of the more distinguished humanists were either notaries or members of the legal profession: Coluccio Salutati, Leonardo Bruni, and Lorenzo Valla in Italy; Guillaume Bude, Etienne Pasquier, and Jean Bodin in France; and Thomas More and Thomas Wilson in England, to

name a few. There was, at least, one obvious reason for this. Beyond the priesthood there were few professions, other than the legal profession, that required an extended formal education. Since humanism had its origins in the universities, members of the legal profession were bound to have some association with it. There were, however, differences regarding the impact that humanism had on continental legal communities compared with the legal community in England.

On the continent, it was not uncommon during the medieval period for law schools to develop within or out of schools of rhetoric. The University of Bologna, the most famous center for legal education in medieval Europe, had evolved in just this way. Prior to the advent of the law schools, orators had often represented clients in courts of law. Thus, there was a natural affinity between the study of law and the study of rhetoric that the humanists were quick to stress and to capitalize on. A final reason for the humanist involvement in continental law schools was their active concern over the choice of a textbook. The schools had adopted the Corpus Juris Romanorum as the standard text for the study of civil law. Standardization was also a common practice in other disciplines. Theology stressed the importance of the Church Fathers and the Bible, and medicine focused on the significance of Galen and Hippocrates. The commanding weight attached to the Corpus Juris as the authoritative source led medieval legal scholars to write

numerous commentaries about this text. Since the Italian law schools were in the forefront of this endeavor, this type of legal scholarship was commonly referred to as mos italicus. As was pointed out earlier, the humanists were opposed to such exegetical interpretative essays as this educational format generated, because they were unsystematic and detracted from a critical study of the sources. Their opposition to the mos italicus was reflected in the impact the humanists had on continental jurisprudence. Once they had gained entry into the law faculties, they developed and introduced a new approach called mos gallicus, because it was primarily the achievement of French humanists. This method explicitly stressed the need to utilize both philological and historical approaches for a systematic examination of legal sources. This resulted in the humanist method having a direct and significant consequence for the study of the civil law across Renaissance Europe.

Whereas the humanist philosophy took a direct and somewhat commanding role in the continental law schools, the response in England was indirect and rather subtle. Civil law was practiced in England, but its influence was limited to ecclesiastical and prerogative courts. Furthermore, civil lawyers had to obtain their training on the continent. The common law, on the other hand, was the principle law of England; it was indigenous to England and had been rapidly developing since the twelfth century. The common law courts at Westminster were the sole domain of the common law

lawyers. These men did not receive their legal education at the universities. Instead, they were instructed at one of the four Inns of Court--the Inner Temple, Middle Temple, Gray's Inn, and Lincoln's Inn. Legal education at the Inns consisted of learning by example and practice. Since there had been no attempt to codify the common law, it was extremely disjointed and complex, and there was no single text, like the Corpus Juris, that law students could turn to for a standardized training in the law. Also by the early sixteenth century, few treatises had been written to elaborate significant portions of the law. Therefore, students attended readings or lectures, listened to mootings by advanced students, and observed the legal arguments presented in the courts. When they became advanced students they too would participate in the moots, and once adept at this, they were called to the bar.

Towards the end of the sixteenth century, however, a gradual change occurred that affected the educational method at the Inns and also the kinds of treatises produced by legal scholars. Both changes had a significant but subtle relationship with the English humanist movement, which reached its zenith during the early years of Queen Elizabeth's reign. The increased use of the printing press throughout the century had led to an expanded body of printed legal literature that was readily available to the law students. This had important consequences for the Inns as students began to rely more upon these printed treatises and less

upon the method of aural learning. The numerous sixteenth-century editions of Thomas Littleton's Treatise on Tenures (1481) were illustrative of this fact. In addition to legal treatises, auxiliary books were written, with some specifically designed for use among lawyers and law students. It was generally in this manner that the humanists were able to affect the common law community. One of the earliest and more important books in this auxiliary category was Thomas Wilson's The Arte of Rhetorique (1553). It was the first rhetoric book published in the English language. Wilson, who was a humanist and doctor of civil law, had been a fellow at King's College, Cambridge, where he was associated with such English humanists as John Cheke, Thomas Smith, and Roger Ascham. Throughout his book, which went through eight editions in thirty-two years, Wilson stressed the importance of rhetorical skills to his readers, and his primary illustrations usually focused on the need for lawyers to have a command of rhetorical eloquence when pleading in court. No doubt part of the book's success was directly attributable to the Elizabethan legal community, which was becoming much more sophisticated due to the humanist influence.

This leads to another significant fact that helped to augment a change in legal education and scholarship. Throughout the late sixteenth century, there was an increase in the number of young men attending Oxford and Cambridge, either for a few years or until they received a degree,

before they entered one of the Inns. While attending the universities, these men were a captive audience to the humanist philosophy of education and their concern for a greater utilization of rhetorical eloquence, philological criticism, and historical studies. Thomas Wilson was an early example of this; Francis Bacon's preoccupation with codifying English law reflected his interest in philological criticism, and Edward Coke's attraction to history, to support his contentions about the common law, was representative of the acknowledged importance of historical studies. Through this association with the humanists, England's future legal scholars were directed into unique areas of scholarship, that heretofore had been left untapped. Thus, without invading the rather closed law faculties at the Inns of Court, the humanists were able to have an indirect but significant impact upon the priorities and assumptions of the Elizabethan legalists that was reflected in the choice of their scholarly works.

The sense of urgency to reform the status quo was not limited to the humanist movement, however, Juxtaposed to those Renaissance intellectuals, who were concerned about the dignity of man, was another group of reformers, who were equally concerned about the dignity of God. Although the goals of the Reformation thinkers were dissimilar from those of the humanists, they, nevertheless, utilized the humanist method. They employed philological techniques and historical studies in an effort to return to a simpler

form of Christianity that was based on the gospel of Jesus and was devoid of the excessive material trappings of the church centered in Rome. Like the Renaissance, the Reformation had a pervasive impact on European society, and it ultimately affected more people because of the nature of the issues that it addressed itself to. "The Reformation Era,..., was above all else an age of religious faith," Harold Grimm argued so persuasively, "when what people believed had a significant bearing upon political, economic, and social theories and upon literary and artistic expression."[15] What created this mood of religious reform was, once again, the highly critical appraisal of the medieval framework. This included doubts about established doctrinal pronouncements, the effects of clerical abuses on the spiritual consciousness of people, and the commanding presence of the papacy in the administrative hierarchy of the church. The sixteenth century, therefore, was dominated intellectually by two psychological points of reference: the secular mentality of the Renaissance and the spiritual mentality of the Reformation.

The Reformation created a spirit of ideological confrontation that lasted for over one hundred and fifty years. Initially, the values and philosophy of the medieval church were questioned and judged to be no longer viable. Truth

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[15]Harold J. Grimm, The Reformation Era 1500-1650, (New York, 1954), p. 569.

was being espoused in a new manner, based not on any empirical research, but rather in the form of a new ideology. Central to this conflict were two issues: theology and morality, that dominated the early period of the Reformation and continued to influence the direction of the confrontation between Catholics and Protestants throughout the Reformation era.

Early in the sixteenth century a growing number of religious thinkers had serious doubts about some of the church's doctrines, in particular, the belief in transsubstantiation, the necessity of an ordained priesthood, and the practice of auricular confession and infant baptism. Doubting the credibility of such established practices and beliefs had a profound effect upon the religious faith of people, because it was suddenly being suggested that their relationship to God was somehow different from what they had been taught. The new theology qualified the mythical quality that had dominated medieval theology for so long and created feelings of doubt and uncertainty for people. What tempered some of their feelings of doubt was the fact that the Reformation was also concerned with the moral abuses of the church, such as indulgences, simony, pluralism, and nepotism. The laity and lower clergy had been critical of such transgressions for a long time, and within the broad context of religious reforms, these abuses were finally being arrested.

In addition to the theological and moral issues raised during the Reformation, there was also a political factor

that had serious consequences for the legal profession. During the medieval period that most elementary of political assumptions had been a belief in the theocratic polity of the papacy. The papacy maintained that it had supreme authority in spiritual and temporal matters of espousing the doctrine of plenitudo potestatis or the fullness of power. Despite the existence of two types of magistrates, sacredotium and regnum, this doctrine enabled the spiritual authority in theory to dominate the temporal. From the medieval point of view, this was in keeping with the law of nature. Religion influenced everything including custom, which along with revelation, was the major source of medieval law.

Criticism of the papacy's legal hegemony over Christendom had been a frequently bitter and long standing issue throughout the medieval period. One of the leading pre-Reformation critics had been Marsilius of Padua (1270-1342). In his Defensor pacis, which was compiled in 1342 and condemned by the church in 1362, Marsilius attempted to put an end to the papacy's unfounded assertions of authority and to contend that the course of all legal authority rested ultimately with the people and should be administered by the secular rulers. He said,

> it is indeed to be wondered why any bishop or priest, whoever he be, assumes for himself greater or other authority than that which Christ or his apostles wanted to have in this world. For they, in the guise of servants, were judged by the secular rulers. But their successors, the priests, not only refuse

> to be subject to the rulers, contrary to the example and command of Christ and of the apostles, but they even claim to be superior to the supreme rulers and powers in coercive jurisdiction.[16]

Marsilius was particularly critical of the doctrine of plenitudo potestatis, which he claimed was fallacious and with which "the Roman bishops have contaminated and, if one may say so, destroyed the whole mystical body of Christ."[17] Citing the New Testament, he argued that the church, at least with respect to secular matters, did not have suzerainty over the state and was, therefore, subject to the secular rulers. Instead of acquiescing in revelation, the pope and bishops had allowed "their insatiable appetite for temporal things" to distort their true purpose; as a result, "they have set themselves up as rulers and legislators, in order to reduce kings and peoples to intolerable and disgraceful slavery to themselves."[18]

Marsilius's thoughtful criticism of the papacy's extensive involvement in secular politics and its extended jurisdictional limits went unheeded at first. But with the advent of the Reformation, there was a renewed interest in his treatise, because most reformers did not limit their criticism of the church to theological matters. For example,

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[16]Marsilius of Padua, The Defender of Peace, tr. Alan Gewrith, (New York, 1967), p. 168.

[17]Ibid., p. 321.

[18]Ibid., p. 340.

although Martin Luther was primarily concerned with salvation, his theological assumptions also threatened the temporal powers of the church. He stressed quietism in religion and acquiesced to the worldly authority of the temporal magistrates. While never really developing a theory of the state, Luther was quite certain about what the state did not need. Like Marsilius, he opposed ecclesiastical interference into secular affairs. Regarding the temporal authority of the papacy, he was adamant, "the pope should let temporal lords rule land and people, while he himself preaches and prays."[19] The German princes, both Catholic and Protestant, seemed to be in agreement with Luther on this issue.

Luther was also critical of the amount of man-made law; he would have preferred to rely solely upon scriptures and the common sense of people. While conceding the necessity for some law, he remained unequivocally opposed to the need for the canon law and the ecclesiastical courts. He pointed out,

> Even if there were much of value in the canon law, it would still be wise to let it perish, because the pope claims to have all the canon laws ensconced in the chambers of his heart. Henceforth, therefore, to study it is a mere waste of time and a self-deception. To-day,

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[19]Martin Luther, "An Appeal to the Ruling Class of German Nationality As to the Amelioration of the State of Christendom," in Reformation Writings of Martin Luther, tr. Bertram Lee Woolf, (New York, 1953), I, p. 151.

> the canon law does not consist of what is written in books, but in the arbitrary choices preferred by the pope and his lick-spittles.[20]

Luther's condemnation of canon law and ecclesiastical jurisdictions was not unlike that of other religious reformers.

In England there was also a growing opposition to the jurisdical impositions of the church. At Court Henry VIII was incensed with Cardinals Wolsey's and Campeggio's failure to have his marriage to Catherine of Aragon annulled through a special ecclesiastical commission. In the city of London the people could point to the infamous court of their bishop, Richard Fitzjames, and his handling of the case of Richard Hunne.[21] Moreover, criticism of the church's moral stature and theological doctrines had been apparent for sometime. The memorable clerical characters in Geoffrey Chaucer's Canterbury Tales (ca. 1387) were evidence of this. And John Wycliffe's anticipation of Luther by his vehement rejection of transubstantiation and the need for an ordained priesthood was indictive of the long standing doctrinal disputes.

Nevertheless, throughout Henry VIII's reign the English church remained doctrinally conservative. It was only after his death that theological nuances were borrowed from

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[20] Ibid., p. 186.

[21] For a concise description of the particulars of the Hunne case see A.G. Dickens, The English Reformation, (New York, 1964), pp. 90-96.

Luther, Zwingli, and Calvin. What was unique during his reign was the expeditious manner in which the English crown absorbed en masse the political, legal, administrative, financial, and doctrinal powers of the medieval church by act of Parliament.[22] Through the legislative process, the church, which had once united all the principalities of Europe into the Christian commonwealth, was reduced in England to an auxillary role in the commonwealth of England. Both pope and clergy were stripped of their spiritual and temporal powers. And the king, in consultation with the clergy, was to determine doctrine.

> All Decrees and Ordinances, which according to God's Word, and Christ's Gospel, by the King's Advice and Confirmation by his Letters Patents, shall be made and ordained by the Archbishops, Bishops, and Doctors appointed, or to be appointed, in and upon the Matter of Christian Religion and Christian Faith, and the lawful Rites, Ceremonies and Observations of the same, shall be in every Point thereof believed, obeyed and performed to all Intents and Purposes, upon the Pains therein comprised.[23]

Five years later it was clearly stated in another act that the king had always been head of the English church and had the power "to exercise all other manner of Juridictions, commonly called Ecclesiastical Jurisdiction."[24] Henry VIII, therefore, used the English high court of Parliament and

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[22] Supra., p. 45.

[23] 32 Henry VIII, c. 26.

[24] 37 Henry VIII, c. 17.

English statute law to rid his kingdom of the papal ecclesiastical courts and the papal canon law. Under the reign of his son, Edward VI, the English church moved toward a doctrinal form of protestantism, and his daughter, Elizabeth I, established the Anglican faith which resisted the extreme demands of her Catholic and Puritan subjects.

To some extent the rise of the nation states and the humanist movement had already undermined the political stature and legal influence of the church. Attacks by religious reformers on theological and moral grounds threatened further the church's authority. The total impact of these attacks was obviously destroying the Roman church's pervasive influence across Europe and dissolving the framework that had once justified its prominent place in medieval society. As a result of the dissolution of the papacy's power, religion increased in spirituality while the state expanded its power base. Territorial rulers gained the allegiance of the people in political and legal areas formerly held by the church. Gradually, secularized standards in politics and law replaced religious standards. The legal profession was to benefit immensely from this shift. Lawyers became for the early modern era what priests had been for the medieval period, guardians of ethics and morality and apologists of the established order.

Compared with the events and ideas discussed thus far, the development of international law and the advent of the scientific revolution did not dominate the intellectual

mood of the sixteenth century. Nevertheless, they did begin to affect the climate of opinion towards the end of the century, and both were to have serious consequences for the law throughout the seventeenth century. A brief examination, therefore, of the implications they brought to the dissolution of the medieval synthesis is in order.

Christianity contributed an ideal framework by which international peace and universal brotherhood could be a goal. The church's canon law supplied the code of international conduct among the principalities of the Christian commonwealth. But the decline in papal power brought with it the passing of medieval universalism. Europe was left with a diversity of states that lacked a law of nations. Thus, the development of international law was intricately related to the demise of the Christian commonwealth, the rise of the nation states, and the impact of the Reformation.

In the fifteenth century, there was an increased need to practice the art of statecraft because of the prevalence of dynastic disputes, the emergence of strong monarchies, and the growth of foreign trade. They turned to Italy and the city-states for a model where the fine art of diplomacy was a fact and necessity of life. Here the issues of embassies and rules of war had already been formalized at some length. In France, Bernard du Rosier, the provost and future archbishop of Toulouse, had even written a method book, Short Treatise About Ambassadors (1436). It was a handbook for diplomats in which titles were explained;

diplomatic powers and instructions were discussed; and the solemnity of diplomatic procedure was described. These concerns suggest the level of sophistication among diplomats that remained fairly constant until the middle of the sixteenth century.

By the second half of the century, however, two additional problems developed which complicated the art of diplomacy further. One was the extension of European dominance over new territories due to the voyages of exploration. At issue was the acquisition and jurisdictional rights of this new found property and the treatment of heathen natives by the Christian conquerors. The other problem, and the more serious of the two, was the rejection of the church centered in Rome. This had left the nation states facing one another without a universally acceptable arbiter. Furthermore, up until now, wars had been dynastic power disputes, but with the Reformation they became wars of ideology. These conflicts, based on theological absolutes, tended to undermine established diplomatic procedures.

The state of potential and real lawlessness, due to the compromising effects of the Reformation on the art of diplomacy, became the particular concern of theologians, canon lawyers, and civil lawyers. Towards the end of the sixteenth century, they began to outline basic principles for resolving the problems plaguing international relations. The old issues of embassies and rules of war were re-examined,

and solutions to new problems, such as immunities and negotiations, were offered. These suggestions appeared in lengthy treatises, often entitled the laws of war. In the forefront of this endeavor were the civil lawyers in the northern protestant countries.[25] Within this group, the Elizabethan legalists made a significant contribution toward resolving the conflicts and tensions and in establishing a body of internationally recognized law.

The impetus for establishing rules in order to resolve international disputes had been largely dependent on the great issues confronting sixteenth century men, that is, the changing nature of political and religious thought. The scientific revolution, on the other hand, was of a more independent origin. Although the Renaissance and Reformation had questioned inherited authority and this did provide ideal conditions for questioning the Ptolemaic cosmos and the theocentric notions of Christianity, the sixteenth-century scientists, nonetheless, tended to be disinterested observers. Unlike the humanists and religious reformers, they were not conscious of creating a revolution in science. The sixteenth century treated Copernicus's heliocentric

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[25]W.S. Holdsworth maintained, "We should naturally expect that the principles of this new body of law would take their modern shape in the writings of men who belonged to the reformed religion. It was easier for them to see eye to eye with the new political and intellectual conditions which have given them birth. And this is the case." See W.S. Holdsworth, A History of English Law, (London, 1937), V, p. 51.

theory as just that, another theory, that was taught alongside Ptolemy in the universities. So long as humanism dominated the intellectual community, the century would remain not overly receptive to science because of the humanists' own indifference to it. By the late sixteenth and early seventeenth centuries, as the humanists' influence waned and the church's authority diminished, people feared the implications of scientific investigation. With Brahe, Kepler, and Galileo attempting to verify the heliocentric theory, the churches, for the first time, began to persecute scientific opinion. They were fearful that the last elements of the medieval design, the Ptolemaic cosmos and the theocentric idea, would also be discredited. These were elements that had been left untouched during the intellectual turmoil of the sixteenth century, because they were believed to be true, even by the most persuasive critics of the medieval view.

Thus, the interest in science was a revolutionary movement of sorts, because it too questioned inherited authority. The scientific method was based on mathematical testing and the gathering of empirical proofs that would provide some certainty for scientific truth. This suggested, for the first time, the modern notion that knowledge was a progressive experience and overthrew the medieval idea that it was static. The effects of this method were minimal for the late sixteenth century legal community. During the seventeenth century, however, the impact was

significant. The search for absolute truth in intellectual endeavors was abandoned. In the field of jurisprudence, lawyers began to examine the credibility of witnesses and search for truth beyond a reasonable doubt.[26]

The final event that so profoundly affected the intellectual mood of the sixteenth century was the Reception of the Roman law. It, of all the events discussed thus far, had the most immediate and significant impact on the legal communities of Europe. Once again, the issue at hand was the inadequacy of the status quo, in this case the existing legal systems, to cope with the changing needs and demands of the age. Although the Renaissance, Reformation, and rise of the nation states were, to some extent, causal factors that helped to produce the Reception, the state of medieval law was such that a Reception of some kind, independent of these events, seemed inevitable.

Medieval law on the continent had been a mixture of three legal systems: Roman, canon, and Germanic, along with countless enactments indigenous to various municipal centers and feudal principalities. By the sixteenth century, the civil law of Rome had superseded the other systems in pre-eminence. The reasons for this are rooted in the nature of the changing political climate.

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[26]One of the most recent and perceptive studies of law and science in the early modern period is Barbara J. Shapiro, "Law and Science in Seventeenth-Century England," Stanford Law Review, XXI, (1969), pp. 727-66.

During the twelfth century the Law School of Bologna introduced into the western empire the Roman law of Justinian. The purpose was to extract the approximate meaning of the Justinian texts and to incorporate them into medieval legal practice. The School did not succeed, however, in its original endeavor. Instead, the scholars became preoccupied with writing comments that concentrated on grammatical and analytical criticism. These comments were called glosses because of the manner in which the criticisms were compiled. Absent from them was a consideration of the philological, historical, and literary origins of the texts. In spite of that, the texts were explained to some extent and adopted in part to meet the needs of the age.

By the fourteenth century a new school, the Post-Glossators, had developed in reaction to the Glossators. Founded in France by Jacques de Revigny, a professor at Toulouse, the School was popularized by the Italians, Bartolus de Sassoferrato and Baldus de Ubaldis. The Post-Glossators employed the dialectical method of the scholastic philosophers in their attempt to glean a corpus of legal doctrine from Justinian's texts, the glosses, and medieval sources of law. They wrote lengthy treatises on the sources, and were particularly adept at synthesizing the various laws in order to contrive new legal rules. Bartolus, the foremost Post-Glossator, was especially interested in joining the best of the canon and civil laws into one ideal system of civil law.

The existence of the Glossator and Post-Glossator Schools, which employed the mos italicus previously mentioned, indicates that a Reception of Roman law was not something new or unique to the principalities of Europe. Yet despite the previous Receptions, the European states were still governed by multiple legal systems. To illustrate, France had at least four systems within its boundaries: pays de droit ecrit, pays de coutume, canon, and municipal laws. With the development of separate territorial states, however, the need for a single system of law became particularly acute. In hope of establishing a single legal system, Charles VII ordered the compilation of the laws of France by the ordinance of Montils-les-Tours (1453). Other monarchs across Europe expressed a similar interest, and they relied upon the Roman civil law of Justinian as the basis of their new system and the method of the Bartolists for implementing it.

While the Bartolist tradition continued into the sixteenth century, another school of continental legalists developed as a result of the Renaissance and humanist movement. This School's most famous representatives were Guillaume Bude and Jacques Cujas of France, Andrea Alciati of Italy, and Ulrich Zasius of Germany. These men, who wanted to apply the humanist new learning to the study of civil law, were advocates of the mos gallicus. They believed the Post-Glossators, like the scholastic philosophers, were too pedantic in their scholarship. They were also

critical of both the Glossators and Post-Glossators' failure to utilize historical studies and philological techniques in their work. Their concern was to correct the errors: analytical, grammatical, historical, and philological of the previous schools, and to bring to the national codes that were being compiled throughout the century the true meaning and polished language of Justinian's laws. For the most part, their efforts were successful in raising new standards in legal scholarship and in facilitating the work of codification.

The Reception, however, had a broader significance than the introduction and refinement of the Roman civil law and its subsequent codification by the territorial states of Europe. The adaptation of the civil law also had administrative and political consequences for these states. It has already been pointed out that the civil law stressed centralized authority and generated political theories of royal absolutism. Furthermore, the Reception caused a jurisdictional shift in the power of existing courts of law. This occurred when the king's council, while acting as a court, encroached upon the jurisdictions of the ordinary courts. This was necessary, from the monarch's point of view, because the ordinary courts were staffed by judges who had inherited their positions and were irremovable from office. Any dispute between these judges and the Crown would have raised serious doubts about the monarch's position of authority within his state. The sixteenth-

century Reception, therefore, must be viewed as not just the introduction of Roman civil law at the expense of rival legal systems, but also as the source from which the monarchs of the nation states were able to justify their centralized authority and to establish a political theory based on royal absolutism.

In light of the chaotic state of medieval law and the previous receptions of Roman legal principles, the sixteenth-century Reception on the continent appeared inevitable. But in England, the Reception caused considerable consternation among some common law lawyers. They were fearful of the impact that this foreign legal system would impose upon the common law and the effect it would have on their livelihood.[27]

England had experienced Roman law receptions before. Prior to the twelfth century the ecclesiastical courts of England used Roman law, and the introduction to charters and wills was of Roman origin. The revival in the study of Justinian's laws during the twelfth century was also received in England, but it did not affect the substantive

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[27]For a time, there was considerable debate over the extensiveness of the Reception in sixteenth-century England. Some of the more salient views are found in: F.W. Maitland, English Law and the Renaissance, (London, 1901); Paul Vinogradoff, Roman Law in Medieval Europe, (London, 1929); Theodore F.T. Plucknett, A Concise History of the Common Law, (Rochester, 1936); W.S. Holdsworth, A History of English Law, IV and V, (London, 1937); Stuart E. Prall, "The Development of Equity in Tudor England," American Journal of Legal History, VIII, (1964), pp. 1-19; and W.J. Jones, The Elizabethan Court of Chancery, (London, 1967).

rules of the common law. Instead, Roman principles were adapted to the particular needs of the common law. W.S. Holdsworth considered Henry de Bracton, the thirteenth-century judge and ecclesiastic, as an important source for determining how Roman law influenced English common law. Citing Bracton's famous treatise, De Legibus et Consuetudinibus Regni Angliae (ca. 1258), Holdsworth discovered: traces of the glossators' dialectical method, the utilization of Roman principles to resolve problems in the law of property, and the use of Roman illustrations and phraseology.[28] In contrast with the continental Reception, the use of Roman legal principles was limited and subtle. What had ultimately prevented an unlimited reception was England's insular character and pride in its common law.

During the sixteenth-century Reception, the English common law was not threatened with extinction as was the case of the customary laws found on the continent. But its supremacy was endangered. It has already been observed that the Tudors relied upon the council, both as an advisory body and as a law court, to solidify their power base. As a court, the council developed jurisdictions, especially during Henry VII's and Henry VIII's reigns, in areas not administered by the common law courts. This action created and revised a number of prerogative courts: Chancery, Star Chamber, Admiralty, Requests, and High Commission, for

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[28]Holdsworth, A History, II, pp. 271-86.

the king which accelerated the Crown's efforts at establishing a centralized authority.[29] Some common law lawyers felt threatened by these prerogative courts because: the administrative principles were based upon the civil law, which suggested notions of Roman imperialism; they were superseding the common law courts in jurisdictional areas of constitutional, criminal, and commercial law; they were providing quick and efficient justice that reduced the number of cases heard in the common law courts; and they employed civilians, civil lawyers, as officers of the court. The lawyers' concern was enhanced further when Henry VIII encouraged the study of civil law and went so far as to establish regius professorships in civil law at Oxford and Cambridge. These actions were viewed by some as a serious invasion of the common law jurisdictions and as a potential threat to the livelihood of the common law lawyers.

Despite the Tudors' extensive use of prerogative courts and the magnification of the Crown's authority through these courts, fears of a Reception similar to that experienced on the continent were totally unfounded. Obviously, the Tudors

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[29]Chancery, an equity court, and Star Chamber, a court used to repress the powerful barons, had already been in existence, but they increased and clarified their jurisdictions. The Admiralty Court was revived after having suffered a decline in the fifteenth century. The Court of Requests, an equity court for the poor, was created around 1493. And the Court of High Commission, formally called this by 1570 but in existence since Henry VIII's break with Rome, was an ecclesiastical commission created as a result of the dissolution of the canon law courts.

did have much to gain personally by espousing a theory of royal supremacy, but so did the welfare and stability of the commonwealth of England. The baronial upheavals were curtailed; the papal position of influence was overthrown; and an efficient system of justice which the common law was unable to provide totally was assured. Yet one of the most consistent traits of the Tudors was the scrupulous observance of the letter of the law, especially in regard to constitutional questions. This was particularly evident throughout the Reformation era, when the legislative features of Parliament were utilized to the utmost. Therefore, while supporting the theory of royal supremacy, the Tudors also acknowledged and accepted a constitution that was dependent upon the common law.

Moreover, it has already been shown that the issue of the Tudor supremacy within the state was largely qualified by theorists who pointed out the Crown's dependence on the law. The perpetuation of this medieval notion was due in part to the popular appeal throughout the sixteenth century for the writings of Sir John Fortescue, the fifteenth-century Chief Justice of King's Bench under Henry VI.[30] Fortescue maintained,

> the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not

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[30]In his works Fortescue often discussed the wisdom of the English legal system over that of the civil law. He wrote: De Natura Legis Naturae (1461-63), The Governance of England (ca. 1470), and De Laudibus Legum Angliae (1471).

> only regal but also political. If he were to preside over them with a power entirely regal, he would be able to change the laws of his realm,...this is the sort of dominion which the civil laws indicate when they state that What pleased the prince has the force of law....But the case is far otherwise with the king ruling his people politically, because he is not able himself to change the laws without the assent of his subjects.[31]

The view was expressed continually in the works of such Henrician apologists as Thomas Starkey, Christopher St. Germain, and Richard Morison and by Elizabethan theorists Thomas Smith and Richard Hooker.

Finally, during the course of the century, a number of factors occurred that gradually produced an improvement in the status of the common law. First until Thomas More assumed the position of Lord Chancellor, the premier legal officer in the realm, the office was generally held by an ecclesiastic. These men were often trained in the civil law. Despite their lack of formal training in the common law, these ecclesiastical chancellors did understand and appreciate the common law, especially as it related to the church. But starting with More, there was an almost unbroken line of common law lawyers who occupied the position of Lord Chancellor. Second, the lawlessness of the fifteenth century had been considerably reduced during the course of the sixteenth century. As a result, petitions of redress to the Chancery and Star Chamber courts began to diminish.

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[31]Fortescue, De Laudibus, p. 25.

Third, the Crown made a concerted effort to police the oppressive local courts. The success of this action brought about a decline in the issuance of writs of certiorari and habeas corpus to remove cases from these courts. Fourth, the common law was adapted to the needs of the age. It became more efficient at exercising its criminal jurisdictions, and it also developed an effective law of contract. Fifth, the common law and Admiralty courts worked out a compromise that enabled them to share the merchantile litigation. And sixth, throughout the sixteenth century an increasing number of common lawyers participated in the work of the prerogative courts.

By the end of Elizabeth's reign, the judges and lawyers had at least reached an understanding in theory of the need to develop a unified court system. Yet they lacked a program for the practical application of the theory. As a result, the problem of the prerogative courts remained and became closely linked to the fundamental question that needed answering during the age, that is, the limits of the Crown's prerogative power. Once again, the Elizabethan legalists were active participants in the debate.

Since the medieval design no longer offered acceptable explanations to the questions that needed answering, a search had commenced to establish a new framework. The rise of the nation states, the Renaissance, the Reformation, the scientific revolution, and the Reception of the Roman law were the more prominent responses to that search. The fact that these events upset the traditional way of looking

at such basic factors as politics, education, religion, science, and law attests to the unsettling mood that developed during the course of the sixteenth and early seventeenth centuries. They also explain why the century was so uncommonly rich in the quality and quantity of ideas produced. Each response proved to be a significant factor that ushered in what Basil Willey called "a general demand for restatement," that is, the "wish to live and to act according to a different formula."[32] Because of the nature of the shift from a theological and mythical world view to a scientific and empirical perspective and because the search raised such fundamental questions about the nature of God, man, and the universe, the response produced was one of serious doubt and anguished tensions. There were people in England and on the continent who continued to believe in the total medieval framework or at least parts of it. Many, as yet, were unconvinced of the credibility of the new ideas. They were comfortable with the old and had no intention of abandoning the traditions that they had accepted for so long.

Initially, England was one of the more reluctant countries of Europe to reject the medieval framework, because many of its indigenous medieval institutions had continued to work well. Partially because of its geographical remoteness to the rest of Europe, England could choose to reject or accept ideas emanating from the continent. The

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[32]Basil Willey, The Seventeenth-Century Background, (Harmondsworth, 1972), p. 11.

Channel acted as a buffer that produced a more conservative response to new ideas. In light of this fact, it is not too surprising to find the English only becoming totally involved in the search for a new framework late in the sixteenth and early seventeenth centuries.

As the dissolution of the medieval synthesis became more apparent towards the end of the sixteenth century, a response was elicited from the English intellectual community. Since the legal system in England was such an important source of order for the society, it was inevitable that the lawyers would actively engage in responding to the conflicts and tensions affecting them. The Elizabethan legalists and their works were early examples of this response. They were important for the interests that they generated in legal scholarship. How were these men both products and formulators of the intellectual milieu? What were their philosophical interests? What were the origins, nature, and quality of the ideas expressed in their treatises? The answers to these questions begin to explain the manner in which the Elizabethan legalists were a part of the age of restatement.

2 LAMBARDE AND THE USE OF HISTORY

"It is not accidental," J.H. Plumb wrote a few years ago, "that great social crises, when secular authority or ancient beliefs are torn in conflict, bring forth a huge spate of historical writing and, indeed, historical controversy."[1] Plumb was referring specifically to the sixteenth century and the proliferation of historical treatises that it generated. At that time, there was a recognition among humanists that history had a didactic value. It could teach moral and ethical lessons, and it commemorated past and present political achievements. History, like ethics and rhetoric, was a significant component employed to familiarize and to advance man's understanding of his own personal worth and value to society. Although the humanists were unable to establish history as a part of the academic curriculum, they were quite successful at associating the study of the past with life in the present. Referring specifically to the Elizabethan age Louis Wright indicated that "the vast influence of historical reading upon the rank and file of Tudor and Stuart society cannot be measured, but clearly it was a potent factor in the intellectual

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[1]J.H. Plumb, The Death of the Past, (London, 1969), p. 40.

progress of the citizenry."[2] With the rise of the nation states, history was also utilized to augment feelings of nationalism. Furthermore, the advent of the Reformation produced another reason for wanting to understand the past better. Protestant and Catholic reformers endeavored to go beyond or behind established beliefs and to trace their origins based on historical sources.

Indeed, there were substantial reasons for the age being as historically minded as it was. And the legal profession across Europe was to play a significant role in cultivating an appreciation for history and contributing to historical scholarship.[3] One obvious reason for this course of conduct was that lawyers represented the largest secular learned profession in European society. Their educational experience fostered an interest in reading history. Julian H. Franklin has pointed out that "it was very seriously assumed that the reading of historians was the ideal form of political and moral education.... A complete familiarity with universal history was now regarded as a fundamental obligation of the educated man."[4] Increasingly,

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[2]Louis B. Wright, Middle-Class Culture in Elizabethan England, (Ithaca, 1958), p. 337.

[3]Bouwsma, "Lawyers in Early Modern Culture," pp. 303-27. His reference to recent scholarship on this topic is particularly important.

[4]Julian H. Franklin, Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History, (New York, 1963), p. 3.

the close affinity between legal and historical scholarship was made evident. On the continent, the Reception of the Roman law caused some lawyers to devote much of their time and energies to historical research. They were particularly interested in discovering the origins of laws and judicial institutions. They were also concerned with identifying and differentiating between the judicial contributions of classical Rome and those pre-feudal and feudal legal developments indigenous to each country. Furthermore, the emphasis placed on case law also generated a significant interest to know something about the past in England.[5]

One of the least appreciated, perhaps, of the Elizabethan legal historians was William Lambarde. He was the senior member of a group of scholars, among them William Camden, Henry Spelman, and John Selden, who addressed themselves to the study of English legal history. Lambarde was born on October 18, 1536, in London. Like the other Elizabethan legalists discussed in this study, Lambarde came from a middle-class family.[6] His father, John, was a draper who

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[5]R.J. Schoeck pointed out that two-thirds of the forty-three members of the Elizabethan Society of Antiquarians were also members of the Inns of Court. See R.J. Schoeck, "Early Anglo-Saxon Studies and Legal Scholarship in the Renaissance," Studies in the Renaissance, V, (1958), p. 104.

[6]In order to avoid getting embroiled in a controversy over what constitutes membership in the middle class, I refer the reader to J.H. Hexter's use of Claude Seyssel's definition: "estat moyen - merchants, financiers, industrialists, the town rich, the bourgeoisie." See Hexter's chapter 'Myth of the Middle Class in Tudor England,' in his Reappraisals In History, (New York, 1961), p. 75.

became a master of the Draper's Company; he also was an alderman and sheriff for the city of London. William's career differed from the other legalists discussed in this paper in that he lived and worked within the confines of the Tudor age. Moreover, his life paralleled closely that of Elizabeth. He was born three years after the Queen, during a crucial period in England, for Henry VIII and Thomas Cromwell were in the midst of reforming the English church, and he predeceased Elizabeth by two years. The formative years of each occurred as England attempted to cope with and adapt to the changes brought on by the Renaissance, Reformation, and rise of the nation state. England was at the crossroads of leaving the medieval age and entering the early stages of the modern era. Because of these facts, Lambarde's career and works represented a significant phase in the development of English historical scholarship.

Nothing is known of William's education before his admittance to Lincoln's Inn in April of 1556. Conyers Read, however, indicated that "in view of his scholarly achievements it is hard to believe that he was not a University man, but there is no record of him either at Oxford or Cambridge."[7] Since he was the eldest son,

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[7]Conyers Read, "William Lambarde's 'Ephemeris," 1580-1588," Huntington Library Quarterly, XV, (1952), p. 124. More recently Wilbur Dunkel has attempted to support Read's contention when he pointed out that "matriculation for a degree was only essential for a position in the church or in an educational institution. In these years university authorities actually complained that many young scholars in residence had not registered for the degree." See Dunkel, William Lambarde, Elizabethan Jurist 1536-1601, (New Brunswick, 1965), p. 19.

William inherited, upon the death of his father in 1554, the family manor of Westcombe in Greenwich, Kent. This circumstance was a common reason for a young man interrupting his university studies, for it was necessary that he assume the responsibilities of the family's finances. Moreover, this situation was also a common motive for a young heir entering one of the Inns of Court, for a legal education would prove invaluable to a landowner.

It took Lambarde eleven years to complete his legal training, an unusually long period, since the average was about eight. His acquisition of the manor, however, provided him with a financial security that made him less dependent on pursuing a legal career for a livelihood and enabled him to cultivate his scholarly interests. No doubt, prior to the commencement of his legal training, Lambarde had developed an inquisitiveness toward history, for in addition to his legal studies, he possessed a lively curiosity for antiquarian research. This interest was developed and fortified through his association with Laurence Nowell, the famous antiquarian.

Lambarde first met Nowell at Lincoln's Inn, where he was occupying the rooms of his brother, Robert, who was studying law. Laurence, a Protestant divine, had sought seclusion at the Inn from Queen Mary's religious persecutions. Nowell was a member of a group of scholars, educated in the humanist tradition, who were interested in recovering the ancient rules and traditions of Britain. His particular interest was the collection and translation of Anglo-Saxon

manuscripts. Wood referred to Nowell as "a most diligent searcher into venerable antiquity, a right learned clerk also in the Saxon language, and was one of the first that recalled the study thereof."[8] The leader of this group of scholars, Matthew Parker, who was also in seclusion at this time and who was to become Queen Elizabeth's first Archbishop of Canterbury, specialized in the study of the early church leaders of Britain.

Apparently, it was Lambarde's facility with Latin that first attracted Nowell to the young law student, for he taught Lambarde Anglo-Saxon and encouraged him to study the ancient manuscripts of Britain, while continuing his legal training. During these early years, Lambarde's service to Nowell was not unlike that of a research assistant. This initial association was rather brief, however. Nowell found it necessary to flee to Germany as Mary stepped up her attacks on English Protestants.

While Nowell was out of the country, Lambarde devoted his energies to his legal studies. He also had more time to cultivate the friendship of his peers. Given the few thumb-nail sketches of Lambarde in later years, this proved to be not too difficult a task. He was the type of person who attracted people to him. Sir Julius Caesar, master of the Court of Requests, called him "a gentlemen of great

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[8]Anthony A. Wood, Athenae Oxonienses, ed. Philip Bliss, (London, 1813), I, p. 426.

learning and sincerity."[9] And the historian, William Camden, referred to Lambarde as a man "eminent for learning and piety."[10] During his stay at Lincoln's Inn, Lambarde had the good fortune to develop lasting friendships with John Puckering and Thomas Egerton. As a matter of fact, Puckering and Lambarde were called to the bar on the same day, June 15, 1567. Unlike Lambarde, Puckering and Egerton were interested in pursuing careers in the central government. At the time Lambarde had no idea how successful his two friends would be. Both were to become Lord Keeper and Egerton attained the position of Lord Chancellor. Toward the end of Lambarde's career, Puckering and Egerton were to play influential roles in obtaining significant positions for him.

With the accession of Elizabeth as Queen, Protestant Englishmen began to return to their country, and Laurence Nowell was among them. Throughout the 1560s, Nowell, stayed at the home of William Cecil, Elizabeth's chief minister during much of her reign. Cecil, who was also a collector of manuscripts and a friend of Matthew Parker, became Nowell's patron. No doubt Parker, the new Archbishop of Canterbury, introduced Nowell to Cecil. There is another connection here, however. Cecil at the time was Master of

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[9]I.S. Leadam, Select Cases in the Court of Requests 1497-1569, (London, 1898), XII, p. xxv.

[10]John Nichols, Bibliotheca Topographica Britannica 1780-1790, (London, n.d.), I, p. 498.

the Court of Wards, and Nowell's brother, Robert, was then Attorney General for the Court.

Upon his return to England, Nowell renewed his association with Lambarde at a time when there was a good deal of interest in Anglo-Saxon studies, particularly among Cecil, Parker, and their associates. Lambarde had already developed lasting friendships with Puckering and Egerton, men destined for responsible positions of authority during the waning years of Elizabeth's reign. Presently, he would have an opportunity to associate with men who actually would assist in shaping the Elizabethan age. Both Nowell and Lambarde quickly rediscovered their friendship for each other and their mutual scholarly interests. Nowell continued to teach Lambarde Anglo-Saxon and to make transcriptions of Saxon manuscripts. But Lambarde added a new dimension. He encouraged his teacher to transcribe old English laws. Nowell did so and gave them to Lambarde before returning to the continent. After first adding a parallel Latin translation, Lambarde had the laws published in 1568. It was his first publication and was entitled Archaionomia. The significance of the Archaionomia will be discussed later. What is important at this time is an understanding of Nowell's contribution to historical research, particularly his humanist perception of the utility of history. This recognition will not only go a long way toward explaining the mode of Nowell's contribution, but it will also clarify further the observation that Lambarde's career and works represented a significant phase in English historical scholarship.

Nowell's great achievement has been clouded, because he neither published nor completed the work on his own manuscript collections.[11] The publication of the Archaionomia, a work that must be credited as much if not more to Nowell than to Lambarde, illustrates this point. Nevertheless, three explanations stand out for Nowell's rather unorthodox career as a scholar. First, it has already been pointed out that Nowell was a Protestant divine. Upon his return to England, he was awarded a number of church livings. Obviously, these occupied some of his time, especially during those critical years of transforming the church in England from a Catholic back to a Protestant denomination. Moreover, a great deal of work was necessary in formulating, adopting, and implementing what eventually became known as the Elizabethan church settlement.[12] Nowell was a participant in those proceedings and in future convocations of religious leaders. Thus, Nowell found it necessary to defer his scholarly interests in favor of his duties as a Protestant minister.

Secondly, Nowell may be regarded as a transitional figure within the humanist movement. He studied logic and grammar at Cambridge and Oxford during the late 1530s and

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[11]See Robin Flower, "Laurence Nowell and the Discovery of England in Tudor Times," Proceedings of the British Academy, XXI, (1935), p. 59 and F.J. Levy, Tudor Historical Thought, (San Marino, 1967), pp. 136-37.

[12]See Statutes of the Realm: 1 Elizabeth I, c. 1 and 1 Elizabeth I, c. 2.

early 1540s, and he graduated B.A. and M.A. from those institutions respectively. Nowell, therefore, was a product of the elitist phase of the humanist movement prevalent in England at that time. This phase possessed a number of distinct characteristics: it was international in scope; it concentrated on a desire to imitate the ancients; it had close ties with the universities; and it attracted disinterested scholars. Men affected by this tradition were inclined to be involved in scholarly research for the betterment of themselves and in the interests of a small circle of friends. Yet, Nowell was also a catalyst in the development of the exuberant phase of the movement in England. This phase brought the new learning of the humanists to a larger number of people within the middle class, and it was associated with popularizing the humanist precepts with the indigenous institutions, characteristics, and needs of each country. His work with Anglo-Saxon laws and his influence on Lambarde exemplified this view of Nowell as an innovator. But Nowell's own scholarly interests and his clerical duties reduced the amount of time and opportunity that he could devote to the exuberant phase of the movement. As a result, he remained in the background encouraging others.

Thirdly, it is imperative to understand the humanist philosophy of history. The use and type of histories that this philosophy elicited during the elitist and exuberant phase of the movement not only clarifies further Nowell's position but also Lambarde's approach to historical

scholarship. In order to place this philosophy in its proper perspective, however, it is important to consider briefly the medieval position.

Like almost everything else that the humanists attempted to accomplish, their philosophy of history was highly critical of medieval historical scholarship. The medieval view of history was based on a linear concept that incorporated a good deal of theological speculation. It dealt with events that started with creation and continued on to the last judgement. Both past and future were represented in the medieval historical design. Actually, this view was a record of God's orchestrated work. Miracles, therefore, were considered credible explanations or casual factors in the turn of events. This view of history was obviously unacceptable to the humanists. Their purpose was to enhance the value of man; to make him less dependent on God, the overseer; and more independent to direct his own life. As long as history was considered a record of God's work replete with mythical events, it could not be utilized as an element in the humanist design. Furthermore, unless the historical perspective was changed, it would have encumbered the humanist aim.

It is not surprising that the Renaissance humanists turned to the ancients of Greece and Rome, of whom they were so fond, in search of a theory of history. From the classical period, the humanists revived and adopted a cyclical theory. This was a dynamic view of history. Its perspective was

dependent upon time, place, and circumstance. And the human condition, which the humanists wanted so badly to improve, was presented with its limitations. History became, as Donald Kelley has pointed out, "the centerpiece of the humanist world view."[13] As a matter of fact, it replaced the medieval qualitative view of nature. Just as the medieval hierarchy provided conceptual limitations, the humanist use of history furnished a new perspective for conceptualization.

The utility of history, as an alternative to the medieval hierarchy, became increasingly evident, because the perspective attained was based, in part, on recorded knowledge. Humanists had begun to employ critical standards of documentation which made their work more credible. But the early humanist histories were not devoid of medieval characteristics. The church, having dominated historical writing throughout the middle ages, did not readily relinquish its hold. Myth in the name of faith was still evident in some late fifteenth and early sixteenth-century histories. Furthermore, the humanist reliance on the classical model also explained the continued presence of myth, but it assumed a secular quality. Guicciardini, for instance, considered by many as the first modern historian, relied upon chance or fortune to explain the outcome of some events, as did Machiavelli. Such terms as chance and fortune

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[13]Donald R. Kelley, Foundations of Modern Historical Scholarship, (New York, 1970), p. 21.

were actually secular forms of Divine Providence. Thomas More's History of King Richard the Third was another case in point. Myth pervaded his sketch of the Yorkist king. The presence of myth in More's work illustrated the English humanist's reliance on the classical model, expecially that of Tacitus.[14]

The reason the humanists relied upon classical models goes back to their desire to imitate the ancients' prose style. For the early humanists, history had the potential of becoming an effective rhetorical tool. It was considered a valuable guide to the present, because it illuminated a significant part of life's past experiences. In order to benefit more fully from these didactic qualities, history was subject to classical models. Thus during the elitist phase, the quality of the prose was even more important to the humanists than the credibility of the sources. Furthermore, the desire on the part of the humanists to establish a simple logical method for studying any body of knowledge also affected their approach to the writing of history. Their method involved moving from the most general to the more specific. As a result, they applied principles of classification and division when organizing historical studies.

Humanists of the elitist phase, therefore, formulated the Renaissance theory of history. It was the humanists of

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[14]Thomas More, The History of King Richard the Third, in The Complete Works of St. Thomas More, ed. Richard S. Sylvester, (New Haven, 1963), II, pp. lxxxiv-xcvii.

the exuberant phase, however, who developed the specific kinds of histories employed. Their approach and interpretations were affected in large part by the advent of the Reformation and the rise of the nation states. Although the upheavals of the Reformation and the development of the nation states were separate causal factors, they both produced bitter national rivalries. This was to lead to the creation of the sixteenth-century cult for the authority of tradition. Tradition had been an important characteristic in the medieval period, but during the sixteenth century it acquired a new object, that of a national consciousness. Obviously, history could be utilized effectively in the development of the spirit of nationalism. People were eager to understand their past. As a result, local histories became quite popular. Historical themes were employed in literature and utilized on the stage. Cognizant of the public interest and their own particular specializations, the humanists no longer wanted merely to chronicle events. They became vitally concerned with discovering the causes and effects of historical events. They still believed, however, that God was the ultimate cause, but emphasis was placed on discovering the temporal ancillary causes. As a result, the selection of sources was considered of paramount importance. Antiquarian and geneological research flourished, and philological studies, another humanist endeavor, were found to be a significant indicator of historical change. Moreover, ancient and contemporary histories were translated

and printed for public consumption. Each of these forms enhanced the nationalistic spirit and lent itself to the cult for the authority of tradition. With this change in the application of history, the quality of historical materials employed gradually improved during the sixteenth century. Scholars insisted upon the use of original documents. This was to produce a marked change for the better in the credibility of histories by the end of the sixteenth century.

Although history was not an academic discipline, it did affect various branches of knowledge taught at the universities. Legal studies, in particular, were influenced by historical scholarship. This development occurred as a result of the humanist interest in philological research. To them philology was singularly important, because it was considered an essential instrument in the humanist pursuit of eloquence. They had been highly critical of the medieval scholastic adulteration of the Latin language as the humanists attempted to return to a purer form of classical Latin. In the process, the study of Latin led to an analysis of various vernaculars. Moreover, these comparisons were extended to include law as well as language, since the genesis of each was grounded in custom and both reflected a unifying element in culture.

The philologists were quick to differentiate between Roman and medieval law. For instance, they found Justinian's Institutes contained rules indigenous to the

needs of Rome. It was also discovered that much of the classical legal wisdom was inaccurately transcribed. Renaissance philologists blamed the scholastics and their pedantic exegesis of the text for the chaotic state of Justinian's code. Furthermore, the interest generated by the philologists to study Roman law and legal institutions created a desire to examine the individual legal systems of various European countries. Distinctions were drawn between indigenous feudal institutions and the universalist tradition of Rome. Part of this comparative research focused on the origins and traditions of the law.

Three of the early proponents for studying the history of law were the Italians Lorenzo Valla and Andrea Alciati and the Frenchman Guillaume Bude. Alciati is credited with the application of humanism to legal study and history in France by emphasizing the close relationship between history and law. It was in France, with the development of the mos gallicus school, that law and history were first systematically studied. The mos gallicus school opposed the narrow scholastic method of logically dissecting the sources and condemned their failure to apply an historical perspective. Jean Bodin agreed with Alciati and those advocates of the mos gallicus school when he wrote in the dedication to his Method for the Easy Comprehension of History (1566),

> Indeed, in history the best part of universal law lies hidden; and what is of great weight and importance for the best appraisal of legislation--

> the custom of the peoples, and the beginnings, growth, conditions, changes, and decline of all states--are obtained from it.[15]

Bodin's Method was the most significant book written on the utility of history in the sixteenth century. His comment keynoted the shift in legal humanism that occurred during the second half of the century. As legal and institutional history became increasingly important in France, a new kind of publication appeared that reflected this change. It focused on an historical analysis of legal institutions.

English historical scholarship was affected by these humanist interests, but the changes were gradual, because England's geographical remoteness to the rest of Europe had produced a provincial attitude toward new ideas. The Henrician Reformation had been an exception to this rule, and even it was doctrinally a conservative response compared to continental reform movements. Nevertheless, devotion to the state, particularly during Elizabeth's reign, fostered a patriotic purpose for a new approach to historical studies. The Reformation not only produced another rationale for the utility of history, but it also made available, through the dissolution of the monasteries, manuscripts long forgotten for use among historians and antiquarians. Moreover, the common law tradition had a profound impact on the English view of history. Nowhere was England's continuity with the

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[15]Bodin, Method, (New York, 1945), p. 8.

past more in evidence than with the common law. Common law lawyers used antiquity to justify their legal system. Yet this tradition could and did have an adverse effect, because it perpetuated the isolationist attitude toward continental ideas, which was not always beneficial.

Laurence Nowell had played a significant role in developing techniques for historical research during the elitist phase of the humanist movement in England. His avid collection of manuscripts, his devotion to transcribing them, and his encouragement of others to pursue historical studies demonstrated his importance. Nowell, along with his pupil, William Lambarde, was a pioneer in the use and development of historical research in England.[16] They were among that group of scholars in the mid-sixteenth century that Donald Kelley has referred to as "laboring in relatively obscure and technical fields of scholarship."[17]

All of Lambarde's works could be classified as pioneering efforts. He published both scholarly treatises and practical manuals, many of which touched on some aspect of the Elizabethan criminal justice system. His first two treatises, in particular, reflected his scholarly pursuits in obscure and technical fields. The Archaionomia (1568)

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[16]Lambarde was given extensive use of Nowell's library. The following manuscripts offer a partial list of those materials that the young scholar had access to: Cotton MSS., Vitellius E.V.; Cotton MSS., Vespasian Avi; and Cotton MSS., Domitian A. viii.

[17]Kelley, Historical Scholarship, p. 13.

was an edition of Anglo-Saxon laws, customs, and ecclesiastical laws. Lambarde acknowledged in the dedication his debt to Laurence Nowell, Dean of Litchfield; Matthew Parker, Archbishop of Canterbury; and Sir William Cordell, the future Governor of Lincoln's Inn. Each had made a significant contribution to the work. For Lambarde, this was "the first fruits both of his legal and Saxon studies."[18] Moreover, it was the first treatise of its kind, containing on one page the Saxon transcription and on the opposite page a Latin translation. This compilation of English legal documents was useful for lawyers and interested clergy. It was also recommended to law students as an important work, tracing a little known aspect of their legal tradition.

The Archaionomia possessed characteristics of both the elitist and exuberant phases of the humanist movement. The emphasis placed on philological and antiquarian research was a quality inherent in the elitist phase. Yet the work was addressed to a uniquely indigenous aspect of English history, and it was popular among those interested in perpetuating the cult for the authority of tradition. Both the provincialism and popularity of the treatise were characteristics of the exuberant phase. The utility of the Archaionomia escalated further during the early seventeenth century. It was used as a precedent book by common law lawyers in

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[18]Nichols, Bibliotheca, I, p. 495.

their constitutional arguments with the first two Stuart kings.

After completing his legal studies in 1567, Lambarde returned to his manor in Kent to take up permanent residence. At this time, the interest in local histories, which had been quite popular for a number of years on the continent, was attracting the attention of England's educated citizenry. Lambarde began almost immediately to turn his attention to this type of scholarship. He collected notes on the county of Kent with the intention of producing an antiquarian and topographical study of it. This endeavor would be the beginning of a much larger work that was to include all the counties of England. It was also another example of Lambarde's willingness to grapple with an obscure and technical area of scholarly research.

The manuscript was completed in 1570 and published in 1576 under the title, A Perambulation of Kent. Lambarde was, once again, a pioneer, for the treatise was the first county history of its kind. But it was more than a history. Employing archaelogy, custom, geography, and law, Lambarde traced the activities in Kent from Roman times to the present. The history, government, and significant buildings of each town and village were discussed. Although the Perambulation was a product of the exuberant phase of history writing in England, Lambarde's emphasis on the etymology of place names illustrated the lingering impact that Laurence Nowell and the elitist phase had on his scholarly apprenticeship.

Lambarde's plan to produce a complete study of England was short-lived, however. He discovered that a young antiquary and historian was already at the advanced stage of preparing a comprehensive work similar to his own. The young man was William Camden and his treatise, Britannia, was a much more extensive treatment of the materials than Lambarde had intended. Although Lambarde was discouraged by the news, he offered Camden the use of his papers. And in a letter to the young scholar, he announced his intention to abandon his own project.

> In reading of these your painful Topographies, I have been contrarily affected: one way taking singular delight and pleasure in the perusing of them; another way by sorrowing that I may not now, as I wanted, dwell in the meditation of the same things that you are occupied withal. And yet I must confess, that the delectation which I reaped by your Labours, recompensed the grief that I conceived of mine own bereaving from the like: notwithstanding that in time passed I have preferred the reading of Antiquities before any sort of study that ever I frequented.[19]

The letter reaffirms the estimation of Lambarde by his contemporaries, when they referred to him as being a benevolent, modest, and learned man.

Following the completion of the Perambulation, Lambarde married Jane Multon. She died three years later. Bereaved by his loss, Lambarde applied himself to community service within the county of Kent by founding a hospital for the poor

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[19]Thomas Smith, Gulielmi Camdeni Epistolae, (London, 1691), p. 28.

of Greenwich. The need for such institutions was acute throughout England. Monasteries had provided this service to the community for centuries, but with their dissolution under Henry VIII, a void was created. It was obvious to Lambarde that a new agency would have to assume this responsibility. Construction began in 1575 and people were admitted on October 1, 1576. The hospital was called "The College of the Poor of Queen Elizabeth", and it is believed "to have been the first hospital founded by a protestant."[20]

In 1572 The Society of Antiquaries had been founded in London. Matthew Parker was the patron of this group of scholars who were interested in researching the language, law, and customs of England. Lambarde, who had already established himself as a Saxon scholar, became an active participant in the Society's proceedings. The group also included Henry Spelman, Robert Cotton, William Camden, and John Selden. Cotton's enormous collection of manuscripts and books served as the Society's library. The group met to discuss their individual research projects. Collectively, they were attempting to document England's past and to eliminate the mythical characteristics that appeared in medieval histories.

On February 9, 1579, Lambarde was honored by his Inn when he was made an associate of the bench. Praised for his

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[20]Nichols, op. cit., pp. 498-99.

service to the country and the fellows of Lincoln's Inn, the council pointed out in their order that Lambarde would continue to make even greater contributions and perform significant services for the commonwealth.[21] The spirit of the proclamation was quickly realized when Lambarde was appointed a justice of the peace for Kent in August 1579. Since the first Tudor, the Crown had relied increasingly upon local justices to maintain law and order in the counties and serve as the administrative arm at the local level. Lambarde, therefore, was assuming an important position of authority. And it is not surprising to find him, once again, becoming innovative in his new office. Lambarde brought to the position a thorough understanding of the law and a compassionate feeling for the human condition. With the support of the other justices in Kent, he had a House of Correction built, where criminals could be rehabilitated by learning skills that would make them productive and self-sufficient citizens.

Displaying his usual singleness of purpose, Lambarde immersed himself in his work as a justice of the peace. He quickly discovered, however, that the office lacked standardized procedures. Moreover, the manuals that had been written to guide the justices in their duties had become dated as a

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[21]William Dugdale, The History and Antiquities of the Four Inns of Court and of the Nine Inns of Chancery, (London, 1780). p. 148 or J. Douglas Walker and W.P. Baildon, The Records of the Honorable Society of Lincoln's Inn 1422-1586, The Black Books, (London, 1897), I, p. 412.

result of changes in statutes.[22] Lambarde decided to write a new tract that would update these procedures. The Eirenarcha, a handbook for justices, was published in 1581, and the first printing was quickly sold out.[23] Lambarde traced the history of the office first. But the largest portion of the book was devoted to explaining, by definition and example, the various types of criminal offences and penalties that a justice would have to oversee. It also identified the non-legal responsibilities of a justice in his county.

The Eirenarcha was the first of three practical manuals that Lambarde produced. In 1582 he wrote "The Duties of Constables, Borsholders, Tythingmen, and such other lowe ministers of the peace." This usually appeared as an addendum to the Eirenarcha. Finally, he published in 1583 a treatise on the "Office of Churchwardens, of Surveyors for amending the Highways." Each manual served as a useful guide for men who often lacked a formal education. Furthermore, the frequency with which these tracts were published during the sixteenth and seventeenth centuries was a testimony to the utility of each.[24]

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[22]William Lambarde, Eirenarcha or of the Office of the Justice of Peace, in foure Bookes, (London, 1599), p. 1.

[23]The Eirenarcha was reprinted in 1582, 1588, 1591, 1592, 1594, 1599, 1602, 1610, 1614, and 1619.

[24]Conyers Read, ed., Bibliography of British History, Tudor Period 1495-1603, 2nd. ed., (London, 1959), pp. 110 and 112.

On October 28, 1583 Lambarde married a second time. His wife was a young, wealthy, widow, Sylvestria Dalison. They decided to reside at her spacious palace of Halling which she, as sole heir, had inherited from her father, Robert Dean. This marriage was almost as brief as Lambarde's first one. Yet in four years they produced four children: a son, Multon; a daughter, Margaret; and twin sons, Fane and Gore. The twins were born late in August 1587. Sylvestria suffered from complications, however, and died on September 1.

In spite of his additional parental responsibilities, Lambarde does not appear to have reduced his professional activities. He continued his work as a justice of the peace and participated in the meetings of the Society of Antiquaries. Moreover, he completed his research on another treatise that was to be his last, and possibly his most important, scholarly publication. Like his other works, Lambarde gave it an anglicized Greek title, Archeion. He mentioned in the dedication that he had been at work for some time compiling materials for the treatise. The Archeion or, A Discourse upon the High Courts of Justice in England was a historical survey of the English court system as it existed in the Elizabethan period. Although the work had been completed in 1591, it was not published until 1635. Nevertheless, manuscript copies were readily available so that members of the legal profession and interested historians and antiquarians were already familiar

with the work prior to its publication.[25]

The Epistle dedicatory of the Archeion suggested a minor but rather interesting feature that had political overtones. The work was dedicated to Sir Robert Cecil, the son of Lord Burghley, Queen Elizabeth's long time advisor. This may have been done out of respect for Burghley, who was attempting to advance his son's chances of succeeding him as principal advisor to the Queen. Cecil, however, did not sponsor the Archeion. In fact it is not known if he read the book let alone concurred with its contents. No doubt, Cecil's failure to sponsor the work prevented its publication in Lambarde's lifetime.

Furthermore, it was pointed out earlier that historical works were utilized to enhance a spirit of nationalism during the sixteenth century. This pride in the homeland was in its ascendancy during the Elizabethan period, and it had international repercussions. The papacy, Spain, and to a lesser extent France, had threatened to invade England and dethrone Elizabeth for her failure to retain Queen Mary's religious policy. Lambarde in the dedication of the Archeion, dated October 21, 1591, managed to express his xenophobic temper toward these threats. Only three years had passed since the English had defeated the Spanish Armada. Subsequently,

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[25]William Lambarde, Archeion, ed. Charles H. McIlwain and Paul L. Ward, (Cambridge, Mass., 1957), p. 147 and Wilbur Dunkel, William Lambarde, Elizabethan Jurist, 1536-1601, (New Brunswick, 1965), p. 140.

various forms of literature had celebrated the event. In reference to Burghley in the dedication as Nestor, the Greek leader in the Trojan Wars who was known for his wisdom, was obviously a recognition of the elder Cecil's skill at directing the Spanish defeat. Also Lambarde's comparison of Robert Cecil to Atlas, the titan, implied that he anticipated the young Cecil assuming the weighty responsibilities that his father had held for so many years.

Lambarde's displeasure with papal threats was also subtly evident in the body of the Archeion. He mentioned early in the work that the courts of England were divided into three categories: ecclesiastical, civil, and mixed. He briefly described the ecclesiastical courts, but did not attempt an indepth study of any of them. Lambarde explained,

> for as much as the description of these Ecclesiasticall Courts pertaineth to another Learning, I meane to the Civill and Canon Lawes (by which they be governed;) and for that they doe not peculiarly (as the rest) belong to our Nation.[26]

The ecclesiastical courts, for good or ill, had an important place in the history of the English judiciary. Lambarde was too knowledgeable a lawyer and historian to dismiss them so lightly. No doubt, this snub was fostered by the fact that the ecclesiastical courts relied upon canon law that had its origins in Rome. Both the law and symbolically the city had excommunicated his Queen and had been a constant source of threatening reprisals for his country.

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[26]Lambarde, op. cit., p. 14.

In its own time, the Archeion was significant because it was the first treatise written that was devoted solely to the historical study of the English court system. Its style and overall readability suggest that it was designed not just for lawyers and scholars but also for the reading public. Conyers Read had indicated that it was "the best contemporary account of the English courts of Justice."[27] Moreover, the work was completed and distributed in manuscript form at a time when common law lawyers were beginning to question the authority of the newer prerogative courts and councils. For the past two hundred years, particularly during the Tudor period, the prerogative courts were developed and utilized as judicial agencies providing quick and efficient justice.[28] Some common lawyers, no doubt the mediocre ones, feared that these courts would impinge upon their livelihood. In one sense, therefore, the Archeion appeared to be a rebuttal to these lawyers' protestations. Obviously, Conyers Read believed this to be the case, for he contended that "Lambarde treated his whole subject rather as an advocate than as a historian."[29]

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[27]Conyers Read, ed., William Lambarde and Local Government, (Ithaca, 1962), p. 56.

[28]The efficiency of these courts has been questioned. See Thomas G. Barnes, "Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber," American Journal of Legal History, VI, (1962), pp. 221-49 and 315-46; and W.J. Jones, The Elizabethan Court of Chancery, (London, 1967).

[29]Read, "Lambarde's 'Ephemeris'," Huntington Library Quarterly, XV, (1952), p. 128.

The tone of the work was overwhelmingly one of an apology for the prerogative courts, particularly the Court of Star Chamber.

In the large section devoted to the Court, Lambarde's objective was to dispel the common assumption that the Star Chamber was first created by Henry VII's statute.[30] He was also attempting to refute the notion that the Court had extended its jurisdiction beyond the statute.[31] Lambarde was the first scholar to address himself to these issues.[32] No doubt, this explains why the section on the Star Chamber occupied such a disproportionate amount of space, in a treatise that was supposed to be a study of all the high courts of justice in England.

At the beginning of the section on Star Chamber, Lambarde offered his own judicious observation as to the need for such a court.

> Within this Realme of England, the most part of Causes in complaint are and ought to be referred to the ordinairie processe & solemne handling of Common Law, and regular distribution of Justice; yet have there alwayes arisen, and there will continually, from time to time grow some rare matters, meet (for just reason) to be reserved to a higher hand, and to be left

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[30]See Statutes of the Realm: 3 Henry VII, c. 1.

[31]Cora Scofield, A Study of the Court of Star Chamber, (New York, 1969), p. 10.

[32]Other contemporaries of his who were to follow him in this endeavor and who were to concur with him were: William Hudson, A Treatise on the court of star chamber, ca. 1620, ed. F. Hargrave, Collectanea Juridica, II, (London, 1792); and Edward Coke, The Fourth Part of the Institutes of the Laws of England, (London, 1648).

> to the aide of absolute Power, and irregular Authoritie.[33]

Lambarde then proceeded to support his pragmatic reasoning with some examples, all of them being criminal causes, for the existence of Star Chamber. His "extraordinary reasons" focused on bribery, perjury, and corruption. Although private citizens could be taken before the court for such crimes, Lambarde found that the majority of cases involved public officials. He viewed the Star Chamber as being "fruitful or beneficiall to the Common good," for it would "checke the insolencies and outrages of...men that be great by their places, and Authoritie."[34] Thus, the author considered the Court's primary function as that of overseeing and arresting any improprieties by public officials. Yet underlying his entire treatment of the Star Chamber was Lambarde's desire that it be used moderately and only when the common law was unable to hear and determine the case.

Next the author set out to prove that the origins of the Star Chamber preceded Henry VII's statute in spirit if not in name. Relying upon historical precedent, Lambarde cited the treatises of Britton and Bracton to establish a theoretical justification for his argument. Britton commented that King Edward I maintained,

> Wee will (saith the King) that our owne Jurisdiction be above all the Jurisdiction

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[33]Lambarde, Archeion, p. 48.

[34]Ibid., p. 51.

> of our Realme;...We have power to yeeld (or cause to yeeld) such Judgements as doe appertaine (without other Processe) wheresoever wee know the right truth, as Judges.[35]

Also Bracton believed,

> As it is inseparably annexed to the Office of a King, to be the Judge of his people, and as he cannot any longer remaine King indeed, than he shall be readie to deliver Judgement and Justice unto them,...if that power and authoritie which they have, may not enjoy her free course and passage, then must the King either exercise his preeminent and royal Jurisdiction, or else must the injuriously afflicted be deprived of that helpe and remedie, which both the Ordinance of God, the Dutie of a Kingly Judge, and the common law of Nature and Reason doe afford unto him.[36]

To support Britton and Bracton's theories, Lambarde paraphrased a number of statutes and cases where the King and his council had heard cases not unlike those presented to the Star Chamber.[37] The thrust of Lambarde's argument was, that although the council of men hearing these cases may not have sat in the starred chamber or been referred to as the Court of Star Chamber, the judicial procedure now familiar to the Star Chamber had existed in the medieval period. Once again, Lambarde stressed the moderate use of such proceedings in deference to the common law.

Having explained the existence of the court prior to Henry VII's statute, Lambarde then cited and analyzed the

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[35] Ibid., p. 57.

[36] Ibid., pp. 66-67.

[37] Ibid., pp. 68-69 and 73-76.

statute for any possible changes. He discovered two things. First, the place where the court would sit, the process by which a case would be heard, and the judicial members that would constitute the court being in session were more clearly defined.[38] Second, he found that the statute merely clarified, and in some instances, expanded the judicial authority of the Court to include: maintenance, champartie, giving of liveries, embracerie, offences in the making of pannels, untrue returns by sheriffs, taking of money by jurors, and riots, routs, and rebellious assemblies.[39] Lambarde cautioned the reader not to assume that the statute had in any way limited the Court's jurisdiction, however. He indicated,

> those Honourable Judges are not tyed (as I said) to the prescript Paines of those Statutes: but may (as the Case shall offer to their grave Considerations) eyther alter, encrease, or otherwise qualifie any of the same.[40]

Lambarde, therefore, was refuting the notion that the Court was exceeding its jurisdiction beyond the statute. Actually, his argument was that Henry VII's statute was not intended to limit the Court's work, but rather to clarify its procedures, personnel, and expand its authority.

Finally, Lambarde concluded his discussion of the Court by attempting to reassure the common law lawyers that the

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[38] Ibid., p. 92.

[39] Ibid., p. 89.

[40] Ibid., p. 115.

Star Chamber served only to support the work of the other courts of law. He said,

> this most noble and praise-worthy Court; the beames of whose bright Justice,...doe blaze and spread themselves as farre as this Realme is long, or wide: and by the influence of whose super-eminent Authoritie, all other Courts of Law, and Justice, that wee have, are both the more surely supported, and the more evenly kept, and managed.[41]

His closing statement sounded like a man pleading with his colleagues not to upset the delicate judicial balance between the common law and the prerogative courts. This statement lends further credence to Conyers Read's observation that the author presented his material as an advocate. Lambarde's concern over the future use of the prerogative courts, particularly Star Chamber, may well have been his primary reason for undertaking the research and writing of the Archeion.

Although the author's reason for writing the Archeion was obviously important, of particular significance is the treatise's value as a document of sixteenth century intellectual history. How did Lambarde employ history to realize his objective? What were the priorities and assumptions that he brought to his work? Finally, was Lambarde an innovative contributor to legal studies? The answers to these questions should aid in the assessment of the Archeion's significance and of Lambarde's contribution to the intellectual climate of the Elizabethan period.

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[41] Ibid., p. 116.

Lambarde had been an innovator throughout his career. He had founded "The College of the Poor" and had supported the construction of a House of Correction. A Perambulation of Kent was the first county history of its kind. His manuals for minor officials within the Elizabethan criminal justice system were extremely useful. Like the endeavors that preceded it, the Archeion was also a unique contribution. It was the first treatise written examining the history of the English courts. Yet it also illustrated the fact that Lambarde was a product of his intellectual experience, because the work was one of the earliest applications of the humanist method for writing history that appeared during the exuberant phase of that movement in England.

Throughout their movement, the humanists had sought to establish a method of learning that was lucid, eloquent, and credible. Each of these characteristics translated into something more specific, however, when applied to their historical methodology. Lucidity was concerned with basic organizational techniques, the classification and division of topics in a treatise. Lambarde applied these techniques to the Archeion. For instance, after first briefly discussing the origins of laws, courts, and the king's role in the administration of justice, he then divided the courts into three categories: ecclesiastical, lay, and mixed. The ecclesiastical courts were examined summarily. The lay courts were discussed next, in the order of their frequency of use. Following the discussion of the common law courts--Queen's Bench, Exchequer, and Common Pleas--, Lambarde turned his attention to the

prerogative courts. Of particular interest, as was illustrated above, were the courts of Chancery and Star Chamber. Finally, the author concluded with an examination of Parliament's role as a law maker.

Eloquence in speaking and writing was also a goal of the humanist philosophy. In order to achieve this desired end, philological studies became an integral component in this pursuit. Although historians were concerned with an eloquent prose style, during the exuberant phase, philological techniques were concerned more with analyzing the origins and meaning of significant historical terms. Lambarde's association with Laurence Nowell made him particularly adept at tracing the origins of legal terms, because of his proficiency with Anglo-Saxon. He dealt with the etymology of important titles, among them chancellor, admiral, constable as well as the significant judicial agencies, such as court, parliament, and star chamber.

Of utmost importance was the humanist desire to employ critical standards of documentation, which made their works more credible. This concern for the credibility of sources became increasingly significant during the exuberant phase. Historians were obviously among the leading proponents for utilizing documents in their works. Once again, Lambarde's role was prominent. His combined efforts with Nowell in the publication of the Archaionomia had provided legal scholars with a useful document book. But it was Lambarde's use of a variety of sources in the Archeion that was his

most notable application of the humanist method to assure the credibility of a work.

Lambarde utilized the writings of Caesar, Cicero, Tacitus, and the Bible; authorities frequently cited in humanist works during the elitist phase. But he relied especially on the works of Bracton and Britton, men often referred to in English legal treatises, and to a lesser extent the Venerable Bede, Ranulf Glanville, Matthew Paris, Polydore Vergil, and Lorenzo Valla. Reference to these writers indicated the author's familiarity with past and recent authorities of England's court system and history. Although the writers listed above lent credibility to the work, it was Lambarde's extensive use of original documents that was most impressive. Throughout the Archeion, he quoted or paraphrased statutes, cases, or court entry books to support his contention about the origin or jurisdiction of a judicial agency. This extensive search to provide authentic and credible facts to support his hypotheses illustrated conclusively Lambarde's adoption and application of the humanist methodology for writing history.

Although the author's primary objective had been to dispel the common law lawyers' fear of the prerogative courts' jurisdiction, a more general theme pervaded the Archeion, which was the issue of authority. Defining the extent of the monarch's supremacy and the limits of his prerogative power was the fundamental question that needed answering in England during the late sixteenth and early

seventeenth centuries.[42] Lambarde approached this issue by examining the judicial institutions of England. Like most early modern and all medieval writers, he presumed that the power and ability to judge men, in the name of authority, was decreed by God, "the chiefe Justice of the World."[43] Having identified the source of all authority, Lambarde turned his attention to the original need for it. He pointed out that authority was necessary even in the beginning, when only a few families existed. "The Elder (or Father of the Family) exercised authoritie over his Meyney, and did distribute Reward and Paine amongst them after his owne discretion."[44] What was evident here and throughout the text was the author's acknowledged support for the naturalist philosophy of kingship.

The naturalist philosophy put forth the view that the monarchy was a natural institution from which laws evolved. The monarch, therefore, was the supreme authority in the state above all laws. Counter to this view was the legalist philosophy. This theory maintained that the law could place limitations on a monarch's authority. Hence, law was primary and monarchy was secondary. During much of the Elizabethan period, neither philosophy was argued to its extreme limits,

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[42] Supra., p. 81.

[43] Lambarde, op. cit., pp. 141-42.

[44] Ibid., pp. 9-10.

because the Tudors had always utilized their prerogative powers within a legal framework. These philosophies were to become particularly significant during the reigns of the early Stuart kings, however. James I adopted a strict interpretation of the naturalist theory in his bitter confrontation with Edward Coke. Coke, on the other hand, espoused the legalist philosophy.

Yet during the closing years of Elizabeth's reign, when the limits of the monarch's authority were just beginning to be debated, lawyers and parliamentarians began to side in varying degrees with one of these theories. Lambarde was a disciple of the naturalist philosophy. In the Archeion, he focused on one aspect of this debate, the historical development of common law and prerogative courts, to illustrate the authority of the monarch. Relying heavily on Britton and Bracton, Lambarde pointed out that as Vicar of God on earth, "the King ought onely to be the Judge of his people."[45] Courts developed because as the population grew wickedness increased. One person could no longer handle the suits.[46] The king, therefore, found it necessary to distribute "his Charge into sundry portions, because he alone is not sufficient to heare and determine all complaints of his people."[47]

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[45]Ibid., p. 56.

[46]Ibid., p. 11.

[47]Ibid., p. 57.

Lambarde maintained that the courts of law and equity were developed before the Norman Conquest by the Anglo-Saxon kings. Since the principal duty of the kingly office was to deliver justice to his people, all other courts were offshoots of the King's High Court. They were like "so many branches sprung out of that one Tree, or streames derived from the same Spring and Fountaine."[48] Lambarde was speaking here primarily of the common law courts. Later he indicated that, if these common law courts were unable to apply a legal remedy, the king could create additional courts, that is the prerogative courts, by exercising "his pre-eminent and royal Jurisdiction,...,which both the Ordinance of God, and Dutie of a Kingly Judge, and the common law of Nature and Reason doe afford unto him."[49]

In view of the important role that historical works played in the Elizabethan period, Lambarde's contribution was evident. The fact that the Archeion was the first treatise of its kind to trace the history of the English court system was significant enough. Yet the basis on which to assess Lambarde, as a historian, and his work, as an important part of the historical literature of the period, rested on three additional points. First, the author addressed himself to a critical issue that was being debated

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[48] Ibid., p. 18.

[49] Ibid., p. 67.

in the late Elizabethan period, the source of authority within the realm. Utilizing his historical survey of the courts, he attempted to lend support to the naturalist philosophy that the monarch possessed supreme authority in the state. Second, and closely related to the first, Lambarde vigorously defended the need for the existence of the prerogative courts. This occurred at a time when these courts were being criticized by a sizeable number of common law lawyers. Finally, the author's application of the humanist methodology for writing history was notable. Lambarde applied the organizational techniques of classifying and dividing his work into specific topics. He utilized philosophy to discover and analyze the historic origins of significant legal terms. And he employed critical standards of documentation, which enhanced the credibility of his work.

Following the completion of the Archeion, Lambarde, who was now fifty-six, married Margaret Reader, a widow, on April 13, 1592. He had established himself as an eclectic scholar, who possessed a significant understanding of the history, administration, and documents pertaining to the English legal system. Most men would have considered retiring or at least reducing their work load after having accomplished so much. Recognition of Lambarde's talents had been bestowed earlier by antiquarians, historians, and legal scholars, but now the administrators of the central government were to acknowledge their gratitude. His old friend from Lincoln's Inn Sir John Puckering, who was the Lord Keeper, appointed

him a Master of Chancery on June 22, 1592. No doubt, Lambarde's knowledge of the Court of Chancery exhibited in the Archeion led to his appointment. On May 26, 1597 he was made Master of the Rolls by the newly appointed Lord Keeper, Sir Thomas Egerton. It has been suggested that Lambarde's versatility with legal scholarship was to influence Egerton's approach to reforms in the Chancery.[50]

Lambarde's final recognition came from the Queen herself. Elizabeth desired that an index be made of the records in the Tower of London. There was no person, other than Lambarde, who could accomplish this arduous task competently and conscientiously. On January 21, 1601, the Queen named him Keeper of the Rolls in the Tower. He completed his work on the index and was granted an audience with the Queen to present her with the book entitled Pandecta Rotulorum. The meeting took place in the Queen's privy chamber at Greenwich on August 4, 1601. Lambarde's own account was that the aging Elizabeth refused to have him kneel before her during the presentation of the manuscript. She talked to him for a short time and then,

> being called away to prayer, she put the book in her bosom, having forbidden me from the first to the last to fall upon my knee before her; concluding "Farewell, good and honest Lambarde!"[51]

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[50]Jones, The Elizabethan Chancery, pp. 111-12.

[51]Nichols, Bibliotheca, I, pp. 525-26.

The author returned to his manor at Westcombe following this momentous event in his career. Two weeks later, on August 19, he died and was buried in the Greenwich Church. John Nichols, writing two hundred years after the author's death, said of him:

> His disposition was benevolent, his mind judicious and elegant, his learning solid and deep; and he devoted himself to the service of his country, in the profession and station which he filled, with unremitted zeal and labour. It is just, it is useful, to preserve the remembrance of such a man, and to assign to him his due portion of praise.[52]

Such an epitaph fittingly described William Lambarde's contribution to the intellectual tradition of England.

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[52] Ibid., p. 494.

3 FULBECKE, RIDLEY AND THE COMPARATIVE METHOD

In The Laws (357-247 B.C.), Plato wrote,

> The next step necessary is that these people should come together and choose out some members of each clan who, after a survey of the legal usages of all the clans, shall notify publicly to the tribal leaders and chiefs which of those usages please them best, and shall recommend their adoption.[1]

The comparative approach to the study of government and law is an ancient one. Not since the classical period was the interest in this method so significant to legalists as in the sixteenth century. As has been pointed out the impact of the Renaissance, the Reformation, the Reception of the Roman law, and the rise of the nation states had created an age of restatement. Central to this period was the need to redefine and clarify the issue of authority, for it had become obscure with the demise of medieval Christendom. The changes brought about by this re-examination of authority were to affect the law and the legal institutions of various European countries. One of the more important processes employed to resolve this conflict was the comparative method.

Utilization of the comparative method in legal studies was not something that had been completely dormant during

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[1]Plato, Laws, ed. R.G. Bury, (New York, 1926), I, p. 183.

the medieval period. Continental scholars had been in the habit of producing numerous commentaries or interpretations of ancient legal texts. This resulted in a preoccupation by students and scholars alike with comparative studies of the various commentaries. In England Sir John Fortescue drew comparisons between the English and French governments in his De Laudibus Legum Anglie (1471). He also differentiated between the civil and common laws. Fortescue pointed out,

> All the kinds of the law of England are now plain to you. You will be able to estimate their merits by your own wisdom, and by comparison with other laws; and when you find none in the world so excellent, you will be bound to confess that they are not only good, but as good as you could wish.[2]

Hence, the interest in the comparative method was already established and recognized both on the continent and in England before the sixteenth century.

Yet, it was not until the sixteenth century that the comparative method became such a valuable tool among scholars in general and legalists in particular. The united Christendom of the medieval period had been largely discredited by this time. The power vacuum left by the papacy was being supplemented by the development of the nation states. Kings were consolidating their power base and centralizing their authority within their kingdoms. In order to create a cohesive state effectively, monarchs were

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[2]Fortescue, De Laudibus, p. 41.

relying more on the positive laws of their individual kingdoms rather than on the natural law, that had limited the authority of their medieval predecessors.[3] Moreover, the Reformation had enabled the territorial rulers to gain the allegiance of the people in political and legal areas formerly controlled by the church.[4] In Protestant countries, the papal authority was repudiated. Church and state were being united at the national level.

The process by which sixteenth-century monarchs and legalists put greater emphasis on positive law rather than natural law was part of the Reception of the Roman law. During the medieval period, natural law was the premier type of law, because it was considered to be of divine origin. It applied to all men. Other types of medieval law consisted of a mixture from three legal systems: Roman, canon, and Germanic, combined with countless enactments indigenous to the various feudal principalities. But throughout the fifteenth century, monarchs across Europe expressed an interest in establishing a single legal system as they moved toward centralizing their kingdoms. They relied considerably on Bartolus de Sassoferrato's work. He had endeavored to synthesize the canon law and Justinian's Institutes into one ideal system of civil law. Although the natural law was not discarded, nevertheless, by the sixteenth

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[3]Supra., pp. 40-42.

[4]Supra., pp. 61-69.

century the civil law of Rome had superseded the other legal systems in importance. It had become a significant division of the universal law of Christian Europe.

The rise of the nation states, the Reformation, and the Reception of the Roman law were important factors in fostering and enhancing the position of the civil law. It was the humanists of the Renaissance, however, who were to examine the utility of this legal system. Actually, they were critical of Bartolus and his followers for their failure to employ historical studies and philological techniques. Lawyers of the humanist movement researched the origins of laws and legal institutions, while philologists made distinctions between Roman and medieval law. The emphasis placed on the study of history, along with comparative analyses, was to lead to "a concept of comparative jurisprudence that was to have great significance" during the second half of the sixteenth century.[5]

It was the French humanists who made the most important contributions to comparative jurisprudence. During the medieval period France was governed by at least four legal systems: pays de droit ecrit, pays de coutume, canon, and municipal laws. Throughout the high middle ages the authority of the Roman law increased in France. Acceptance of this law was undermined, however, with Charles VII's order to compile and to establish a single legal system for the

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[5]Gilbert, Renaissance Concepts, p. 80.

country.[6] This order, along with the work of the Bartolists, prevented "the Roman law from achieving the status of a common law for France."[7]

The dualism of the French law, that is the Roman law of Justinian and the indigenous laws of France, prompted comparative historical studies. One of the early proponents for utilizing history in the reform of the law was Francois Baudouin. In his De institutione historiae universae (1561), he argued that the study of history and jurisprudence should be fused into a single volume.[8] Six years later, Francois Hotman was suggesting in his Antitribonianus (1567) that, in addition to an historical approach, a comparative method should be employed in the study of law.[9] What was being discovered in Baudouin and Hotman's research was that the Roman law was often not applicable to the French experience. Since Roman law had changed with the circumstances of Roman history, these French legalists were beginning to question and to reject the common assumption that the principles of Roman law should be accepted automatically over the customary law of France.

The foremost French theorist of the comparative method during this period was Jean Bodin. Trained in the humanist

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[6] Supra., p. 75.

[7] Franklin, Jean Bodin, p. 37.

[8] Ibid., p. 46.

[9] Ibid., p. 58.

tradition at the Law School of Toulouse, he addressed himself to this issue in two of his works: Juris universi distributio (ca. 1559) and in the preface to the Methodus (1566). In the Juris universi distributio, he argued that the continental legalists had failed to develop a system of law, because they had relied too much upon the Roman civil law.[10] The civil law was a legal system of a particular state, Bodin pointed out. Since Rome had a history unique unto itself, the development of its law would reflect the anomalies of that history. Therefore, the Roman civil law could not be taken in its totality as a basis for a new legal system. Bodin suggested an alternative approach, however. Legalists should compile the public law, private law, legislation, edicts, and customs of the famous commonwealths.[11] Once collected and compared, the best precepts could be arranged under sub-headings. Such a corpus would then form the basis of a new legal system.

Having based his system of comparative jurisprudence on the study of universal history, Jean Bodin was recognized as the leading advocate of the comparative method. His works were read by intellectuals across Europe. In England his comparative method was to be utilized by one group of scholars

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[10]Jean Bodin, Juris universi distributio, in Oeuvres Philosophiques de Jean Bodin, ed. Pierre Mesnand, (Paris, 1951), V, p. 71.

[11]Ibid., pp. 72-73.

in particular, the civilians. These men were educated in the Roman civil law, either at a continental university or at Oxford or Cambridge.

The English civilians were employed by the government in a variety of circumstances. Since the nation states on the continent were adopting many of the precepts of the civil law, English monarchs utilized the civilians' expertise in this law as permanent ambassadors, on diplomatic missions, and in the field of international law. Moreover, with the increase in international trade, the English Court of Admiralty practised civil law. There was also a need for civilians in the English prerogative courts. These courts were created to handle cases where the common law lacked an adequate and effective remedy. As a result, civil law procedures were used. Civilians were invaluable in the Star Chamber, Court of Chancery, Court of Requests, the Council of Wales, and the Council in the North, though they did not dominate these courts completely. Lawyers trained in common law were also employed in them. Finally, when Henry VIII made his break with Rome, the canon law ceased to be practised in the ecclesiastical courts.[12] In fact, it was no longer taught at the English universities. Because of the close affinity between the canon and civil laws, the civilians became advocates and judges in the English ecclesiastical courts. They also served as chancellors to the English bishops.

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[12]See Statutes of the Realm: 24 Henry VIII, c. 12.

Toward the end of the sixteenth century, the civilians were coming under increased criticism from the common lawyers. There were at least four reasons for the rise of this opposition. First, the humanist revolution in the writing of history had fostered a rather biased view of England's national heritage. Common lawyers presumed that their law was immemorial and that the civil law really had no place in their legal system. This insular attitude was to receive "its classic formulation soon after 1600 from Sir Edward Coke."[13]

Second, there was a concern among common lawyers over the number of civilians employed in the prerogative courts.[14] Traditionally, both civilians and common lawyers were used in these courts. During the first forty years of Elizabeth's reign, the Queen had appointed twenty civilians as opposed to only two common lawyers to fill mastership vacancies in the Court of Chancery.[15] In the Court of Requests, Elizabeth raised the number of masters from two to four. Prior to this change, masterships were awarded to one civilian and one common lawyer. But after the increase in the number of

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[13]J.G.A. Pocock, The Ancient Constitution and the Feudal Law, (London, 1957), p. 31.

[14]Brian Levack has discovered some rather interesting statistics regarding the civilians. Between 1603-1641 there were approximately 200 civilians in England compared to about 2,000 common lawyers. Of that 200, only forty-one monopolized the practise of the civil law in the courts, and then only twelve to fifteen dominated the practise at a time. See Levack, The Civil Lawyers, pp. 3 and 21-22.

[15]Ibid., p. 62.

positions, the notion of equal representation broke down. Civilians controlled a majority. When the Queen died, three of the four masterships were held by civilians.[16]

Third, the common lawyers had another reason for distrusting the civilians when James I ascended to the English throne. James had lived most of his life in Scotland, a country that utilized the civil law. As a result, he advocated retaining the use of the civil law in England over the protestations of the common lawyers. Because of the King's favorable view toward the civilians, they, in turn, were presumed to support his political philosophy. James's divine right theory of kingship was considered by many common lawyers to be a threat to the basic political and legal philosophy governing England.[17] This only increased the anomosity toward the civilians.

Finally, as judges in the ecclesiastical courts, the civilians enforced the King's policy of maintaining a strict religious orthodoxy, especially against the Puritans. Naturally, the Puritans opposed the civilians on this issue. And as they gradually gained representation in the House of Commons, they joined the common lawyers in voicing their antagonism toward the civilians.

The civilians were threatened by both the misinformed common lawyers and by the intolerant Puritans. Their education, however, had provided them with a better understanding

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[16]Ibid., p. 61.

[17]Supra., pp. 19-24.

of the historic evolution of the law than that possessed by most common law lawyers. Not only had they studied the history of Rome and its laws, but they also knew a good deal about the development of the English common law. This was essential in order for them to function effectively in the prerogative courts. With their livelihoods at stake, some of them wrote treatises defending the use of the civil law in England. Their knowledge of both legal systems enabled them to make comparisons in their treatises. Two civilians, who employed the comparative method, were William Fulbecke and Thomas Ridley. Both attempted in their works to place the use of the civil law in its proper perspective.

Except for a few biographical facts, William Fulbecke's life is something of a mystery. He was born in the city of Lincoln, where his father, Thomas, was mayor. When William was seventeen, he matriculated at Oxford and graduated on October 25, 1581, from Christ Church. Fulbecke remained at Oxford and was associated with Gloucester Hall, where he received his master's degree in May 1584.

The following November, William, who was now twenty-four, journeyed to London and entered Staple Inn, one of the Chancery Inns that was associated with Gray's Inn.[18] Seven years later, having completed his studies at Gray's Inn,

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[18]Before attending one of the four Inns of Court, a law student usually spent some time at one of the Chancery Inns. These junior Inns had specific associations with one of the four senior Inns: New and Strand with Middle Temple; Cliffords, Lyons, and Clements with Inner Temple; Thavies and Furnivals with Lincoln's; and Staple and Barnards with Gray's.

Fulbecke was called to the bar. It is believed that he then went to the continent, where the degree of doctor of civil law was conferred on him, though Anthony Wood indicated that "at what place, or by whom, I cannot yet find."[19] Usually, when an English civilian received his doctorate in civil law at one of the continental universities, he was subsequently incorporated at either Oxford or Cambridge. This was not the case with Fulbecke. Thus, there is some doubt whether he actually possessed the degree. It has also been suggested by Bishop Kennet, that Fulbecke took orders on May 25, 1603, and became vicar of Waldershere in Kent.[20] Finally, scholars are generally of the opinion that Fulbecke died in 1603.

Although Fulbecke spent most of his adult life preparing himself for various professional careers: as a common lawyers, as a civilian, and then as a vicar, he was also a prolific writer. Within three years, he had published five books. His best known work, A Direction or Preparation to the Study of the Law (1600), was a method book for the beginning common law student.[21] Two other works were An Historical Collection (1601) and The Pandectes of the Law

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[19]Wood, Athenae, I, pp. 726-27.

[20]Ibid.

[21]The significance of this work will be discussed in chapter five.

of Nations (1602).[22] Neither of these works was widely read, however. Yet the subject matter of these treatises, one dealing with ancient Roman history and the other examining international law, support the contention that Fulbecke probably had studied the civil law, even if there was not adequate evidence to support the view that he had received the doctorate. Englishmen were simply not in the habit of writing books on both of these topics without training as civilians. Another clue to his status as a civilian was the kind of treatise, cited in A Direction, that Fulbecke felt a law student should consult.[23]

Fulbecke has been viewed as "a neglected, but ingenious writer."[24] Part of his ingenuity must be ascribed to his two-volume work, A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of this Realme of England. These volumes were published in 1601 and 1602, and they lend further credence to Fulbecke's education in the civil law. Given his probable professional training, there were few people better suited for the task that he had set for himself.

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[22]The complete titles of these works are: An Historical Collection of the Continual Factions, Tumults, and Massacres of the Romans and Italians during the space of one hundred and twentie yeares next before the Peaceable Empire of Augustus Caesar,...beginning where the Historie of T. Livius doth end, and ending where Cornelius Tacitus doth begin; and The Pandectes of the Law of Nations, contayning severall discourses of the questions...of law, wherein the nations of the world doe consent and accord.

[23]See chapter four of William Fulbecke, A Direction or Preparation to the Study of the Law, (London, 1600).

[24]J.G. Marvin, Legal Bibliography, (Philadelphia, 1847), p. 325.

Fulbecke's purpose, as stated in the extended title to his work, was to show "wherein the agreement and disagreement of these three Lawes, and the causes and reasons of the said agreement and disagreement, are opened and discussed."[25] In his Epistle dedicatory to John Whitgift, the Archbishop of Canterbury, Fulbecke pointed out his beliefe that "the common lawe cannot otherwise be divided from these twaine then the flower from the roote and stalke."[26] Yet, in his introduction to the reader he conceded,

> It seemed straunge unto me, that these three lawes, should not as the three Graces have their hands linked together, and their lookes directly fixed the one upon the other, but like the two faces of Janus, the one should be turned from the other, & should never looke toward, or upon the other: and weighing with my selfe, that these lawes are the sinewes of a state, the Sciences of government, & the artes of a commonweale, I have seriously & often wished that some joynt discourse might be made of these three excellent Lawes.[27]

Having recognized the growing discontent among the practioners of the common, civil, and canon laws, Fulbecke attempted to illustrate the similarities and differences.

Like most scholars educated in the humanist tradition, Fulbecke respected the intellectual contributions of the ancients of Greece and Rome. Since the humanists were in the

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[25]William Fulbecke, A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of this Realme of England, (London, 1601), title page.

[26]Ibid., introduction to the reader, p. ii.

[27]Ibid., p. iii.

habit of copying the classical style and methodology, it was not surprising to find Fulbecke expressing his reverence for them by adopting and employing the Socratic dialogue in his A Parallele or Conference.[28] Just as Plato's dialogues were utilized as a vehicle for explaining a philosophy, Fulbecke, found the form of dialogues particularly suited to his needs.

The settling for the dialogues was the house of Nomomathes, a wealthy Englishman, who was "a great favourer of learning, and desireous by all meanes to increase & advance it."[29] Fulbecke likened Nomomathes to Cosimo and Lorenzo de Medici of Florence, who were patrons of such well known scholars as Marsilio Ficino and Giovanni Pico della Mirandola. Nomomathes was particularly interested in the law. As a result, he was the patron of three jurists who resided at his home. They were Canonologus, a canon lawyer; Codicgnostes, a doctor of the civil law; and Anglonomophylax, a barrister of the English common law.

Prior to commencing the dialogues, the author provided the reader with his interpretation of the origins of these three laws. "The Canon lawe is more auncient,..., and of greater continuance," he said.[30] From Christ and his

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[28]Fulbecke's treatise was published in two books. The first published in 1601 contained fifteen dialogues. The second appeared to be an addendum to the first; it contained seven dialogues and was published separately but under the same title in 1602.

[29]Fulbecke, op. cit., introduction to the dialogues, p. ii.

[30]Ibid., introduction to the reader, p. vii.

apostles down through the bishops of the church, canon law has been presented to and approved of by emperors and kings. Fulbecke cited Justinian, Constantine, Henry VIII, and even Elizabeth as monarchs accepting the authority of the canon law. The origins of the civil law, he pointed out, were to be found in ancient Rome, because this law was actually the law of Rome. Finally, the common law was identified as the law indigenous to England. Fulbecke indicated that the common law had been changed through conquest, but that the alterations occurred by consent through reason rather than from the command of the new sovereign.[31]

Fulbecke's interpretation of the history of the common law, his use of the law of reason, and his view of sovereignty are of interest here. Seventy years earlier, Thomas Starkey had espoused the view that William the Conqueror brought the common law to England during his invasion.[32] English scholars, educated during the first half of the century, either accepted Starkey's interpretation or at least conceded that the common law had been influenced by some continental legal principles. During the second half of the century, as the exuberant phase of the humanist movement fostered a more nationalistic and at times xenophobic interpretation of the past, scholars began to write about the homogeneity of the common law.

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[31] Ibid., p. ix.

[32] Starkey, A Dialogue, p. 110.

Edward Coke epitomized this view.[33] Fulbecke, however, offered a more moderate opinion in this debate. Although he recognized that the Conqueror added some of the customs of Normandy to the common law, he maintained, 'our greatest law makers were Ina, Alfred, Edmund, Edgar, Canute, and Edward the Confessor.'[34] To him the common law had already been established during the Anglo-Saxon period.

Of particular interest was the author's emphasis on the law of reason and its relationship to the common law. Throughout the sixteenth century, the law of reason had been gradually replacing the medieval notion of the law of nature. The law of nature was influenced by Christian principles and was considered a higher authority. The law of reason, on the other hand, was influenced by the humanist movement. Like the law of nature, it was considered a law of a higher authority, but it possessed a more secular quality. Curiously, Fulbecke appeared to equate the common law with the law of reason, for he gave the common law an independent status that even the sovereign could not transgress.

The final point gleaned from the author's prefatory remarks was his view of sovereignty. Sixteenth-century English political theorists from Starkey to Sir Thomas Smith had espoused the view that the sovereign's authority

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[33] Supra., pp. 18-25.

[34] Fulbecke, op. cit., p. ix.

was a shared responsibility with the people.[35] Smith even discussed parliament's role as did another Elizabethan theorist, Richard Hooker. Increasingly, it was assumed during the Elizabethan period that parliament was the agency that prevented arbitrary power from resting with the Crown. Fulbecke, however, avoided all mention of parliament's role. Rather he considered the common law, and its proximity to the law of reason, as being the essential authority that prevented the Crown from establishing unlimited prerogative.

What Fulbecke appeared to be doing in his introduction of these controversial issues was suggesting a need for compromise. No doubt, he realized the issue of authority was a critical problem that would probably escalate further upon the death of the Queen. His comments were an idealistic attempt to please the various groups concerned. He took political ideas from men of such opposing views as Sir John Fortescue and Jean Bodin and integrated them into a theory of authority.[36] He attempted to check the power of the monarch further, not by emphasizing parliament's role, but rather by giving the common law an independent status and associating it with the law of reason. Finally, he resolved the debate over the origins of the common law by

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[35]Supra., pp. 47-48.

[36]Fortescue stressed that the king was under the law. See his De Laudibus, p. 25. Bodin, however, argued that the sovereign was answerable only to God. See his Method, pp. 201 and 282-90.

offering a moderate opinion. Overwhelmingly, the mood of compromise, created in the introduction, was carried over into the dialogues.

Actually, Fulbecke's dialogues were both a success and a failure. They were a success, because he did manage to show that these legal systems, although unrelated in origin, possessed many similarities. The dialogues devoted to explaining contracts, tenancy, legacies, theft and burglary, lending, bailment, wrongs, trespasses, unlawful assemblies, and debts indicated a general agreement on the part of Codicgnostes and Anglonomophylax. In fact, the only noticeable differences found throughout the dialogues were in making distinctions of homicide and manslaughter and in the severity of sentencing.[37]

It should be noted that Canonologus played only a minor role throughout the dialogues. This was probably a direct result of the fact that the project to codify English ecclesiastical law had failed and that students were discouraged from studying the canon law, another example, no doubt, of Fulbecke's willingness to prevent discord.

The author did display a thorough familiarity with the sources. In his discussion of the civil law, Fulbecke either quoted or referred the reader to Aristotle, Cicero, Horace, Justinian, Plato, Plutarch, Polybius, and Vergil, along with

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[37]The civil law recognized two categories: homicide and manslaughter. The common law had three categories: homicide, murder, and manslaughter. In regard to the severity of sentencing, the civil law tended to be more extreme, banishment and execution were frequent forms of punishment.

contemporary writers like Bartolus, Bodin, and Gentili. When he explained the common law, the author relied frequently on statutes and cases. But he also cited the works of Bracton, Britton, Coke, Finch, Fitzherbert, Glanville, Littleton, and Staunford.

Fulbecke had employed a method that complemented his subject matter and made it an instructive work. Yet, the book was in one sense a failure. Its failure was not the fault of the author. Time was the culprit more than anything else. Although his work dealt with a significant issue, the use of the civil law, Fulbecke composed and published his book during a period of compromise and restraint. Englishmen knew their Queen would not live much longer. Instead of pushing the critical issue about the use of the civil law, many common lawyers preferred to wait, out of respect for her and the House of Tudor, and confront the new monarch with their grievances. Fulbecke was party to this view and his work reflected this mood. Certainly, Nomomathes's epilogue expressed that spirit.

> I praie you therefore let us still converse together under one roofe... that if God doe still vouchsafe the Moone-diall of this darksome life, with the reflexe of his intellectual illumined influence, this triple-wheeled clocke may still be kept in motion, by the divine agilitie of his Law-favouring spirit.[38]

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[38]William Fulbecke, The Second Part of the Parallele, or Conference of the Civill Law, the Canon Law, and the Common Law of this Realme of England, (London, 1602), p. 74.

But the conversational form of the dialogues encouraged participation that could lead to a controversial debate. This was Plato's reason for using this method, to show conflict within society. Moreover, the dramatic effect gained from this encounter increased the utility of the technique. Given the mood of the common law lawyers and the Puritans during the first half of the seventeenth century, Fulbecke, like Plato, could have displayed more dramatically the seriousness of the conflict. No doubt had he lived to publish or republish A Parallele or Conference a few years later, when Dr. Cowell's Interpreter raised such a controversy, Fulbecke's work could have had a more significant impact. But he was writing during a period of compromise and restraint. As a result, Fulbecke's treatise tended to present the subject in a rather superficial and at times a deceptively harmonious manner.

The career of Sir Thomas Ridley differed in one interesting respect from the other Elizabethan legalists discussed in this study: he composed only one treatise, A View of the Civile and Ecclesiastical Law (1607). The work was significant not only as an apologia for the practise of the civil and ecclesiastical laws in England, but also because it was published in the same year as Dr. John Cowell's Interpreter. Cowell's work created an almost instant fervor among common law lawyers and had to be supressed by royal proclamation.

Ridley's book, on the other hand, met with moderate success.[39]

Thomas Ridley was born in Ely around 1550. Little is known of his life, as was the case with Fulbecke. Ridley was the second son of Thomas Ridley of Brewling, Shropshire. Young Thomas entered Eton College in 1565. While at Eton, William Day, the provost of the College and the future Bishop of Winchester, recognized the young man's potential and offered to become his patron. Through Day's assistance, Ridley was able to continue his studies at King's College, Cambridge, where he graduated B.A. in 1570. Thomas received his M.A. four years later and then commenced, with Day's encouragement, the study of the civil law. Using his influence as provost, Day had Ridley appointed headmaster at Eton, while he continued his legal studies. In 1583, Thomas was awarded the doctorate in civil law from Cambridge.

During the early 1580s, it was not unfashionable to hold a doctorate in the civil law, as was the case during the first half of the seventeenth century. In addition to the degree, Ridley also had the good fortune to cultivate friendships within the ecclesiastical community. This was invaluable, for it was through the bishops that a young civilian usually received his first professional position. Day was certainly an ardent supporter until his death in

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[39] A View of the Civile and Ecclesiastical Law appeared in four editions during the seventeenth century. First in London, 1607; the second in Oxford, 1634; the third in Oxford, 1676; and the fourth in London, 1684.

1596. Then George Abbot, the future Archbishop of Canterbury, began to promote Ridley's advancement.

Ridley married Margaret Boleyn, the daughter of William, who was believed to be a distant relative of the family of Anne Boleyn. They had three children: Anne, Elizabeth, and Thomas. In 1585 Ridley received a warrant from the Archbishop of Canterbury for admission to the Doctors' Commons.[40] He was to gain full admission in 1590. Throughout the 1590s Thomas held positions that befitted his rank as a doctor of the civil law. He became a master in the Court of Chancery and chancellor to the Bishop of Winchester. Much later, he was to become vicar-general to the Archbishop of Canterbury, George Abbot. He was also knighted at Greenwich on June 24, 1619 for his service to the Crown. Finally, Ridley died on January 23, 1628, the same year that Charles I acquiesed to the Petition of Right.[41] He was buried at St. Benet's Church in London, the parish in which the house of the Doctors' Commons was located.

Like Fulbecke's treatise, Ridley's work was designed to show the common law lawyers how needless their protestations were concerning the use of the civil and canon laws. But

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[40]The Doctors' Commons was a professional society formed by and for the civilians. It promoted the education of young civilians in the art of pleading cases in the courts of law. It also assisted their members in finding suitable employment with the prerogative courts, the government, or the ecclesiastical community.

[41]The Petition of Right represented the point at which Parliament began to curb the prerogative authority of the King. That authority, in many ways, had protected the positions of the English civilians.

unlike Fulbecke, his treatise, A View of the Civile and Ecclesiastical Law, compared only the use of these two laws. It was assumed that the reader possessed a reasonable command of the common law. Ridley stated his specific purpose for writing his book in the Epistle dedicatory to King James.

> I have thought good,...,to set out the whole sume of both the Lawes to the view of the people, that they may see there is more worth in those for whom I speake, than was by many conceived to be: so that the profession of the Ecclesiasticall and Civile Law may appeare to the world, neither to be idle nor unfit for the State; so far as it hath pleased the Royall predecessors of your Highnesse to give entertainment unto it, and your Maiestie your selfe to admit of it.[42]

He also implored the King to protect the use of these laws in England, not only for the good of the civilians' professional status, but also for improving the administration of justice in the commonwealth.

The work was more than an apologia, however. It was an instructive manual, written in a style similar to a command paper or government report. Ridley first described the sources of the civil and canon laws. Next, he discussed how these laws had been utilized in England. The author then explained how the administration of the civil and canon laws was impeded by the common law lawyers. Finally, suggestions were offered for improving the use of these laws in England.

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[42]Thomas Ridley, A View of the Civile and Ecclesiastical Law, (London, 1607), p. 2.

The author's premise was,

> That every well order (ed) Commonwealth stands on two parts principally, the publicke part, which consisteth of the Prince and people, and the Ecclesiasticall part, which standeth in Sacris & Sacerdotibus ...neither can the one of these be wanting, but the other will bee ruinated and brought to defolation.[43]

Thus, in order to assure an orderly and reasonably governed commonwealth, the monarch was dependent upon laws that ruled the outward man and those that provided instruction for the inward man. The civil and canon laws, Ridley argued, completely provided this need for most nations with the exception of England.

Although these two legal systems were not utilized as frequently as on the continent, they did serve, nonetheless, important functions in the administration of justice in England. The civil law was employed in cases of equity. Ridley pointed out that the English "so much admire the equitie thereof, that they interpret their owne lawes thereby."[44] In particular, the Court of Chancery and the Court of Requests were dependent on the civil law.

Ridley readily admitted that the canon law was highly suspect throughout the realm, for it contained "many grosse and superstitious matters used in the time of Papistrie, as of the Masse, and such other like triumperie." But he went

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[43] Ibid., pp. 224-25.

[44] Ibid., p. 3.

on to point out that "there are in it beside, many things of great wisdome, and even those matters of superstition themselves, being in a generalitie, well applied to the true service of God."[45] The author cited the composition of parliament and reminded the reader of the utility of its ecclesiastical members. He went on to stress the need to retain another ecclesiastical authority, the use of the canon law, for this authority was as important for maintaining the dignity of the Crown as was the temporal power.

In spite of the wisdom, variety, and utility found in the civil and canon laws, Ridley was deeply concerned about the future of these two legal systems in England. "The Professors thereof," he said, "have very little use here within this Realme."[46] Besides Oxford and Cambridge, where these laws were practised with a larger degree of freedom, the civil and canon laws had only limited jurisdiction. In addition to equity cases, he said, the use of the civil law was divided into two categories. The ordinary cases dealt with maritime law, commerce, and piracy. The extra-ordinary cases involved foreign treaties, martial causes, and challenges of honor. The canon law, on the other hand, was employed in areas involving wills, legacies, and tithes.

Even though the jurisdiction of the civil and canon laws were limited, the common lawyers attempted to curb

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[45] Ibid., p. 66.

[46] Ibid., p. 78.

their use. Praemunire and prohibitions were the means often employed. Praemunire was designed to prevent cases from being appealed above the archbishop of Canterbury's court or outside England. Two statutes had been addressed to this problem during the fourteenth century.[47] Originally, it was an attempt to curb appealing cases to Rome. During the early seventeenth century, however, praemunire was utilized to stop proceedings in the Court of High Commission. High Commission was the court of first instance for the administration of the ecclesiastical jurisdiction of the Crown. It was also a court of appeal for other ecclesiastical courts. The writ of prohibition had existed from hearing cases where the law court had proper jurisdiction.[48]

Finally, Fidley concluded with some recommendations for retaining the use of the civil and canon laws for the benefit of the commonwealth. Actually, he was requesting that the common law lawyers restore those jurisdictions that had been curtailed through praemunire and prohibitions. In matters of equity, Ridley argued that the civilians "might seeme best able for their skill in these tytles (of which no other law hath the like) to assist the Lord

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[47]See Statutes of the Realm: 27 Edward III, c. 1 and 16 Richard II, c. 5.

[48]For an example of the use of the writ or prohibition in the seventeenth century, supra., p. 24.

Chancellor in matters of conscience."[49] Also the use of the civilians in international law, commerce, and admiralty should be retained, since the common law lacked a proper remedy for dealing with such cases.

The subjects of the realm would also benefit from the retention of the ecclesiastical law. This law, he maintained, would protect people against the penalties of illegitimacy and from executors absconding with benefits from wills. It would also safeguard rightful inheritances, legacies, and bequests. These were areas in which the common law had been noticeably weak. Holdsworth pointed out that Ridley had proposed "some very necessary reforms in the law of executors and intestate succession."[50]

Ridley concluded his study of the civil and canon law by indicating his reverence for the common law. He pointed out that the purpose of his treatise was not "to derogate from the credit of that Law, under which I was borne," since he revered it "as a necessarie Law for this state." Yet he was saddened "to see two such Noble Sciences as the Civille and Ecclesiasticall law are so to be disgraced."[51] He maintained that both were beneficial to the administration of justice in the commonwealth. And he believed that their absence would

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[49]Ridley, op. cit., p. 228.

[50]Holdsworth, A History, V, p. 13.

[51]Ridley, op. cit., p. 229.

weaken the state by depriving it of the wisdom of the civilians.

Like most sixteenth-century civilians educated in England, Ridley not only displayed a thorough understanding of the civil law and its sources, but he also possessed an excellent command of the common law and its primary materials. In his treatise, he explained the contents of the four books that constituted the civil law: Digest, Code, Institutes, and Feuds. He also described the Decrees and Decretals, the two principal parts of the canon law. Throughout his work, Ridley cited English statutes and cases from Plowden's Reports to bolster his defense of the civil and canon laws. And he enhanced his arguments further with his utilization of such authorities as Glanville and Bracton. Finally, the author's humanist education at Cambridge was also evident in his use of Aristotle, Cicero, Herodotus, Homer, Pliny, and Plutarch. References to more recent authorities, such as Baldus, Bartolus, Bodin, and Guicciardini were also significant.

Earlier, it was pointed out that Ridley's work was important, because it was published in the same year as Dr. Cowell's Interpreter. John Cowell was Regius Professor of Civil Law at Cambridge. In 1607 he published the Interpreter, a glossary of legal terms that encompassed the civil, ecclesiastical, and common laws. No doubt, he was attempting to mediate between the civil and common law factions as Fulbecke and Ridley had done. In his work,

however, he defined the terms king, parliament, prerogative, and subsidy in a manner that supported and enhanced the absolutist political claims of King James. Parliamentarians were incensed by Cowell's royalist interpretations and demanded that he be punished. The King did not accede to their requests; however, he did have the book suppressed by royal proclamation on March 25, 1610.[52]

Cowell's confrontation with the parliamentarians is usually cited to illustrate the rivalry between the civilians and the common law lawyers. Unfortunately, this episode has been an exaggeration, a misrepresentation of the approach that many members of the civilian community employed to resolve their conflict with the common law lawyers. As Chrimes pointed out, Cowell "fell a victim to his own honest but impolitic zeal for definition."[53] Unlike Cowell, who had been a scholar all of his life, most civilians were in the employ of the central government or the church hierarchy. As a result, they were very conscious of the political climate and the implications that could be drawn from their treatises. They realized that they had to defend themselves against the exaggerated protestations of the common law lawyers and the vitriolic attacks of the

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[52]An excellent study of the controversy surrounding Dr. Cowell is found in S.B. Chrimes, "The Constitutional Ideas of Dr. John Cowell," English Historical Review, LXIV, (1949), pp. 461-83.

[53]Ibid., p. 482.

Puritans. But the politically astute civilians had used a degree of discretion and restraint in their defense of their legal system.

The treatises of William Fulbecke and Sir Thomas Ridley represented this approach. Both had addressed themselves to the continued use of the civil and canon laws in England. This issue was a significant part of the larger question that needed answering during this period, that is, a clarification of the issue of where authority rested in the realm. By utilizing the comparative method, Fulbecke and Ridley attempted to resolve the issue, at least, as it pertained to the civil and canon laws. Through their compromising techniques and emphasis on restraint, they may have gained a modicum of success for the civilians in England.

4 GENTILI AND THE DEVELOPMENT OF INTERNATIONAL LAW

While he was exiled in Paris, Hugo Grotius published De Jure Belli ac Pacis Libri Tres (1625). This work helped to establish international law as a new branch of juristic study. "Up to the present time," Grotius argued, "no one has treated it in a comprehensive and systematic manner."[1] Although the concept for such a corpus of law had been recognized during the medieval period, the old principles had become largely discredited due to the new ideas emanating from the Renaissance and the Reformation and from the impact of the rise of the nation states and the voyages of discovery. Grotius systematized the principles governing international law by synthesizing the philosophies expressed in natural law, divine law, and established custom. The result was that his theory "won universal acceptance."[2] In 1661 the first chair of international law was created at the University of Heidelberg. Until the second half of the nineteenth century, Grotius was considered the undisputed father of international law.

The Reformation, more than any other event, provided the need for a re-evaluation of international law. Disputes

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[1]Hugo Grotius, De Jure Belli ac Pacis Libri Tres, tr. Francis W. Kelsey, (Indianapolis, 1925), p. 9.

[2]Holdsworth, A History, V, p. 56.

over religious ideology were often the root cause of many wars during this period. In fact, Grotius had been imprisoned in his native Holland for supporting religious toleration. He later escaped into France where he wrote and published his famous treatise. The author's purpose was to explain that law functions even in time of war. He also defined the specific rights and duties of nations not only in war but also in peace. And he distinguished just wars from unjust wars.

Two distinct achievements by Grotius in the field of international law have been cited by modern scholars. Garrett Mattingly pointed out that Grotius was "the first person to see, or to make it clear that he saw,...the heterogeneous, pluralistic international society of western Europe. That was what the future was going to be like."[3] The old authorities, the universal empire and the universal church, had diminished in power. Henceforth, the nation states of Europe would be free, equal, and have no temporal or spiritual overlord. Concurring with Mattingly, but emphasizing a different point, was Charl Friedrich's estimation that "the decisive achievement of Grotius was to separate natural law from its Christian and theological basis as it

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[3]Garrett Mattingly, "International Diplomacy and International Law," in The New Cambridge Modern History, III, The Counter-Reformation and Price Revolution, (Cambridge, 1968), pp. 169-70.

had been understood in the Middle Ages."[4] Grotius maintained that although natural law conformed to divine law, it existed independently from revelation. Natural law was the rule of right reason established by God. It was through this law that man learned to distinguish just from unjust acts. But neither the Bible nor divine laws were necessary for understanding it. By separating natural law from its religious bonds, Grotius offered a secular interpretation for the freedom and equality of man. This view was extended and applied to the individual nation states, where the absence of a superior power was emphasized.[5]

Although he claimed originality in his treatise, Grotius offered no new rules. The elements of international law had already been formulated by his predecessors. While at the University of Leyden, Hugo was influenced by the humanist tradition, and as a result, classical writers such as Aristotle, Cicero, Homer, Josephus, Justin, Livy, Tacitus, and Thucydides were used extensively in his work as were the Corpus Juris Civilis and the Corpus Juris Canonici. Thomas Aquinas, perhaps the leading medieval advocate of international law, was frequently cited. But Grotius's more recent predecessors were of particular importance to him,

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[4]Carl J. Friedrich, The Philosophy of Law in Historical Perspective, (Chicago, 1958), p. 65.

[5]For a more complete interpretation of Grotius's conceptualization of natural law see James Brown Scott's introduction to Grotius, op. cit., pp. xxx-xxxii.

for they had also been intimately affected by events of the sixteenth century. Among these scholars were the Spaniards Franciscus de Victoria, Balthazar de Ayala, and Francisco Suarez, and the Italians Pierino Belli and Alberico Gentili.

Notwithstanding his Italian birth and education, Alberico Gentili deserves recognition in the annals of English legal thought. He spent most of his adult life in Elizabethan England, and his career as a legalist was certainly affected by his experiences there. Grotius acknowledged his debt to Gentili. He had read two of his works, De Jure Belli Libri Tres and Advocatio Hispanica, while he was in prison.[6] But it was not until the nineteenth century that Gentili's contribution to international law was fittingly recognized. In an inaugural lecture delivered at All Souls College on November 7, 1874, Thomas Erskine Holland said,

> I am by no means concerned to place Gentilis on a level with his undeniably greater follower; or to say that his writings do not exhibit, in some degree, the faults with which they have been charged. My object has been merely to call attention to a much forgotten reputation; and to remind you that the first step towards making International Law what it is, was taken, not by Grotius, but by the Perugian refugee, the adopted son of Oxford, Alberticus Gentilis.[7]

Since that lecture, Gentili's significant contributions to international law have been examined and recognized by

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[6]Ibid., p. 22.

[7]Thomas Erskine Holland, An Inaugural Lecture on Albericus Gentilis, (London, 1874), p. 35.

other scholars.[8] And Hugo Grotius no longer held the undisputed title as the father of international law.

Alberico Gentili was born on January 14, 1552, at San Genesio. He was the eldest of Matteo and Lucrezia's seven children. Members of the Gentili family had long distinguished themselves in law and medicine. Matteo was a physician in the town. Alberico chose to prepare for a career in the law. He attended the University of Perugia, one of the foremost law schools in Italy, and on September 22, 1572, he attained the degree of doctor of civil law. Part of the University's reputation for excellence in this area was due to the work of Bartolus de Sassoferrato and Baldus de Ubaldis, both former faculty members and both leaders of the Post-Glossator School.[9] Unfortunately, training in the mos italicus precluded Gentili from gaining an appreciation for the significant contributions of the humanist method. Both philological techniques and historical studies, popular at other law schools, were excluded from the curriculum at Perugia.

Having completed his legal education, Gentili moved to Ascoli where his father had established a medical practice in

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[8]See Ernest Nys, Le Droit De La Guerre et Les Precurseurs De Grotius, (Bruxelles, 1882), Ernest Nys, Les Origens du Droit International, (Bruxelles, 1894), Coleman Phillipson, Great Jurists of the World, (Boston, 1914), Gezina Hermina Johanna Van Der Molen, Alberico Gentili and the Development of International Law, (Amsterdam, 1937), and Giorgio Del Vecchio, "The Posthumous Fate of Alberico Gentili," The American Journal of International Law, (1956), pp. 664-67.

[9]Supra., pp. 7-273.

1571. Two months later Alberico was appointed praetor, a position that combined the duties of mayor and judge. In 1575 he returned to San Genesio with his father. There he practiced law and was entrusted with revising the town statutes. Gentili's future appeared bright until he was forced to flee his native land, accompanied by his father and younger brother. Matteo, Alberico, and Scipio Gentili were members of a Protestant community. But by the late 1570s the Inquisition was successfully destroying these little groups and causing their members to leave the country. For a short time Alberico stayed with his father and brother at Tubingen. In 1580, Alberico Gentili, having refused professorships at Heidelberg and Tubingen, journeyed to England in hope of beginning a new career. He was to gain fame as a professor of civil law and a scholar in the field of international law.

Before discussing Gentili's contribution to the development of a theory of international law, it is important to discuss briefly how this concept was viewed prior to the events of the sixteenth century. During the medieval period, the term international law did not exist. Legalists recognized four basic types of law.[10] Each contributed to the formation of a theory of international law. As Holland pointed out, "the science (of international law) has come down to us by no unbroken course from one remote fountain-head, but is the

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[10] Jus naturale - what nature had taught all living things, jus gentium - law used among civilized peoples, jus civile - the law of a particular state, and jus divinum - the law of the Church.

result of the recent convergence of many independent rivulets of thought."[11]

Jus naturale and jus gentium were the two prominent components in elaborating a theory of international law. Jus naturale was most significant in offering a natural system of ethics, that was distinct but not separate from revealed ethics. It embodied the fundamental harmony that existed between human and Christian values. It served as a universal criterion for measuring just and unjust acts. Thomas Aquinas was the leading medieval proponent of this theory. He wrote,

> Since all things subject to divine providence are ruled and measured by the eternal law, as was stated above, it is evident that all things partake in some way in the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to divine providence in a more excellent way, in so far as it itself partakes of a share of providence, by being provident both for itself and for others. Therefore it has a share of the eternal reason, whereby it has a natural inclination to its proper act and end; and this participation of the eternal law in the rational creature is called the natural law. Hence the Psalmist, after saying (Ps. iv. 6): Offer up the sacrifice of justice, as though someone asked what the works of justice are, adds: Many say, Who showeth us good things? in answer to which question he

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[11]Thomas Erskine Holland, Studies in International Law, (London, 1898), p. 40.

> says: The light of Thy countenance, O Lord, is signed upon us. He thus implies that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the divine light. It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law.[12]

Thus, man's reason, his rational nature, provided a universal basis of morality. By this standard, political and social institutions could be evaluated and judged. Jus naturale could be a guide to the perfectibility of man, a guide that was dependent on reason and revelation.

Throughout the medieval period, some theorists continued to grapple with the speculative nature of jus naturale and its application to jus gentium. Others addressed themselves to the practical issues of the law of war. This aspect had been the oldest concern among writers of international law. Since the theorists were all Catholic and often ecclesiastics or lawyers, they developed their arguments from the Bible, Church Fathers, jus divinium and jus civile. There was a theological basis for each precept. The ideas discussed included the solemnity of declaring war and the formalities of making treatises. Such diverse topics as punishments for desertion, army organization, distinctions in military rank and pay, and military discipline were also emphasized. Theorists had raised and discussed a number of

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[12]Thomas Aquinas, Summa Theologica, in Basic Writings of Saint Thomas Aquinas, ed. Anton C. Pegis, (New York, 1945), II, p. 750.

questions that dealt with belligerent relations, but failed to establish international law as a separate science. They only integrated jus naturale, theology, and secular laws into western Christian ethics and morality.

Christianity had offered an ideal framework for achieving international peace and universal brotherhood. By the fifteenth century, the foundation of this framework was seriously undermined, and by the sixteenth century, it had been considerably weakened. The decline in the power of the Papacy and of the empire had threatened medieval universalism.[13] The demise of these traditional authorities created a number of new and interrelated problems.

As a result of the rise of the nation states, each claiming to be equal and autonomous, there was no longer a universally acceptable agent to enforce international rules or mediate international disputes. "Curiously enough," as Roland Bainton pointed out, "nationalism, which overcame disunity at the bottom of medieval society, destroyed unity at the top."[14] The treaty of Cateau-Cambresis (April, 1559) illustrated this observation best. The representatives of Spain, France, and England decided the fate of Italy without the presence of a representative of the Papacy. This never would have been seriously considered during the preceding centuries.

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[13]Supra., pp. 36-38.

[14]Roland H. Bainton, "Changing Ideas and Ideals in the Sixteenth Century," Journal of Modern History, VIII, (1936), p. 431.

The Reformation also subverted the medieval idea that Christendom was united in opposing the unbelievers and pagans in a hostile world. During the early years of the sixteenth century, wars within Europe had been caused by dynastic disputes related to the formation of the nation states, and in the second half of the century, were concerned with conflicts over religious ideology. Attempts at diplomatic negotiations were rendered impossible. The conflicts, based on theological absolutes, hampered established diplomatic procedures.

There were also new problems created by the voyages of discovery. What legal principles should be applied by Europeans in their dealings with natives? What of the political and legal questions surrounding the acquisition of territories in the newly discovered portions of the world and of the jurisdictional limits on the high seas? Theoretical doctrines had been based on moral, legal, and theological concepts that were common to the people of Christendom. There was a realization that these doctrines had to be reconsidered in light of discoveries beyond the realm of Christendom. The notion of the unity of the human race was more important and it became a leading issue. By admitting that the Indians had rights, the people of Europe extended the sphere of international law outside that closed coterie of European states. And old idea that religion was a legal justification for declaring war on infidels was questioned and subsequently condemned as an unnecessary cruelty.

The final problem concerned ambassadors, that branch of international law that Mattingly called "the international law of diplomacy."[15] Resident ambassadors were an Italian creation. No doubt, Francesco Sforza, the Duke of Milan, instituted the practice among the secular princes of Europe.[16] Permanent embassies developed because of the complexity of international relations which increasingly involved commercial considerations as well as the traditional political issues. By 1500, there was a growing need to explain the ambassador's role, since most western European countries had adopted resident embassies. Rules regulating the status and behavior of diplomats were some of the issues that had to be resolved.

Western European legalists were gradually becoming aware of the problems associated with international law. Medieval concepts were no longer functional in the handling of many of these critical issues. Some of the specific rules involving laws of war had ceased to be reasonable ordinances. A small group of writers recognized the need to change the status quo by reshaping some concepts, discarding others, and creating new ones. Three schools of theorists emerged. Although these groups were grappling with the same problem, each possessed distinct characteristics and made certain basic assumptions that affected its contributions toward changing the theory of international law.

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[15]Garrett Mattingly, Renaissance Diplomacy, (Baltimore, 1964), p. 18.

[16]Francois L. Ganshof, The Middle Ages A History of International Relations, (New York, 1970), p. 293.

Representatives of the first group were the Italian Pierino Belli (1502-1575) and the Spaniard Balthazar Ayala (1548-1584). These were Catholics who had studied law at Perugia and Louvain respectively, had served as military judges, and had written treatises dealing with the laws of war. Belli's De Re Militari et de Bello Tractatus appeared in 1563. His purpose was to explain the just cause of war, and how a war is declared and a peace is concluded.[17] He devoted considerable attention to the treatment of prisoners, military enemies, and the enemy civilian populace. His ideas were based on Roman law and on the opinions of the Church Fathers. He cited both ancient and modern history to support these ideas. Ayala wrote De Jure et Officiis Bellicis et Disciplina Militaria Libri III (1581). His approach was similar to Belli's except that he was even more diffuse.[18] Both writers lacked a singleness of purpose, for they retained many of the diverse and extraneous questions that were found in the writings of the medieval theorists. But they also continued to rely upon the theological rationale.

The significant contribution of these two was the utilization of recent history to illustrate their ideas. Their education in the Bartolist tradition attached

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[17]Pierini Belli, De Re Militari et de Bello Tractatus, tr. Herbert C. Nutting, (Oxford, 1936), II, p. v.

[18]Balthazar Ayala, De Jure et Officiis Bellicis et Disciplina Militari Libri III, ed. John Westlake and tr. John Pawley Bate, (Washington, 1912), II, pp. i-ix.

considerable importance to the use of recent precedents and authorities. This was particularly useful in the field of international law, where more current illustrations could enhance the credibility of the espoused theory.

The second school of theorists, who addressed themselves to the problems of international law, was represented by the Spaniards Franciscus de Victoria (1480-1546) and Francisco Suarez (1548-1617). Victoria was a Dominican friar and a professor of moral theology; Suarez was a Jesuit and a professor of theology and philosophy. Victoria composed two works: De Indis and De Jure Belli. Both appeared in his Relectiones Theologicae XII published posthumously in 1565. Actually, these treatises were lectures that he had delivered in 1532.

De Indis was Victoria's principal contribution to a new theory of international law. In it, he condemned the Spanish atrocities that had been perpetrated against the Indians in the Americas. He began by offering an apologia for his discussion of such matters by maintaining that all controversies fall within the purview of theologians. He asserted that barbarians were not controlled by European laws, but were by divine laws. Obviously, theologians were better versed than jurists for such a discussion.[19]

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[19]Franciscus de Victoria, De Indis et De Jure Belli Relectiones, ed. Ernest Nys and tr. John Pawley Bate, (Washington, 1917), pp. 116-20.

Victoria was particularly adamant about repudiating the popular medieval notion that Christians had the right to punish idolatry. He pointed out,

> War is no argument for the truth of the Christian faith. Therefore the Indians can not be induced by war to believe, but rather to feign belief and reception of the Christian faith, which is monstrous and a sacrilege.[20]

The idea that international law should extend beyond the realm of Christendom to include unbelievers, who also had rights, was Victoria's most significant and innovative contribution.[21] He rejected the medieval notion of jus gentium, that the legal community was limited to Christendom, and maintained that it existed for all states, jur inter gentes, and encompassed the entire world.[22] The author did retain, however, many of the medieval doctrines pertaining to the laws of war and many of the old moral, legal, and theological arguments.

Whereas Victoria presented a practical case of the Indians for enlarging the theory of international law, Francisco Suarez offered the theoretical rationale to support it. Suarez, therefore, complemented Victoria's point of view. He did this when he published De Legibus, ac Deo Legislatore (1612). The author indicated that the old notion of jus

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[20] Ibid., p. 145.

[21] Ibid., p. 127.

[22] Ibid., pp. 151-56.

gentium was based on Roman jurisprudence and that "it is a body of laws which individual states or kingdoms observe within their own borders."[23] But the law of nations had another interpretation independent from the first. Suarez explained, "this is the law which all the various peoples and nations ought to observe in their relations with each other."[24]

Suarez maintained that the latter definition was more applicable to the needs of the nation states. "The human race," he wrote, "always preserves a certain unity, not only as a species, but also a moral and political unity enjoined by the natural precept...which applied to all, even to strangers of every nation."[25] Although the sovereign states possessed their autonomy, they, nevertheless, were all members of a universal society, an international community. Besides, he continued, "states when standing alone are never so self-sufficient that they do not require some mutual assistance, association, and intercourse, at times for their own greater welfare and advantage."[26] Suarez envisioned a

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[23]Francisco Suarez, De Legibus, Ac Deo Legislatore, in Selections from Three Works of Francisco Suarez, ed. Gwladys L. Williams et al., (Oxford, 1944), II, p. 347.

[24]Ibid.

[25]Ibid., p. 348.

[26]Ibid., p. 349.

unity among the many independent nation states. The unity was based on a foundation that was reasonable, natural, and moral.

The significant contribution of this group was their clarification of a definition for international law. Both a practical and a theoretical explanation were presented for jus inter gentes. But these theorists were still dependent on the theological bonds developed by their Church during the medieval period.

Until the second half of the sixteenth century, Italian and Spanish theorists, who were Catholic ecclesiastics and military judges, dominated the discussion on the laws of war. They failed, however, to make distinctions between theological principles and judicial rules. By the second half of the century, another group of legalists concerned with international law had emerged, the Protestant theorists. Both Alberico Gentili and Hugo Grotius were leaders in this school, and both had suffered exile from their native lands because of their religious convictions. Their major contribution to the field of international law was the systemization of the law to meet the needs of the new age.

Gentili was educated in the Bartolist tradition at the University of Perugia. During the fourteenth and fifteenth centuries, the Bartolists had undertaken the task of systematizing the texts of the Roman law and blending them with the canon and customary laws. Gentili had been thoroughly trained in the nuances of Roman law and was

familiar with the systematic approach to the study of jurisprudence. He brought these important abilities to England. Both were to affect his method of examining and contributing to a new theory of international law.

Although the young exile was unknown in England, he received a friendly welcome upon his arrival late in 1580. The fact that he had been a victim of the Roman Inquisition made him an attractive immigrant. Gentili found support immediately from Battista Castiglioni, the Italian tutor to the Queen; Tobie Matthew, the Vice-Chancellor of Oxford; and from Robert Dudley, Earl of Leicester and Chancellor of Oxford. Early in December of 1580, Alberico journeyed to Oxford where he was provided with money and lodgings at the New Inn Hall. On March 6, 1581, he was incorporated at Oxford and became a professor at St. John's College.

Apparently, Gentili's facility with the civil law was immediately recognized. In November 1584, the Spanish ambassador, Bernardino de Mendoza, was implicated in the Throckmorton plot to liberate Mary, Queen of Scots, and to dethrone Queen Elizabeth.[27] Since a theory of diplomatic immunity for ambassadors in civil and criminal actions had been developed by civilians during the medieval period, Elizabeth's council requested the advice of two civil lawyers, before pronouncing a sentence on Mendoza. The

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[27]For a concise summary of the Throckmorton plot see J.B. Black, The Reign of Elizabeth 1558-1603, (Oxford, 1959), pp. 360-64.

opinion of Gentili and that of the French jurist, Jean Hotman, were solicited. Both men empathized with the council's desire to punish the ambassador severely, but they concurred in their opinions that Mendoza was covered by diplomatic immunity. They suggested that the ambassador's recall be demanded and that a complaint be lodged with Philip II of Spain. The council accepted the decision of Gentili and Hotman, and they expelled Mendoza on January 9, 1585.

Throughout the sixteenth century, the status of ambassadors and the privileges of embassies had been undefined. Scholars and students had not been concerned with this issue. Gentili's participation in the Mendoza affair prompted him to examine the status of ambassadors further. He was particularly interested in explaining what their status ought to be. In the annual summer disputations at Oxford, Gentili made this the topic of his presentation. He expanded upon these ideas further and published them in De Legationibus (1585). It was Gentili's initial work in a tri-part effort that dealt with the concept of international law.

De Legationibus consisted of three books. The first book traced briefly the historical development of the various types of embassies. Gentili was of the opinion that ambassadors probably were utilized before the time of Moses, but that the current use of envoys undoubtedly emanated from the Papacy. The popes had established embassies throughout Europe. As a result, European princes tended to imitate

the practice in order to safeguard their interests.[28]

The second and most important book explained the privileges and immunities of an ambassador. It was here that Gentili offered an explanation for his opinion in the Mendoza case, for he stressed the legal status of envoys. He wrote, "in dealing with an ambassador who is a spy, I do not believe that severity can be carried beyond the point of refusing to admit him, or if he has been admitted, of expelling him."[29] He went on to say that an envoy "can be tried only under international law."[30] Thus, ambassadors could not be indicted for offenses cited in the civil and criminal codes of a country. An embassy was subject only to the jurisdiction of international law. The author did concede, however, that ambassadors guilty of such offences could be "punished with great severity by their own nations," once they had been surrendered to them.[31]

Gentili utilized the theory of jus naturale, when he explained the development of jus gentium. He maintained that "international law is based on natural principles which have been implanted in all by nature, and which are so well

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[28]Alberico Gentili, De Legationibus Libri Tres, tr. Gordon J. Laing, (New York, 1924), II, pp. 52-53.

[29]Ibid., p. 65.

[30]Ibid., p. 97.

[31]Ibid., p. 98.

known that they need neither argument nor art to establish them."[32] He did not offer a precise definition of natural law; he simply assumed its existence. Gentili did retain the medieval association between jus naturale and jus gentium, but he had de-emphasized the significance of theological doctrines. This precluded any claims by the Papacy of being an universal intermediary. This view was typical of Protestant writers, who were shifting the emphasis to the law of nature and away from the idea of a united Christendom that was no longer viable, in spite of the Council of Trent.

The third book discussed the qualifications that an envoy should possess. Gentili recalled that he had overheard Sir Francis Walsingham explain these necessary traits. They included neatness in appearance, superiority in intellect, eloquence in speaking, and capacity as a dignified and prudent observer. The author also offered his own estimate of the perfect ambassador. "The perfect ambassador," he wrote, "is one who can accomplish efficiently the business and duties which have been assigned to him or which he himself has recognized the necessity of undertaking."[33] Gentili pointed out that these qualities had in his opinion been exhibited in only one man, Sir Philip Sidney, to whom he had dedicated the treatise.

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[32] Ibid., p. 111.

[33] Ibid., p. 198.

Gentili's study was not a complete treatment of the topic, but it did surpass all previous discussions on ambassadors. The separation of the moral qualities of envoys from their legal status had never been undertaken before. Gentili was the first legalist to examine systematically a perplexing, but often ignored, branch of international law.

Gentili continued to teach at St. John's College, but was disappointed not to have secured an independent chair at Oxford. In the autumn of 1586 he left the University and travelled to Wittenberg. At the time, he had no intention of returning to England. He had come to Germany to seek a more permanent academic position and to be closer to his brother, Scipio. But in November of the same year, Griffin Lloyd, the Regius Professor of civil law at Oxford, died. Through the influence of Walsingham and Leicester, Gentili was offered the post. He returned to Oxford immediately to accept this prestigious appointment. Two years later he married Hester de Peigni, a French Huguenot refugee.

The status of the civil law at Oxford and Cambridge had declined during the middle of the sixteenth century. But with Gentili's appointment as Regius Professor, there appeared to be a renewed interest in this branch of law.[34] William Fulbecke remarked that Gentili's "great industrie hath

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[34]Ernest Nys pointed out in his introduction to De Legationibus that during Gentili's period as Regius professor (1587-1608) the University created sixty bachelors in law and twenty-four doctors in law. Ibid., p. 27.

quickned the dead bodie (of) the Civil Law."[35] During his professorship, Gentili continued to emphasize the study of international law and to raise it to a status independent of the civil and canon laws. This study led to the publication of his most important treatise, De Jure Belli Libri Tres. It was published in 1598, and was the first attempt made as a systematic study of the law of war.

His purpose was to explain that international law was a broad area that dealt with a number of issues. He had already examined the art of diplomacy, one branch of international law, in his De Legationibus. Now he was going to examine the law of war, another subdivision. In De Jure Belli, the author addressed himself to two issues. The first was to inquire under what conditions a war could be justly undertaken, conducted, and terminated. The second demonstrated that international law was a separate area of study and was not the concern of civilians, moralists, or theologians, but was of international jurists.

Gentili defined war as "a just and public contest of arms."[36] War, therefore, was comprised of three essential elements: a public contest between sovereigns, a utilization of the force of arms, and the necessity to conduct hostilities in a just manner. By defining war in this manner,

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[35]Fulbecke, A Direction, p. 26.

[36]Alberico Gentili, De Jure Belli Libri Tres, tr. John C. Rolfe, (Oxford, 1933), II, p. 12.

Gentili rejected the possibility of justified private warfare, a frequent topic in medieval treatises.

The major thrust of the author's argument centered on whether or not the contest was just. He maintained that men could go to war for two reasons: self-defence or to gain what had been denied that "Nature herself has bestowed upon mankind."[37] He also argued that a state must inform its enemy of the intention to declare war.[38] During the course of the war, just conduct must also be maintained. Captives should not be slain.[39] Those that surrender should be spared death.[40] Women, children, and old people should not suffer reprisals.[41] In concluding a war, the victor had the right to inflict a just penalty. But he should not randomly destroy cities or kill enemy leaders.[42] Rather he "should recover the expense of the war and compensation for the losses which he has suffered."[43]

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[37] Ibid., p. 58.

[38] Ibid., p. 131.

[39] Ibid., pp. 208-15.

[40] Ibid., pp. 216-30.

[41] Ibid., pp. 251-60.

[42] Ibid., pp. 315-27.

[43] Ibid., p. 298.

Gentili was offering the most comprehensive analysis of the law of war that had been published to date. He was not only concerned with questions of war, but he also displayed a sensitivity to the problems of securing an equitable peace. His entire approach liberated the laws of war from the extraneous discussions of military ranks, discipline, and tactics.[44] Furthermore, he rescued the study of international law from domination by Catholic theology and Roman law. He admitted that "international law is a portion of the divine law."[45] He also acknowledged that Roman law "is not wholly unlike the law of nature or that of nations."[46] Yet Gentili maintained that international law involved the day to day practical relationships between states. And although Catholic theology provided general ideas pertaining to equity, much of its doctrine was no longer relevant to the multiplicity of religious beliefs. Gentili, therefore, adopted from the Roman law and Catholic theology the principles that were still useful, but he successfully shifted the authority to a civil base.

The facility with which he shifted the authority was due to his recognition of the importance of history. In the De Legationibus, he said, "our wisdom is nothing else than the observation of results, and knowledge of the present and prescience of the future are drawn from the past as from a

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[44] Supra., pp. 158-60.

[45] Gentili, op. cit., pp. 7-8.

[46] Ibid., p. 17.

fountain head."[47] In fact, he pointed out that "history has one advantage over all other sciences: it provides us with both theory and practice."[48] Gentili applied this philosophy of history to the De Jure Belli. He collected facts from recent and ancient history, and he examined contemporary phenomena. From these observations, he adopted his general principles for international law.

The specific use of historical sources in the De Jure Belli was also significant in light of his training as a Bartolist. The Bartolists had frequently criticized the humanists' use of ancient sources, while neglecting more recent authorities. Gentili cited contemporary jurists and historians, such as Bertachinus, Emilio, Giovio, Guicciardini, and Maynus. Yet as Mattingly indicated Gentili utilized classical authorities in the De Legationibus and the De Jure Belli by almost twenty to one.[49] He apparently was influenced to some extent by his humanist colleagues at Oxford, for the sources frequently cited--Aristotle, Augustine, Cicero, Jerome, Livy, Plato, Plutarch, Tacitus, and Thucydides--were authorities popular among humanists.

Gentili moved to London in 1600 to practice law. Spain and the Netherlands were at war. Since England was a neutral nation, many cases of belligerency were heard in the English

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[47]Gentili, De Legationibus, II, p. 153.

[48]Ibid., p. 155.

[49]Mattingly, Renaissance Diplomacy, p. 249.

Court of Admiralty. Gentili was asked by Pedro de Zuniga, the Spanish ambassador to England, to represent Spain's interests. No doubt, his stand in the Mendoza case influenced his appointment. Gentili kept his notes from those years when he was an advocate for Spain. When he died on June 19, 1608, his brother, Scipio, inherited his papers. He had the notes published under the title Hispanicae Advocationis Libri Duo in 1613. This was a record of the practical application of the theory presented in De Jure Belli. And it represented the third part of Gentili's effort to establish international law was a separate branch of law.

Anthony Wood referred to Gentili as "the most noted and famous civilian, and the grand ornament of the university in his time."[50] Indeed, the exile from San Genesio had made a significant contribution to enhancing the reputation of Oxford through his systematized study of international law. He examined the art of diplomacy and the role of the ambassador. He offered a comprehensive analysis of the law of war. And he left a legacy of authentic cases that were applicable to his ideas on war. Gentili was the most important international legalist of the sixteenth century. His practical application of its principles prepared the way for Grotius. Grotius's work, on the other hand, was not bound as closely to the times as Gentili's had been. By synthesizing the

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[50]Wood, Athenae, II, p. 90.

precepts of his predecessors, particularly Gentili, Grotius transcended his age with a philosophy of international law that won for it universal acceptance.

5 DODDERIDGE AND THE CONCERN FOR LEGAL EDUCATION

The traditional system of educating common law lawyers declined during the sixteenth century.[1] The primary cause for the decline has been identified as the extensive use of the printing press. The neglect of the mooting exercises at the Inns of Court, the legal institutions of learning, has usually been cited as the significant effect of the decline. With the introduction of printed books, legal literature was more accessible to the students and teachers.[2] Students felt that they could avoid participating in the lengthy process of readings, moots, and other aural learning exercises that had become the traditional method of studying

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[1]W.S. Holdsworth maintained that the decline started in the sixteenth century. See W.S. Holdsworth, "The Disappearance of the Educational System of the Inns of Court," University of Pennsylvania Law Review, LXIX, (1920-21), pp. 201-22. Kenneth Charlton, on the other hand, cited evidence of decline late in the fifteenth century. See Kenneth Charlton, "Liberal Education and the Inns of Court in the Sixteenth Century," British Journal of Educational Studies, IX, (1960), pp. 25-38.

[2]Some of the most useful literature printed was: the Nautra Brevium (1496), a collection of precedents and writs that appeared in seventeen French and eleven English editions before 1600; La novel natura brevium (1534) of Anthony Fitzherbert that went through at least eight editions in the sixteenth century; the Old Abridgement, a collection of statute law, produced by John Lettou and William de Machlinia in the early 1480s; the Magnum Abbreviamentum (1528) by John Rastell which was later jointly published with Robert Redman in a number of English editions; the Year Books, regal yearly case gatherings, were published in the 1480s; and the Reports, private collections of cases with commentary, the most famous of which were by Edmund Plowden (1571) and James Dyer (1585).

the common law. The teachers were also concerned about time, but for a different reason. The hours spent in preparing to teach minimized the time that they could allot to their private practice. Since the teachers were selected from among the best lawyers, but not paid for their services, they stood to lose a great deal of money in an age that was considered highly litigious. Nevertheless, none was so arrogant as to refuse an opportunity to read. Sir George Buck pointed out that,

> Readers...are called by the king out of those houses of court to plead, serve his highness at the Bars of his high courts of the King's Bench, of the Common Pleas, of the Exchequer, and also of the chancery, and Star-Chamber, and other courts.[3]

Reading the law was obviously an important means to advance one's career.

Despite the decline in the educational system, the Inns experienced a phenomenal increase in attendance during the second half of the sixteenth century.[4] There were several factors that prompted this rise: a growth in population; a prosperous gentry, merchant, and yeoman class due to agricultural production, industrial development, and mercantile expansion; and the increased use by government of men who were trained in the law. No doubt, Sir Thomas Elyot's famous

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[3]Sir George Buck, The Thirde Universitie of England, in John Stow, The Annales, (London, 1615), p. 975.

[4]Wilfred R. Prest, The Inns of Court Under Elizabeth I and the Early Stuarts, (London, 1972), p. 6.

treatise, The Book Named the Governor (1531), which was published at least nine times during the sixteenth century, had a significant impact on what many middleclass fathers wanted for their sons. Elyot stated,

> I think verily if children were brought up as I have written, and continually were retained in the right study of very philosophy until they passed the age of twenty-one years, and then set to the laws of this realm...undoubtedly they should become men of so excellent wisdom that throughout all the world should be found in no common weal more noble councellors.[5]

Furthermore, Sir Thomas Wilson pointed out at the end of the century that the sons of yeomen were not satisfied with their future station in life on the land. He indicated that these young men desired to become gentlemen. In order to achieve that, Wilson indicated that a young man "must skipp into his velvett breches and silken dublett and, getting to be admitted into some Inn of Court or Chancery."[6] Each of these factors suggests that the time was right, the money available, and the diverse needs and interests apparent for an increase in the number of men pursuing an education in England, especially one that would lead to a career in the law.

The traditional method of learning the law was based largely on the student's own personal initiative and

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[5]Sir Thomas Elyot, The Book Named the Governor, ed. S.E. Lehmberg, (London, 1962), pp. 52-53.

[6]Sir Thomas Wilson, "The State of England Anno Dom. 1600," ed. F.J. Fisher, Camden Miscellany, XVI, (1936), p. 19.

proficiency. Since the Inns were only "nominally institutions of learning but were clearly not institutions for teaching," the increase in the enrollment and the decline in the quality of the learning exercises posed a serious problem for the future of legal education in England.[7] Some guidance was imperative for assisting the law students in considering the complexities of the common law.[8] During the late sixteenth and early seventeenth centuries, attempts were made to provide assistance in the form of a method book. The idea for such a book had originated with the humanist movement. The goal was to provide an elementary outline that would enable a person to master an art rapidly. During the early years of the humanist movement, the elitist phase, method books were directed at improving the qualities deemed necessary for a Renaissance prince or nobleman. When the exuberant phase of the movement became prominent, method books were produced for the diverse and indigenous needs of larger groups of people. Moreover, they were also being adapted in the universities and utilized by the advanced disciplines such as philosophy, medicine, and law. It was most fitting that this type of educational tool was employed to enhance the student's grasp of the legal principles found in the common law.

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[7]J.H. Baker, An Introduction to English Legal History, (London, 1971), p. 76.

[8]It should be remembered that the common law lacked a comprehensive textbook similar to that of Justinian's Institutes.

Sir John Dodderidge, a justice of King's Bench, wrote a method book entitled The English Lawyer (1631). It was one of the last method books published during the age, and was particularly important in light of what was to happen to the Inns as centers of learning. Before assessing the utility of The English Lawyer, however, it is important to consider the educational philosophy that produced such a book.

The humanists had developed a philosophy of education that was inspired by the writings of the ancient Greeks and Romans. Their concern was that society should reform itself and thereby enable a greater number of people to attain a higher quality of life. They felt that reform could be achieved if the moral and ethical qualities of individuals were improved, and they utilized rhetoric as a vehicle for persuading and encouraging people to seek this higher ideal. The humanists were particularly interested in strengthening the individual's potential for achieving an eclectic education. They prided themselves on having already accomplished this goal within their own group. They believed that through a responsiveness to ethics and an appreciation for education, a synergistic effect could be achieved in society. People could reach a common wisdom that would benefit them first as individuals and collectively as members of the Christian commonwealth. But in order to achieve this desired end, a systematic method was needed whereby people would have the desire to learn. The

adoption of this approach to education was a rejection of the scholastic use of exegesis.

During the Renaissance, the concept of method was divided into two categories, artistic and scientific.[9] Both concepts were derived from the philosophies of Plato and Aristotle. Among Plato's works, the Phaedrus was usually singled out for edification. Of particular interest was Plato's method of discussing and analyzing concepts. He classified sub-divisions by definition, and he identified specific causes through demonstration.[10] Aristotle's contribution was his dialectic, the analysis of concepts by logic or methodological discussion.[11] Humanists who were interested in an artistic method were attracted to Aristotle's Topics; while those intellectuals who were concerned with science cited his Posterior Analytics. Plato's and Aristotle's works did not offer any easy approach to learning. But the humanists were disposed to a number of precepts found in them. As a result, they synthesized the ideas of the two philosophers and produced their own methodology.

The humanist method standardized rules so that an art or science was presented in a concise manner. The plan

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[9]For a comprehensive treatment of the issue of method during the Renaissance see Gilbert, Renaissance Concepts.

[10]Plato, Phaedrus, ed. Harold N. Fowler, (Cambridge, Mass., 1960), pp. 531-71.

[11]Gilbert, op. cit., pp. 9-10.

stressed starting with the most general principles and then moving to the more particular. Since humanism was a cultural and literary movement, its members felt a special affinity towards artistic endeavors.

As the humanists gained more converts, assumed more faculty positions in the universities, and influenced the methodology employed in the curriculum, a reaction developed against their movement. The opposition consisted of philosophers and scientists who rejected the humanist ideal of the simple communicability of knowledge. They believed in a more traditional method based on the need to develop strict criteria and demonstrative proofs. Their aim was to produce science or knowledge, and they readily admitted that their method was not intended to simplify the learning process for students or for the general public.

Towards the latter half of the sixteenth century, a debate developed over the issue of method. It was one of the first philosophical debates of the century that was independent from and devoid of theological implications. The controversy focused on the rival interpretations on method gleaned from the ancient philosophical sources. Among the participants were Peter Ramus, Jacopo Zabarella, Everard Digby, and Bartholomew Keckermann. These names suggest the international concern that the issue had generated.

The humanists also affected the teaching of law. This was particularly evident on the continent where the study

of rhetoric and law had a long and close association. During the twelfth century, for example, the University of Bologna's famous law school had evolved out of its school of rhetoric. As early as Petrarch, Renaissance intellectuals were stressing the close affinity between rhetoric and law. Moreover, humanists often cited the comparisons that Cicero had made in his De Oratore between the study of rhetoric and law. Another concern of the humanists was their emphasis on philological studies. This helped to establish a new system for revamping the traditional techniques of commentary on legal texts. Finally, the humanists' desire to reduce learning to a simple method was reflected in the books produced to assist young law students. Johannes Jacobus Canis's De methodo studendi in utroque jure (1476) and Matthaeus Gribaldus's De methodo ac ratione studendi libri tres (1541) were two examples of this new genre.

The English common law lawyers were also affected by the humanist philosophy of education, but the approach was external and the effect indirect. Because the Inns of Court were separate from the universities, the humanists were unable to make a direct impact on the highly technical study of law or to invade the closed faculty. The Inns were, as F.W. Maitland explained years ago, "associations of lawyers which had about them a good deal of the club, something of the college, something of the trade union."[12]

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[12]F.W. Maitland, Selected Historical Essays, (London, 1957), pp. 125-26.

Therefore, whatever effect humanism was to have was bound to be subtle and indirect.

During the reigns of Henry VIII and Edward VI, the humanists had encouraged the nobility and wealthy gentry to read for university degrees, thus enabling them to become gentlemen in fact as well as in name. By Elizabeth's reign there was a rapid rise in university enrollments as an interest in humanist ideals spread to larger numbers of the gentry, yeoman, and merchant classes. Education had become, as Louis Wright tells us, the "goal desired of the generality of men."[13] It was during this increase in enrollments that the humanist philosophy was adapted to the liberal arts curriculum. At about this time and due to the popular trend of pursuing a university education, the kind of student entering the Inns of Court changed. Many were matriculating with either a degree-in-hand or at least a few years of university study to their credit. Some of these young men, having been a captive audience to the humanist philosophy, were to retain aspects of this philosophy long after the decline of humanism as a movement. The intellectual concerns of Francis Bacon and Edward Coke, discussed earlier, were a reflection of that impact.[14] Furthermore, when the effectiveness of the learning exercises at the Inns began to decline, some lawyers adapted

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[13]Wright, Middle-Class Culture, p. 17.

[14]Supra., pp. 7-16 and 18-29.

the idea of the method book as an aid for improving the common law system of education.

The earliest attempt at improving the professional qualifications of English lawyers was Thomas Wilson's (1525-1581) The Arte of Rhetorique (1553). Wilson was a doctor of civil law, who had attended Eton and was a fellow of King's College, Cambridge. While he was at Cambridge and later during the period of the Marian exile, Wilson was associated with a number of English humanists, such as John Cheke, Thomas Hoby, Roger Ascham, and John Ponet. He served Queen Elizabeth as a privy councillor, ambassador, and secretary of state.

Wilson was a product of the early elitist phase of the humanist movement in England, and his scholarly activities reflected that background. The universal tone and scope of the The Arte of Rhetorique, the first treatise on rhetoric written in English, was typical of the elitist phase. Wilson had been concerned with the manner in which the scholastics had employed the Aristotelian dialectic in their works at the expense of grammar and logic. He addressed his book to all the professions that were dependent on rhetorical skills. The work was divided into three parts. The first dealt with a basic introduction to the subject. What is an orator? What is rhetoric? And what is its purpose? The second part was an analysis of the proper manner of disposition, and third was concerned with elocution. Wilson's debt to Cicero was obvious and also

typical of a humanist scholar. He employed the Ciceronian pattern of rhetoric: invention, arrangement, style, memory, and delivery. But he anglicized the precepts by using English cultural and historical illustrations.

A significant portion of Wilson's treatise was devoted to the legal profession. Because he was a lawyer, he offered a number of legal analogies that emphasized the close relationship between rhetoric and law. Although the book was presented from the point of view of a civilian, Wilson displayed a familiarity with the common law and expressed a marked respect for it. But because he was a civil lawyer, he was not equipped to deal with many of the nuances of the common law. One should not forget that the primary aim of the treatise was to explain the utility of rhetorical skills. In spite of its popularity, therefore, it could only be of marginal assistance to the common law lawyers.[15]

In 1600, William Fulbecke, a graduate of Oxford and a member of Gray's Inn, published A Direction or Preparative to the Study of the Lawe. This book exemplified the characteristics inherent in the exuberant phase of the humanist movement, because it was addressed to a particular group of people who were studying a technical subject. It was not concerned with developing the qualities of the universal Renaissance man as had been the case during the

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[15]The Arte of Rhetorique was published in 1553, 1560, 1562, 1563, 1567, 1580, 1584, and 1585.

elitist phase of the movement. Although the treatise was a rather cursory introduction to the subject, it merits consideration, because it was probably the first method book produced specifically for common law students. It was not only a useful guide for these students, but it was also helpful for the civilians for whom it was also essential to have an understanding of the common law.

Fulbecke eulogized the virtues of law in the first chapter and explained the desired qualities of a law student in the next. These included a fear of God, eloquence in speaking, judicious opinions, and the possession of a mild manner.[16] He then defended the common law against the charge that it was barbarous. This criticism had its origins in the humanist movement. Continental humanists wanted to limit the Latin vocabulary to words found in Cicero's writings. This was an expression of their admiration for him, and their attempt to purify the language corrupted during the medieval period. Some English purists had suggested that the common law vocabulary, in particular, needed reform. Fulbecke argued that the legal terms may "be rude in sound, yet are they pregnant in sense."[17] He feared the meaning of the law would be distorted if tampered with by philologist and grammarians. The author also

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[16]Fulbecke, A Direction, pp. 10-16.

[17]Ibid., p. 21.

offered a bibliographical essay and presented a glossary of elementary legal words and phrases.

In spite of his earlier criticism of the humanists' efforts to reform the common law vocabulary, Fulbecke did not reject their philosophy entirely. He was a product of his age, one that had sought a middle ground between old and new ideas, and of his Oxford education which was influenced by the humanists. Fulbecke stressed the importance of rhetorical skills and urged students to practice their elocution. He also acknowledged the utility of method: "Surely Methode is so convenient a thing in the studie of the Lawe, that without it neither can the understanding be well taught, nor the memorie well directed."[18] Although he was aware of the method controversy that had become a serious issue during his years at Oxford, Fulbecke neither adopted a humanistic view nor a traditionalist approach to method. Instead, he synthesized ideas gleaned from Plato and Aristotle that he thought would facilitate the study of law.[19]

Fulbecke's contribution was significant simply because he was one of the first lawyers to write a method book applicable to the needs of common law students. Yet Fulbecke's book was too superficial. Law students needed a more sophisticated method book. Another Elizabethan,

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[18] Ibid., p. 83.

[19] Ibid., pp. 81-84.

John Dodderidge, attempted to meet that need with The English Lawyer.

John Dodderidge was born in 1555, the son of Richard, a merchant from Barnstaple, Devon. John attended Exeter College, Oxford, and graduated a bachelor of arts on February 16, 1576. He read law at the Middle Temple and was called to the bar on February 10, 1585. Fuller intimated that Dodderidge was a versatile scholar, for "it is hard to say whether he was better artist, divine, civil, or common lawyer."[20] His active and diversified career was, indeed, marked with honor and distinction.

In 1586, Dodderidge joined Henry Spelman, Robert Cotton, and William Camden in establishing the Society of Antiquaries, a group interested in historical studies. Dodderidge was apparently active in the Society throughout his life and produced three pieces of scholarship. He wrote two short unpublished treatises: "Of the Dimensions of the Land of England," and "A Consideration of the Office and Duty of the Heralds in England," and his History of Wales, Cornwall, and Chester was published posthumously in 1630. Dodderidge also sat for his native Barnstaple in the Parliament of 1588-1589 and later as a representative of Horsham, Sussex from 1603-1611. But it was his career in the law that gained for him success and recognition.

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[20]Thomas Fuller, The History of the Worthies of England, (London, 1840), I, p. 412.

The officers of his Inn, the Middle Temple, selected Dodderidge in 1593 and again in 1602 to deliver lectures at the New Inn.[21] His lectures on church livings were later published under the heading, A Compleat Parson (1630). He was also appointed in 1603 Lent reader at the Middle Temple. This honor was usually reserved for those lawyers who had been identified as candidates for the Bench. Dodderidge increased his chances of becoming a judge further when he received the degree of serjeant-at-law on January 20, 1604. The serjeant's degree was the common law equivalent to a doctor of civil law, and as a mark of distinction, it almost assured a person's advancement in the legal profession.

After he received the degree, Dodderidge was appointed serjeant to Henry, Prince of Wales. He held this post for only nine months when he was named Solicitor General on October 29, 1604. The high point of his tenure in office came when he argued the famous post nati issue before the House of Commons.[22] Dodderidge was asked to resign the office on June 25, 1607, to allow Francis Bacon, the King's favorite, to assume the position. Dodderidge's accommodating manner brought him a knighthood and the promise of appointment to the next vacancy on the Court of King's

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[21]Supra., p. 131.

[22]For a concise summary of the post nati issue see Godfrey Davies, The Early Stuarts 1603-1660, (London, 1959), pp. 8-10.

Bench. He waited five years before the King could fulfill his promise. Yet on November 15, 1612, Dodderidge was created a justice of King's Bench succeeding Sir Christopher Yelverton. In February of the following year, he was awarded a master's degree from his alma mater in appreciation of his legal services rendered on behalf of the University. Foss tells us the "degree was conferred upon him in (a) distinguished manner" at the hall of Serjeant's Inn.[23] The chancellor, two proctors, and five academicians from Oxford were in attendance.

Dodderidge brought to the Bench a different perspective on the role of the judiciary from that espoused by Edward Coke. Coke, who joined Dodderidge on the King's Bench as its Chief Justice in 1613, sought to establish the principle of an independent judiciary which would be the guardian of the common law, thus averting the threat of the King ruling above law. Dodderidge, however, supported the traditional theory that judges held their office under the Crown and at the pleasure of the sovereign. Although he never addressed himself to this issue in written or oral arguments, his actions suggest two possible reasons for maintaining the status quo. He realized that the Crown, as the leading employer of lawyers, could dismiss at will obstinate judges. Having worked so hard to achieve this prestigious position,

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[23]Edward Foss, The Judges of England, (London, 1857), VI, pp. 307-08.

Dodderidge, at fifty-eight, had no intention of terminating his career on the Bench. The majority of judges tended to agree with him. This does not mean, however, that he placed his own personal interests ahead of the welfare of the commonwealth. The few evaluative statements that we have of his character would repudiate that possibility. Sir George Croke, Dodderidge's successor on King's Bench, called him a "learned and grave judge."[24] Bacon likened his judicial arguments to that of "a good archer,...,he shootes a fayre compasse."[25] And Fuller remarked, "His soul consisted of two essentials, ability and integrity, holding the soule of Justice with so steady a hand, that neither love nor lucre, fear or flattery, could bow him on either side."[26] The other reason for Dodderidge's position may well have been his awareness that the parliamentarians, who wanted to curtail the King's prerogative power, might have substituted their own controls. As he understood it, the extremist element in Parliament would have the means of undermining the effectiveness of the legal system, more than any monarch.

Because of his views on the judiciary, Dodderidge accommodated the King's wishes whenever they did not

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[24]Sir Harebotle Grimstone, ed. The Reports of Sr. George Croke Knight, (London, 1657), unpaginated.

[25]John Bruce, ed. Diary of John Manningham, (London, 1868), p. 62.

[26]Fuller, op. cit., p. 412.

contravene the law. During the course of Peacham's Case (1615), for instance, James wanted his Attorney General, Francis Bacon, to conduct a poll among the judges regarding their opinions in the case.[27] Chief Justice Coke argued that such a request was against established custom. Dodderidge, on the other hand, was "very ready to give opinion in secret."[28] Another example of his accommodating manner occurred during the summer of 1623, when the possibility of Prince Charles's marriage to the Catholic Spanish Infanta posed a serious problem due to England's recusancy laws. "Justice Dodderidge," wrote Walter Yonge in his diary, "saith he thought they should find out a way by law to dispense with the statute against recussancy."[29]

The decision in Darnel's Case (1627) created the greatest furor among the King's opponents.[30] Five men refused to contribute to a forced loan and were imprisoned. They applied for a writ of habeas corpus in order to have the case presented before the Court of King's Bench. They also maintained that they should be released on bail, since they were imprisoned without the authorities showing cause. The Attorney General thought otherwise. Because the law was so obscure

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[27]For a brief description of the case Supra., pp. 26-27.

[28]Bacon, Letters, XII, pp. 100-01.

[29]George Roberts, ed. Diary of Walter Yonge, (London, 1848), p. 69.

[30]Davies, op. cit., pp. 38-40.

on this point, the judges postponed hearing the case. Meanwhile, the men remained in prison, until the king released them early in 1628. In the same year King Charles called for parliamentary elections. The major issues during the campaign were those generated from Darnel's Case. The parliamentarians argued that the judges had endorsed forced loans and indefinite periods of imprisonment. In April the Justices were brought before the newly assembled House of Commons to explain their actions. Dodderidge, now old and infirm, presented his answer on April 21.

> It is no more fit for a Judge to decline to give an account of his doings, than for a Christian of his faith, God knoweth, I have endeavoured always to keep a good conscience; for a troubled one, who can bear? The kingdom holds of none but God, and Judgments do not pass privately in chambers, but publicly in court, where every one may hear, which causeth judgment to be given with maturity. Your lordships have heard the particulars delivered by my brethern, how that counsel being assigned to those four Gentlemen, in the latter end of Michaelmas Term their cause received hearing; and upon consideration of the Statutes and records, we found some of them to be according to the good old law of Magna Carta; but we thought, that they did not come so close to this case, as that bail should be thereupon presently granted...I have now sat in this court fifteen years, and I should know something; surely, if I had gone in a mill so long, some dust would cleave to my cloaths. I am old, and have one foot in the grave, therefore I will look to the better part, as near as I can. But 'omni habere in memoria, et in nullo errare, divinum potius est quam humanum.'[31]

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[31]William Cobbett, Cobbett's Complete Collection of State Trials, (London, 1809), II, p. 163.

Dodderidge, wearied by the ordeal, returned to his home near Egham and died on September 13 at the age of seventy-three. He was buried in Our Lady's Chapel at Exeter Cathedral. He must have realized during the spring proceedings that the England he understood was passing away. He was left among a group of anxious men who wanted to transform the government into something alien to his thinking.

Although Dodderidge was married three times, he had no children. His nephew, John Dodderidge, discovered his uncle's manuscripts and published them. The English Lawyer was one of these works.[32] It was probably the last and most effective method book produced for English law students. It was written sometime during the 1620s and reflected the author's appreciation of the humanist philosophy of education. Dodderidge not only showed an ability to synthesize the wisdom of the ancients, English legal writers, and humanists, but he also brought to the work the experience of a practising lawyer and the reputation of a distinguished judge. These factors underlined the treatise's significance and its contribution to legal education.

Dodderidge had attended university when the humanist philosophy was in its ascendancy. His book demonstrated a man educated beyond the purview of the common law and underscored his appreciation of the humanists. He pointed out that,

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[32]The English Lawyer was published in 1631. The second half of the treatise, entitled "Methodus studendi" was published separately in 1629 under the title, "The Lawyer's Light."

> Since the materiall subject of the Law is so ample (as indeed it is) containing all things that may be controverted. The study of the Lawes then must of necessity stretch out her hand, and crave to be holpen and assisted almost of all other Sciences.[33]

Dodderidge encouraged law students to synthesize the knowledge acquired in their liberal arts curriculum and in their common law readings with their practical experiences and personal observations in the courts.

In the first four chapters of his book, he stressed the importance of rhetorical skills. He did not separate the qualities of a good orator into the five divisions of Cicero as Wilson had. This was not unusual for many Renaissance writers of rhetoric tended to adapt the number of principles to fit their particular needs, while still acknowledging their debt to Cicero. Dodderidge identified three qualities. He maintained a lawyer must possess a sharpness and dexterity of wit, because he would have to be able to refer to laws at a moment's notice. He said,

> It behooveth the Lawyer with a quicke conceit to comprehend the cause of his Client once opened, throughly to understand the drifts of his Adversaries reasons at the first urged, readily both to invent, and fitly to apply his provided proofes and arguments to the point in question: all which are the effects of an excellent wit, and with the which we doe so much desire our learned Lawyer should be adorned.[34]

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[33]John Dodderidge, The English Lawyer, (London, 1631), p. 35.

[34]Ibid., p. 5.

A sound memory was also essential. Although this was a quality obviously recognized by lawyers, Dodderidge emphasized the ability to organize logically and commit to memory one's thoughts. He cited Plato, Aristotle, Augustine, Bracton, and others to support this contention. His use of a diversity of sources reflected the breadth and depth of his own study. The final attribute that the student should cultivate was an eloquent delivery. According to Dodderidge it should be dignified, discrete, without affectation, and agreeable to the matter at hand.[35]

The humanist attempts to purify the Latin language were also acknowledged and supported by Dodderidge. He was critical of the manner in which the medieval legal writers had corrupted the language. He praised the efforts of the legal humanists: Alciati, Bude, and Cujas for purifying the civil law by their criticism of the mos italicus. Dodderidge urged the common law students to study the language, because many significant pieces of legislation and important legal treatises were written in Latin. He specifically mentioned the laws of Edward the Confessor, Magna Carta, the Statutes of Merton, Westminister, and Gloucester and the treatises of Glanville, Fleta, Bracton, and Fortescue.[36] But he cautioned the students against becoming too eloquent at the expense of distorting the true

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[35]Ibid., pp. 24-25.

[36]Ibid., pp. 40-44.

meaning of the law: "for what profiteth a Golden key, if it cannot open, and what hurt is it to use a wodden key, if it will open, when there is no other end of both, but to open that which was shut."[37]

Furthermore, Dodderidge urged the students to apply the art of logic to their study of the laws of England. He maintained,

> To obtaine the knowledge of any Science two things are required, first, the certaine dependency and coherence of the parts of the matter to bee knowne, and secondly, the aptnesse of the instrument whereby we doe apprehend and know the same...these things doth Logicke minister unto us.[38]

The laws of England were not always coherent; they were conclusions drawn from the law of nature or principles based on custom and reason. Yet they lacked a systematized compilation similar to the civil law. Logic, Dodderidge argued, would facilitate the study of the law, because, it "teacheth a man to collect the Axiomes, principles, grounds and rules observed in that Art which he studieth, and being so collected aptly to dispose the same."[39] He cited many classical authors, among them Plato, Aristotle, and Cicero, to endorse his contention to the utility of logic. Moreover, logic would improve and strengthen one's arguments in a court of law, for it would teach the correct manner of arranging an

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[37]Ibid., p. 54.

[38]Ibid., p. 64.

[39]Ibid., p. 62.

argument through the definition and division of parts. It would also assist in resolving imperfect arguments. Dodderidge spent a considerable amount of time in citing examples of land, criminal, and constitutional law on how this could be achieved.[40]

In the last section of his book, entitled "Methodus studendi," Dodderidge presented some guidelines whereby the student could employ a method for collecting propositions and thus facilitate the study of the law. He criticized past practices when he pointed out,

> To adhere therfore and wholly to respect particular cases, without any observation of the generall Rules and Reasons, and to change the memory with infinite singularities, is utterly to confound the same; a labour of unspeakable toyle, & wherin we shall never free us from confusion; but engender in our selves, that wrong opinions which many have (amisse) entertained, that there is nothing certaine in our Lawes.[41]

His criticism of the disorganized state of the law was similar to Bacon's. But, unlike Bacon, Dodderidge did not propose establishing a commission to reform the law.[42] Rather he urged the student to compile a common place book. This was not a new idea. Although students had been encouraged for years to compile observations on cases studied or heard in court, now they tended to rely upon the

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[40]Ibid., pp. 107-43.

[41]Ibid., pp. 259-60.

[42]Supra., p. 11.

published Reports of Plowden and Dyer. Dodderidge considered the common place book as an instrument for compiling principles deduced from the common law. This would not only assist the student in understanding the law by refining complex cases to short and lucid statements, but it would also serve the individual as a useful reference manual once he was in practice.

The English Lawyer was similar to the method books that precede it, for it lacked originality. It was another attempt to glean from the classical sources ideas on method. In fact, a resolution of the method controversy was not forthcoming until the middle of the seventeenth century when interest in scientific investigation became significant.

Nevertheless, it was a useful treatise. Dodderidge recognized the utility of the humanist philosophy of education and was able successfully to modify and apply it to the needs of the English law student. He offered the students a more sophisticated introduction than had been previously written for the study of the common law. It was published at a time when the need for such a book was particularly apparent. Its utility became even more obvious with the outbreak of civil war. Between 1642 and 1647, the Inns of Court were closed. Although attempts were made after the war to open them, the support was less than enthusiastic. Students had begun to study law on an individual basis with accommodating lawyers. They also

read law books and attended court proceedings.[43] Since the individual was left largely to his own resources, the need for such a guide became particularly acute. Dodderidge's The English Lawyer helped to fill that need.

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[43]This system of learning the law was retained until the 1830s.

6 CONCLUSION: TOWARD THE TWILIGHT OF DAWN

By the early eighteenth century, Alexander Pope offered a new perspective of man's relationship to God, the universe, and society in his philosophic poem, "Essay on Man" (1732-34). He wrote,

> Know then thyself, presume not God to scan,
> The proper study of mankind is man.
> Placed on this isthmus of a middle state,
> A being darkly wise, and rudely great:
> With too much knowledge for the sceptic side,
> With too much weakness for the stoic's pride,
> He hangs between; in doubt to act, or rest;
> In doubt to deem himself a god, or beast;
> Born but to die, and reasoning but to err;
> Alike in ignorance, his reason such,
> Whether he thinks too little, or too much:
> Chaos of Thought and Passion, all confused;
> Still be himself abused or disabused;
> Created half to rise, and half to fall;
> Great lord of all things, yet a prey to all;
> Sole judge of truth, in endless error hurl'd:
> The glory, jest, and riddle of the world![1]

Pope was living in a new intellectual climate that emerged as a result of the seventeenth century scientific revolution. This revolution, more than any other single movement, transformed the climate of opinion from a medieval view to a modern one. Physics replaced metaphysics. Philosophy was dominated by scientific analysis and reason rather than myth and revelation.

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[1]Alexander Pope, "Essay on Man," in Collected Poems, ed. Bonamy Dobree, (London, 1956), pp. 189-90.

The emergence of this new intellectual climate was affected by a variety of factors. The pressure of significant events on the status quo, such as the Renaissance and Reformation, was a striking influence. The slow deliberate change in political theories and legal issues brought about by the rise of the nation states, voyages of discovery, and the Reception of the Roman law was another. The re-examination and reshaping of common assumptions about God, the universe, man, and society also inspired a new point of view. Throughout the sixteenth century, the humanist movement encouraged this subtle significant trend that enabled philosophical reasoning to transcend theological speculation.

The Elizabethan legalists were both products and creators of the humanist movement. They realized that the medieval view was no longer applicable to the present. By their acceptance of this fact, the legalists sought to resolve the conflicts of their age that had been created by the decline in the theory of medieval universalism and by the emergence of the events of the sixteenth century. Their search for a new beginning led to an exploration of the use of history and the comparative method, the opening of a new field of international law, and the examination of the condition of their educational system. Each provided a personal approach and interpretation. Although they varied from one another, the legalists did address themselves to the same question, a resolution of the issue of authority.

Obviously, authority suggests a variety of meanings and the principles of authority are dependent on the kind of authority being considered. In the case of the Elizabethan legalists, they tended to focus on issues that political and legal authority generated. They were concerned with the practical consequences that resulted from the changing intellectual climate. Lambarde, Fulbecke, and Ridley attempted to make distinctions between the spheres of influence found in the common and civil laws. Their attention was directed to the practical application of these laws and the courts that administered them. Dodderidge was interested in a different type of authority, a conceptual form, an ideal. His concern involved assuring the primacy of the common law by improving its educational process. Gentili focused his attention on a broader interpretation of authority that was not limited to England. He was concerned with developing an action model for a system of international law. Although they were not always original in their efforts, the legalists did attempt to be creative and display a degree of sensitivity to their particular issue.

"In a transitional period such as the Renaissance," Neal Gilbert suggested, "historians like to look for figures who can be called either 'modern' or 'reactionary' (in this case, 'medieval') and tend to neglect those who genuinely

belong to the transition period."[2] Gilbert's perceptive observation explains, perhaps, in part why the Elizabethan legalists have not received the attention of modern scholars. Each was concerned with the immediacy of a particular issue that was critical to him at the moment. Lambarde's treatise was designed to explain the historic evolution of the common and prerogative courts. The delicate balance of judicial authority that existed between them was a significant issue during the late sixteenth century. Fulbecke and Ridley offered logical explanations for the retention of the civil law. This system of jurisprudence had come increasingly under attack from the common law lawyers and the Puritans during the early years of the seventeenth century. Gentili focused his attention on systematizing international law that had become essential due to the development of autonomous nation states. Dodderidge composed a method book for common law students to facilitate their comprehension of the law. This was important as the system of legal education declined at the Inns of Court during the sixteenth century and disappeared altogether as a result of the civil war in the seventeenth century.

Edward Coke belongs to this "transitional period" too. He was concerned for the state of the common law in the

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[2]Gilbert, Renaissance Concepts, p. xxiii.

commonwealth because of the King's increased use of his royal prerogative power. More than any other person discussed in this study, Francis Bacon deserves the title, "modern". He concentrated his efforts on developing a new approach that would refine the laws of England. And his method would be useful beyond the period for which it had been originally developed.

A comparison of the purpose and method of the lesser legalists with those of Bacon and Coke offers some interesting distinctions. Coke relied on the past to explain and defend the unique position of the common law. His method was dependent on historical precedents found in the common law, statutes of the realm, and histories of England. Lambarde, Fulbecke, and Ridley employed a similar approach, for they utilized historical sources extensively. Unlike the others, Lambarde avoided involving himself in the major political issues of the day.[3] This was partly due to his scholarly training during the elitist phase of the humanist movement. Also his career as a justice of the peace directed his attention to local political issues. Fulbecke, Ridley, and Coke were motivated in part by specific political issues of the time. Dodderidge's approach was an

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[3]The only time Lambarde involved himself in a significant political issue of the central government was during a parliamentary speech on November 8, 1566 over the succession question. See Simonds D'Ewes, The Journals of all the Parliaments During the Reign of Queen Elizabeth, both of the House of Lords and House of Commons, (London, 1682), p. 128.

obvious adaption of humanist ideas on method. His purpose was not unlike Coke's, for his goal was to maintain and assure a vigorous common law. Yet the politics of Dodderidge's judicial stance were opposite to those of the famous Chief Justice. Gentili's interest in system was similar to Bacon's. He collected facts by examining phenomena and then arrived at general rules or conclusions. Although Gentili did not articulate his views on the role of the civil law in England, he probably would have sided with the opinions of Fulbecke, Ridley, Dodderidge, and Bacon.

The Elizabethan legalists had begun to examine critically the conflicts of authority that had been created as a result of the change in the intellectual climate of the sixteenth century. They were among that group of men who responded to the challenge to re-examine and reshape the common assumptions of their age. J.B. Bury referred to this group of thinkers as men "living in an intellectual twilight...the twilight of dawn."[4] Through their insistence on re-examining the past, the Elizabethan legalists contributed to the formation of a process that led to the scientific revolution.

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[4]J.B. Bury, The Idea of Progress; An Inquiry into Its Origins and Growth, (London, 1920), p. 33.

BIBLIOGRAPHICAL ESSAY

BIBLIOGRAPHICAL ESSAY

This essay is designed to acquaint the student with a critical appraisal of the sources and studies essential to an examination of the Elizabethan legalists.

Bacon

The best edition of Bacon's works is The Works of Francis Bacon, edited by James Spedding, Robert Leslie Ellis, and Douglas Denton Heath, 15 vols. (Boston, 1882) and The Letters and Life of Francis Bacon, edited by James Spedding, 7 vols. (London, 1872).

S.R. Gardiner's article in the Dictionary of National Biography is important for identifying biographical sources on Bacon. W.S. Holdsworth, "Francis Bacon's Decisions," Law Quarterly Review, XLIX, (1933), pp. 61-69 examines his ideas on equity. Leonard F. Dean, "Sir Francis Bacon's Theory of Civil-History-Writing," Journal of English Literary History, VIII, (1941), pp. 161-83 is a study of his scattered notions about a theory of history which the author claims has been a neglected aspect of Bacon's thought. Paul H. Kocher, "Francis Bacon on the Science of Jurisprudence," Journal of the History of Ideas, XVIII, (1957), pp. 3-26 is very useful in considering his proposals to codify English law. The most provocative study of Bacon's thought is Fulton H.

Anderson, Francis Bacon His Career and His Thought (New York, 1962).

Coke

Coke's views on the common law are found in his Institutes of the Laws of England, 4 pts. (London, 1628-1644). His Reports, 13 pts. (London, 1600-1615) were edited by George Wilson in 1777 and appeared in 7 volumes.

G.P. MacDonell's article in the Dictionary of National Biography should be consulted. The best biography of his career, however, is Catherine Drinker Bowen, The Lion and the Throne The Life and Times of Sir Edward Coke (Boston, 1956). Henri Levy-Ullmann, The English Legal Tradition (London, 1935) is also useful. Theodore F.T. Plucknett, "The Genesis of Coke's Reports," Cornell Law Review, XXVII, (1942), pp. 190-213 contrasts Coke's and Plowden's methods and purposes for reporting cases. S.E. Thorne, Sir Edward Coke, 1552-1952 (London, 1957) points out the significant development of the law throughout the sixteenth century and Coke's role during this critical period. Originally, this was a Selden Society lecture presented in 1952.

Lambarde

Although Lambarde was a prolific writer, his works have never been compiled into a standard collection. The Archaionomia or Apxaionomia sive depriscis anglorum legibus libri seromone Anglico (London, 1568) appeared in only one

edition. A Perambulation of Kent (London, 1576) was republished in 1596, 1656, and 1826. The Eirenarcha: or the office of the justice of peace (London, 1581) was reissued thirteen times between 1582-1620. The Duties of Constables, Borsholders, Tythingmen, and such other lowe ministers of the peace (London, 1582) appeared in eight editions during the sixteenth century and ten editions during the seventeenth century. It is often bound with the Eirenarcha. Lambarde's rather obscure work, The Seuerall Offices of churchministers and churchwardens, and ouerseers for the poore, surueighours of the highwayes, and distributors of the prouision against noysome fowle and vermin was added to the 1610 edition of The Duties of Constables. The Archeion or, a Discourse upon the High Courts of Justice in England (London, 1635) was completed in 1591. Two editions appeared in 1635 with Thomas Lambarde's edition generally recognized as the authoritative one. This edition was recently republished by Harvard University Press in 1957 edited by Charles H. McIlwain and Paul L. Ward.

Gordon Goodwin's article in the Dictionary of National Biography is helpful for identifying additional source materials. The only biography of Lambarde is William Dunkel, William Lambarde, Elizabethan Jurist 1536-1601 (New Brunswick, 1965). Unfortunately, it is a rather superficial effort. Conyers Read, "William Lambard's 'Ephemeris', 1580-1588," Huntington Library Quarterly, XV, (1952), pp. 123-58 discusses Lambarde's work as a justice of the peace. William

Lambarde and Local Government, edited by Conyers Read (Ithaca, 1962) examines Lambarde's works and his significance to the intellectual community. Paul L. Ward, "William Lambarde's Collections on Chancery," Harvard Library Bulletin, VII (1953), pp. 271-98 discusses this little publicized aspect of his scholarship. R.J. Schoeck, "Early Anglo-Saxon Studies and Legal Scholarship in the Renaissance," Studies in the Renaissance, V, (1958), pp. 102-10 sees the importance of the role of the Society of Antiquaries and Lambarde's in shaping the intellectual life of legal scholarship.

Fulbecke

Fulbecke wrote three significant treatises. A Direction or Preparative to the Study of the Lawe (London, 1600) was republished in 1620. T.H. Stirling then edited the work in 1829. A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of this Realme of England (London, 1601) was expanded and published in the following year as The Second Part of the Parallele, or Conference of the Civill Law, the Canon Law, and the Common Law of this Realme of England (London, 1602). The first part was republished in 1618. Fulbecke also wrote two minor works An Historical Collection of the Continual Factions, Tumults, and Massacres of the Romans and Italians during the space of one hundred and twentie yeares next before the Peaceable Empire of Augustus Caesar,...beginning where the Historie of T. Livius doth end, and ending where Cornelius Tacitus doth

begin (London, 1601); and The Pandectes of the Law of Nations, contayning severall discourses of the questiones...of law, wherein the nations of the world doe consent and accord (London, 1602).

The only article that examines Fulbecke's career is Francis Watt's work in the Dictionary of National Biography.

Ridley

Ridley wrote only one treatise, A View of the Civile and Ecclesiastical Law (London, 1607). Three other editions were produced in 1634, 1676, and 1684. The best edition is the original.

W.A.J. Archbold's article in the Dictionary of National Biography is helpful in highlighting Ridley's very active career. David Lloyd, The Statesmen and Favourites of England Since the Reformation (London, 1665) is also useful. Roland G. Usher, The Reconstruction of the English Church, 2 vols. (New York, 1910) offers some facts about Ridley as a legal representative for the ecclesiastical hierarchy. And Christopher Hill, Economic Problems of the Church (London, 1956) discusses briefly Ridley's role as a defender of the Anglican church.

Gentili

Gentili's major works have all been republished in The Classics of International Law series under the general editor, James Brown Scott. De Legationibus Libri Tres, translated by Gordon J. Laing, 2 vols. (New York, 1924)

appeared with an important introduction by Ernest Nys. De Legationibus was published on three previous occasions in 1585, 1594, and 1607. De Jure Belli Libri Tres, translated by John C. Rolfe, 2 vols. (Oxford, 1933) included a provocative introduction by Coleman Phillipson. De Jure was originally published in 1598. It was then published in 1877 edited by T.E. Holland. The Hispanicae Advocationis Libri Duo was translated by Frank Frost Abbott, 2 vols. (New York, 1921).

Thomas Erskine Holland was largely responsible for pointing out Gentili's contribution to international law. Holland wrote the article for the Dictionary of National Biography. The lecture on Gentili that he delivered at Oxford was published An Inaugural Lecture on Alberico Gentilis (London, 1874). He compared Gentili with his contemporaries in Studies in International Law (London, 1898). Each of these works should be consulted. Ernest Nys, Le Droit De La Guerre et Les Precurseurs De Grotius (Bruxelles, 1882) and his Les Origins de Droit International (Bruxelles, 1894) are useful in examining Gentili's career. Much of what Nys has to say about Gentili has been modified and translated in his introduction to the De Legationibus cited above. Coleman Phillipson, The Great Jurists of the World (Boston, 1914) offers an important analysis of Gentili. Many of Phillipson's comments also appear in his introduction to the De Jure. Gezina Hermina Johanna Van Der Molen, Alberico Gentili and the Development of International Law (Amsterdam, 1937) is especially helpful in analyzing Gentili's minor works.

Finally, Garrett Mattingly, Renaissance Diplomacy (Baltimore, 1955) is a good overview of the issue of international relations in the sixteenth century. And Francois L. Ganshof, The Middle Ages A History of International Relations (New York, 1970) may also be useful.

Dodderidge

Dodderidge's The English Lawyer (London, 1631) was published only once. His History of the Ancient and Moderne Estates of the Principality of Wales, Dutchy of Cornwall, and Earldom of Chester (London, 1630) was republished in 1714.

J.M. Rigg's article in the Dictionary of National Biography is the only available narrative of Dodderidge's life. Some additional facts about his career can be gleaned from the Diary of Walter Yonge, edited by George Roberts (London, 1868) and the Diary of John Manningham, edited by John Bruce (London, 1868). Dodderidge's reply to the habeas corpus issue is available in William Cobbett, Cobbett's Complete Collections of State Trials, vol. 2 (London, 1809). Also a brief description of The English Lawyer is found in J.G. Marvin, Legal Bibliography (Philadelphia, 1847).

Contemporaries

Materials dealing with the contemporaries of the Elizabethan legalists should also be considered. Both treatises and secondary studies are available.

Thomas Wilson, The Arte of Rhetorique, edited by Robert W. Bowers (Gainesville, 1962) is a facsimile of the

1553 edition. The 1560 edition of the Arte of Rhetorique, edited by G.H. Mair (London, 1909) is the best edition and Mair's introduction is useful. Thomas Wilson's other work, The Rule of Reason, conteinyng the Arte of Logique (London, 1551) should be consulted.

Robin Flower, "Laurence Nowell and the Discovery of England in Tudor Times," Proceedings of the British Academy, XXI, (1935), pp. 47-73 is important for Nowell's influence on Lambarde. There are a number of editions of Richard Hooker, Of the Lawes of Ecclesiasticall Politie. E.T. Davies, The Political Ideas of Richard Hooker (London, 1948) is perceptive in analyzing Hooker's ideas. Sir Julius Caesar, The Ancient State, Authorite, and Proceedings of the Court of Requests (London, 1597) examines one of the controversial prerogative courts. Leadam in his introduction to Select Cases in the Court of Requests 1497-1569, edited by I.S. Leadam (London, 1898) discusses Caesar's role in the court and the issue of prerogative. John Cowell, The Interpreter (Cambridge, 1607) should be consulted in any study of the civilians in England and the issue of the prerogative. S.B. Chrimes, "The Constitutional Ideas of Dr. John Cowell," English Historical Review, LXIV, (1949), pp. 461-83 is a provocative examination of Cowell. Another important English civilian was Arthur Duck. He wrote De Usu & Authoritate Juris Civiles Romanorum, In Dominis Principum Christianorum (London, 1653). This was translated by John Beaver in 1714.

Sir Thomas Smith, De Republica Anglorum, edited by L. Alston (London, 1906) and his A Discourse of the Commonwealth

of This Realm of England, edited by Mary Dewar (Charlottesville, 1969) are also helpful in studying the Elizabethan period. Two works are useful in evaluating Smith's significance. Mary Dewar, Sir Thomas Smith A Tudor Intellectual in Office (London, 1964) and George L. Mosse, "Change and Continuity in the Tudor Constitution," Speculum, XXII, (1947), pp. 18-28.

Henry Spelman's works have appeared in The English Works of Sir Henry Spelman, Kt. and The Posthumous Works of Sir Henry Spelman, edited by Edmund Gibson (London, 1723). F.M. Powicke, "Sir Henry Spelman and the 'Concilia'," Proceedings of the British Academy, XVI, (1930), pp. 345-79 discusses Spelman's place among the historians of the sixteenth century. Spelman is also examined in English Historical Scholarship in the Sixteenth and Seventeenth Centuries, edited by Levi Fox (London, 1956). Jean Bodin, Method for the Easy Comprehension of History, translated by Beatrice Reynolds (New York, 1945) explains his philosophy of history. Oeuvres Philosophiques de Jean Bodin, translated by Pierre Mesnand, vol. 5 (Paris, 1951) should also be consulted.

Elizabethan intellectual history

Humanism was the most significant intellectual movement of the sixteenth century. A few works have focused on the contributions of the English humanists. Douglas Bush, The Renaissance and English Humanism (Toronto, 1939) stressed the medieval origins and christian elements of early humanism and the application of these qualities to public life.

James K. McConica, English Humanists and Reformation Politics Under Henry VIII and Edward VI (Oxford, 1965) is a useful companion volume to Bush's work. Arthur B. Ferguson, The Articulate Citizen and the English Renaissance (Durham, N.C., 1965) examines the humanists' contributions to secular thought. Louis B. Wright, Middle-Class Culture in Elizabethan England (Ithaca, 1958) is important for its analysis of the intellectual background of the common people in the Elizabethan age. Foster Watson, The English Grammar Schools to 1660 Their Curriculum and Practice (London, 1908) was helpful in explaining the Renaissance influence in early modern education.

A well accepted thesis is that Englishmen borrowed ideas from the continent. Three early works are addressed to illustrate this fact. Lewis Einstein's two works, The Italian Renaissance in England (New York, 1902) and Tudor Ideals (New York, 1921) and Sidney Lee, The French Renaissance in England (London, 1910).

The humanists made a significant contribution to a new theory of history. One of the more provocative articles on this topic is Myron P. Gilmore's, "Freedom and Determinism in Renaissance Historians," Studies in the Renaissance, III, (1956), pp. 49-60. This was followed by his equally important work, Humanists and Jurists Six Studies in the Renaissance (Cambridge, Mass., 1963). Also of particular interest are Leonard F. Dean, "Tudor Theories of History Writing," The University of Michigan Contributions in Modern Philosophy, no. 1, (April, 1947), pp. 1-24; Wallace K. Ferguson, The

Renaissance in Historical Thought (Boston, 1948); and Beatrice Reynolds, "Shifting Currents in Historical Criticisms," Journal of the History of Ideas, XIV, (1953), pp. 471-92.

May McKisack, Medieval History in the Tudor Age (Oxford, 1971) is one of the more recent books published on early modern historiography. George Huppert, The Idea of Perfect History (Urbana, 1970) and Donald R. Kelley, Foundations of Modern Historical Scholarship (New York, 1970) point out the significance of French historical thought in the sixteenth century. Both see an interest in and willingness to examine the past on its own terms, especially classical antiquity. F.J. Levy, Tudor Historical Scholarship (San Marino, 1967) stresses the significant impact of French historians on English history writing and is very useful. Julian H. Franklin, Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History (New York, 1963) identifies Bodin's influence in England while F. Smith Fussner, The Historical Revolution English Historical Writing and Thought 1580-1640 (London, 1962) is excellent for its examination of the relationship between legal and historical scholarship.

Three rather distinctive studies on sixteenth century history writing are William R. Trimble, "Early Tudor Historiography, 1485-1548," Journal of the History of Ideas, XI, (1950), pp. 30-41. He saw indigenous changes, unaffected by the continent, in early Tudor history writing. G. Wylie Sypher, "Similarities Between the Scientific and the Historical Revolutions at the End of the Renaissance," Journal of the History of Ideas, XXVI, (1965), pp. 353-68 pointed

out the significance of the scientific method on historical scholarship. David Little, Religion, Order, and Law A Study in Pre-Revolution England (New York, 1969) stressed the impact of the Reformation on lawyers' attitudes to the past. His treatment of Coke is of particular interest.

Humanists also made contributions to Renaissance education and politics by their concern for rhetoric. The best work on this topic is Neal W. Gilbert, Renaissance Concepts on Method (New York, 1960). Wilbur Samuel Howell, Logic and Rhetoric in England, 1500-1700 (New York, 1961) and Jerrold E. Seigel, Rhetoric and Philosophy in Renaissance Humanism The Union of Eloquence and Wisdom, Petrarch to Valla (Princeton, 1968) are also worthwhile examining. R.J. Schoeck, "Rhetoric and Law in Sixteenth-Century England," Studies in Philosophy, L, (1953), pp. 110-27 was especially helpful in understanding Thomas Wilson's role.

Elizabethan legal history

The best study of English legal history is still W.S. Holdsworth, A History of English Law, 16 vols. (London, 1922-1966). Volume two is important for its treatment of Roman law in medieval England. The fourth volume in particular discusses the Reception of Roman law while the fifth volume emphasizes the development of equity and international law in the sixteenth century. Finally, part of the sixth volume is useful for its comments on the prerogative issue and the early Stuarts. For a good concise survey, Sir David

Lindsay Keir, The Constitutional History of Modern Britain, 8th. ed. (New York, 1966) covers the Tudor period.

Students should also familiarize themselves with some of the older single volume surveys of English legal history. Among these are Frederic W. Maitland, The Constitutional History of England (London, 1909); Edward Jenks, A Short History of English Law (London, 1912); Theodore F.T. Plucknett, A Concise History of the Common Law (Rochester, N.Y., 1936); Harold Potter, An Historical Introduction to English Law and Its Institutions (London, 1948); and W.J.V. Windeyer, Lectures on Legal History (Australia, 1949). Each is significant for identifying the legal writers of the late sixteenth and early seventeenth centuries.

There are a number of excellent works that examines the constitutional problems that arose between the Crown and Parliament during this period. S.B. Chrimes, English Constitutional Ideas in the Fifteenth Century (London, 1936) is useful for background material. Carl J. Friedrich, Tradition and Authority (London, 1972) is helpful for its theoretical examination of the constitutional questions of Crown and Parliament in the late sixteenth and early seventeenth centuries. Charles H. McIlwain's two studies, Constitutionalism Ancient and Modern (Ithaca, 1947) and The High Court of Parliament and Its Supremacy (New Haven, 1910) are standard works that should be consulted. George L. Mosse, The Struggle for Sovereignty in England (E. Lansing, 1950) is perceptive in its examination of the ideas of the law of nature and the law of reason. J.G.A. Pocock, The Ancient

Constitution and the Feudal Law A Study of English Historical Thought in the Seventeenth Century (London, 1957) offers some excellent analysis of the common law in the late Elizabethan period. His treatment of Coke is especially useful. Finally, Francis D. Wormuth, The Royal Prerogative 1603-1649 (Ithaca, 1939) discusses the conflict between the Stuarts and Parliament over the concept of royal prerogative.

The problem of prerogative courts produced a critical issue in the sixteenth century. The Court of Star Chamber and the Court of Chancery were particularly important. Cora Scofield, A Study of the Court of Star Chamber (New York, 1900) is still the standard work despite its age. Recently, Thomas G. Barnes has examined the Star Chamber in "Star Chamber Mythology," American Journal of Legal History, V, (1962), pp. 1-11 and "Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber," American Journal of Legal History, VI, (1962), pp. 221-49 and pp. 315-46. W.J. Jones, The Elizabethan Court of Chancery (London, 1967) is a thoroughly researched and invaluable study of the Chancery.

While on the topic of prerogative courts, the student should be familiar with the literature on the Roman law in England. Thomas E. Scrutton, The Influence of the Roman Law of the Law of England (London, 1885) is one of the oldest works on this topic. Scrutton does not see any influence before the time of Glandville and Bracton. Frederic W. Maitland, English Law and the Renaissance (London, 1901) offered an interesting argument. He maintained that the

common law was seriously threatened by the civil law of the continent. The leading cause for this was the Renaissance and in particular the humanist movement. Since Maitland, scholars have succeeded in modifying considerably his thesis. William Senior, Doctors' Commons and the Old Court of Admiralty: A Short History of the Civilians in England (London, 1922) is a good survey of the leading theoreticians of the civil law in England. Sir Paul Vinogradoff, Roman Law in Medieval England, 2nd. ed. (London, 1929) should be consulted. Myron P. Gilmore, Argument from Roman Law in Political Thought 1200-1600 (Cambridge, Mass., 1941) is also a more recent study. Charles Ogilvie, The King's Government and the Common Law 1471-1641 (Oxford, 1958) is extremely useful in its consideration of the conflict between the common law and the civil law lawyers. And Brian P. Levack, The Civil Lawyers in England 1603-1641; a political study (Oxford, 1973) examines the civilians and their fate during the political turmoil of the early seventeenth century.

There is one article that is devoted solely to international law of the Elizabethan period, E.R. Cheyney, "International Law Under Queen Elizabeth," English Historical Review, XX, (1905), pp. 659-72. The author discusses the international political climate and mentions some of the international legalists, Grotius, Hotman, and Gentili.

The student will not be hard pressed to find materials on the system of legal education in England. Three works are invaluable for a consideration of the Inns during the Tudor period. Nichols Bacon's Report indicated the quality

of education at the Inns at the close of Henry VIII's reign. The Report can be found in Edward Waterhouse, Fortescue Illustratus (London, 1663), pp. 539-46. Sir George Buck, "The Thirde Universitie of England," in John Stow, The Annales (London, 1615), pp. 956-88 explains the close relationship between the Common law and the Chancery Inns. William Dugdale, The History and Antiquities of the Four Inns of Court and of the Nine Inns of Chancery (London, 1780) offers a critical appraisal of the administration of the Inns.

Recent scholarship on the Inns of Court has focused on the decline of the educational system. W.S. Holdsworth, "The Disappearance of the Educational System of the Inns of Court," University of Pennsylvania Law Review, LXIX, (1920-1921), pp. 201-22 identifies three reasons for the decline: the invention of the printing press, the lack of interest among students to attend the traditional learning exercises, and the failure of the teachers to adhere to the old system. Other useful articles on this theme are Anton-Hermann Chroust, "Beginning, Flourishing and Decline of the Inns of Court: The Consolidation of the English Legal Profession After 1400," Vanderbilt Law Review, X, (1956), pp. 79-123; Kenneth Charlton, "Liberal Education and the Inns of Court in the Sixteenth Century," British Journal of Educational Studies, IX, (1960), pp. 25-38; and Wilfrid Prest's two articles, "The Learning Exercises at the Inns of Court 1540-1640," The Journal of the Society of Public Teachers of Law, IX, n.s.(1967), pp. 301-13 and "Legal Education of the Gentry at the Inns of Court, 1560-1640," Past and Present, no. 38, (1967), pp. 20-39.

Through the years alumni of the various Inns have written some rather informative but superficial surveys in praise of their particular Inns. Among these works are: J. Bruce Williamson, The History of the Temple, London (London, 1925); Hugh H.L. Bellot, The Inner and Middle Temple Legal, Literary, and Historic Associations (London, 1902); George Godwin, The Middle Temple The Society and Fellowship (London, 1946); and William R. Douthwaite, Gray's Inn Its History & Associations (London, 1886). Each is helpful in identifying the significant contributions of its members.

There has been some important research in recent years examining general educational trends in the Tudor period. Mark H. Curtis, Oxford and Cambridge in Transition 1558-1642 (London, 1959); Lawrence Stone, "The Educational Revolution in England 1560-1640," Past and Present, no. 28, (1964), pp. 41-80; Kenneth Charlton, Education in Renaissance England (London, 1965); and Joan Simon, Education and Society in Tudor England (London, 1966) should be consulted. The works of Charlton and Simon are especially useful for the legal historian.

A few scholars have addressed themselves to the study of lawyers and their significance to society. The following articles are essential for understanding the status of the profession in its cultural milieu: Theodore F.T. Plucknett, "The Place of the Legal Profession in the History of English Law," Law Quarterly Review, XLVIII, (1932), pp. 328-40; E.W. Ives, "The Reputation of the Common Lawyers in English Society

1450-1550," University of Birmingham Historical Journal, VII, (1960), pp. 130-61; and William J. Bouwsma, "Lawyers in Early Modern Culture," American Historical Review, LXXVIII, (1973), pp. 303-27.

Finally, three works should be consulted for a discussion of the impact of sixteenth century events on the philosophy of law. Sir Paul Vinogradoff, "Reason and Conscience in Sixteenth-Century Jurisprudence," Law Quarterly Review, XXIV, (1908), pp. 373-84 examines equity. Arthur Goodhart, English Contributions to the Philosophy of Law (New York, 1949) compares the abstract continental approach to the English practical method of developing a theory of law. The most important work of this type is Carl Joachim Friedrich, The Philosophy of Law in Historical Perspective (Chicago, 1958). His discussion of the significance of religion in molding legal philosophy is very provocative.

General studies

Two works serve as a good introduction to English legal history of the medieval period J.E.A. Jolliffe, The Constitutional History of Medieval England, 4th. ed. (New York, 1961) and Bryce Lyon, A Constitutional and Legal History of Medieval England (New York, 1960). Gaines Post, Studies in Medieval Legal Thought (Princeton, 1964) and Walter Ullmann, The Medieval Idea of Law As Represented by Lucas De Penna (London, 1946) are important introductions to the study of continental legal thought of the middle ages. R.F. Wright, Medieval Internationalism (London, 1930) should also be consulted.

Johan Huizinga, The Waning of the Middle Ages (Garden City, 1949) is especially useful for capturing the mood of the late medieval period.

A good deal of scholarship is readily available on the Renaissance. The student should examine carefully Jacob Burckhardt, The Civilization of the Renaissance in Italy, 2 vols. (New York, 1929). Hans Baron, The Crisis of the Early Italian Renaissance (Princeton, 1966) and Myron P. Gilmore, The World of Humanism 1453-1517 (New York, 1952) are sound perceptive studies. Paul Oskar Kristeller is one of the more prolific writers on the Renaissance. His works include: Renaissance Concepts of Man and Other Essays (New York, 1972); Renaissance Essays, edited with Philip P. Wiener (New York, 1968); Renaissance Thought The Classic, Scholastic, and Humanistic Strains (New York, 1961); and Renaissance Thought II Papers on Humanism and the Arts (New York, 1965). Frederico Chabod, Machiavelli and the Renaissance (New York, 1965) is a perceptive analysis of the political theorist and the period. Lauro Martines, Lawyers and Statescraft in Renaissance Florence (Princeton, 1968) is also good. Ernest Cassier, The Individual and the Cosmos in Renaissance Philosophy is one of the most provocative studies of Renaissance thought and is essential reading. Two works that examine the English Renaissance are Hiram Hayden, The Counter-Renaissance (New York, 1950) and Theodore Spencer, Shakespeare and the Nature of Man (New York, 1942). Both are as significant in analyzing Renaissance thought as Cassier's work.

The Reformation also lends itself to extensive scholarly research. Among the works that should be considered are: M.M. Knappen, Tudor Puritanism (Chicago, 1939); Roland Bainton, The Reformation of the Sixteenth Century (Boston, 1952); Harold J. Grimm, The Reformation Era 1500-1650 (New York, 1954); and A.G. Dickens, The Counter-Reformation (New York, 1969).

Two works stand out as perceptive introductions for discussing science in the early modern period. They are Edwin A. Burtt, The Metaphysical Foundations of Modern Physical Science (London, 1932) and Herbert Butterfield, The Origins of Modern Science (New York, 1957).

There is a large corpus of scholarship on sixteenth century political theory. Some stressed the importance of lawyers and their contributions of legal ideas in resolving the political conflicts of the age. Some of these works are: John Neville Figgis, The Divine Right of Kings (London, 1914); and his, Studies of Political Thought From Gerson to Grotius 1414-1625 (London, 1916); J.W. Allen, A History of Political Thought in the Sixteenth Century (London, 1928); Franklin Le Van Baumer, The Early Tudor Theory of Kingship (New Haven, 1940); Christopher Morris, Political Thought in England Tyndale to Hooker (London, 1953); and Carl J. Friedrich, Constitutional Reason of State (Providence, 1957).

Bibliographies

There are three bibliographies that are essential to any study of the Elizabethan period. The standard Tudor

bibliography is the Bibliography of British History, Tudor Period, 1485-1603, edited by Conyers Read, 2nd. ed. (Oxford, 1959). A more recent bibliographical handbook is Tudor England 1485-1603, compiled by Mortimer Levine (Cambridge, 1968). The standard bibliography for the Stuart period is the Bibliography of British History, Stuart Period, 1603-1714, edited by Godfrey Davies and Mary Frear Keeler, 2nd. ed. (Oxford, 1970). Also the Dictionary of National Biography, 63 vols. (London, 1885-1900) is invaluable not only for its biographical sketches but also for citing additional source materials on each legalist.