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Charles Donahue, Jr.

The Civil Law in England

The Civil Lawyers in England 1603-1641: A Political Study. By Brian P. Levack. Oxford: The Clarendon Press, 1973. Pp. x, 311. £5.00

Reviewed by Charles Donahue, Jr.[†]

As is the case with so many controversies, the controversy over the influence of the civil law on the development of English law is one in which the polemical has often preceded the descriptive, in which questions are answered before they have been precisely stated. Anglo-American legal writers have long emphasized the uniqueness of the English legal experience. Pride in the common law, coupled with a contempt for the continental legal tradition (bred, at least in some cases, by ignorance), has made these writers want to find that the contributions of the civil law to our own legal system were small.

The historical reasons for this attitude may be inferred from Professor Levack's book.¹ In the 17th century the civil law became associated in England with royal absolutism, with the Court of Star Chamber and High Commission, with the enforcement of religious orthodoxy and the denial of civil liberty. The effects of this association can be seen today in those opinions of our Supreme Court which define the meaning of the Bill of Rights by contrast to the practices of the "civilian" Stuart monarchy.²

Beyond the specific objections to the civil law there lies a characteristic strain of anti-intellectualism in common law thinking:

The great American jurist, Holmes, has said that the life of the law is not logic but experience. This is bred in the bone in English law. A bench of medieval judges once sneered at a barrister for using the "sophisticated reasons" of the philosophers at the ancient English universities. Law was taught, till the eighteenth

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1. B. LEVACK, *THE CIVIL LAWYERS IN ENGLAND 1603-1641: A POLITICAL STUDY* (1973) [hereinafter cited to page numbers only].

2. See, e.g., *In re Oliver*, 333 U.S. 257, 266-71 & nn.21-31 (1948) (Black, J.); *Brown v. Walker*, 161 U.S. 591, 596-97 (1896); cf. *Ullman v. United States*, 350 U.S. 422, 445-47 (1956) (Douglas, J., dissenting). See also R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 27-54 (1957); Moreland, *Historical Background and Implications of the Privilege Against Self-Incrimination*, 44 Ky. L.J. 267 (1956).

century, only in legal practice at the Inns of Court, a workaday "tough" law in Maitland's view. Inherent in this law is the distrust of philosophical analysis which still survives.³

The view that English law is exclusively a home-grown product of the British Isles has produced a reaction, perhaps equally silly, that purports to see Roman law in every Anglo-American legal doctrine and institution for which a Roman law analogy can be found.⁴ Although there have been occasional attempts at a balanced appraisal,⁵ scholarship has suffered from not having many of the basic documents available in an accessible form and has lacked the necessary monographic foundations on which a definitive appraisal could be erected.

On the basis of the work that has been done, we may now safely begin with the proposition that in England the Roman law did not survive the Germanic invasions, as it did in some places on the Continent.⁶ When the Normans arrived in England, therefore, they found a legal system almost totally devoid of Roman influence. From this starting point the traditional view then focuses on three periods of contact between the English legal system and the civil law.

First, and perhaps most controversial, is the period of the precocious development of centralized royal justice in the 12th century. Roman law, some of which was probably derived at second hand through the academic canon law, may have played some part in that development.⁷ The earliest English treatise on the common law, known as Glanvill,⁸ shows considerable acquaintance with the Roman law, and Bracton, writing in the middle of the 13th century, displays so much knowledge of the Roman law that the accuracy of his description of English law may at times be called into question.⁹

After Bracton the traditional focus of attention shifts to Maitland's

3. Kiralfy, *English Law*, in *AN INTRODUCTION TO LEGAL SYSTEMS* 157, 159 (J. Derrett ed. 1968).

4. See, e.g., Sherman, *The Romanization of English Law*, 23 *YALE L.J.* 318 (1914).

5. See, e.g., J. BARTON, *ROMAN LAW IN ENGLAND* (*Ius Romanum Medii Aevi* pars V, 13a, 1971) (leans toward emphasis of civil law); Plucknett, *The Relations Between Roman Law and English Common Law Down to the Sixteenth Century: A General Survey*, 3 *U. TORONTO L.J.* 24 (1939) (leans toward de-emphasis).

6. The analogies to Roman law which may be found in the scanty surviving legal material from the Anglo-Saxon period can confidently be attributed to the influence of the Church and not to any native survival of Roman law. See J. BARTON, *supra* note 5, at 4-6.

7. For a relatively strong but defensible statement of the influence, see R. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL* 360-90 (Selden Soc'y Pub. No. 77, 1959).

8. *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* (G. Hall ed. & transl. 1965). Glanvill's "Romanism" is discussed in *id.* at xxxvi-xl.

9. See J. BARTON, *supra* note 5, at 13-24 & n.62.

thesis that a reception of Roman law was threatened in the 16th century.¹⁰ Research since Maitland's time would indicate that Maitland may have overstated the seriousness of this threat, and one respected legal historian has recently suggested that there was no threat at all, at least not in the terms in which Maitland conceived of it.¹¹ But precisely what did happen during this period and what role civilian learning played in it are questions that have, as yet, no definitive answers.

A final period of civilian influence comes in the late 17th and early 18th centuries. At this time, particularly under the leadership of Lord Mansfield, the common law courts absorbed much of the law merchant, and with that law some civilian ideas.¹²

For all this, the traditional view would emphasize the uniqueness of the English legal experience. England, alone among the Northern European countries where the Roman law had not survived the Germanic invasions, did not "receive" Roman law in the 16th century. It did not, so this view would have it, because its centralized courts had developed early, because it had learned the Roman analytic methods through Bracton without accepting the Roman law itself, and because it had developed a system for recording precedents, the year books, and centralized institutions for training lawyers, the Inns of Court, which enabled it to resist the onslaughts of Romanism in the 16th century.¹³

More careful proponents of the traditional view do not suggest that all the law in England from the 12th to the 19th centuries is to be found in that applied in the King's superior common law courts. They have a tendency, however, to look at the non-common-law courts as oddities—"eccentric tribunals," Blackstone called them¹⁴—forerunners of what they became in the 19th century, the Probate, Divorce, and Admiralty Divisions of the High Court.

Despite the importance of the common law courts, it is easy to

10. F. MAITLAND, *ENGLISH LAW AND THE RENAISSANCE* (Rede Lecture 1901), *reprinted in* 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 168-207 (Ass'n of Am. Law Schools ed. 1907).

11. Thotne, *English Law and the Renaissance*, in *ATTI DEL PRIMO CONGRESSO INTERNAZIONALE DELLA SOCIETÀ ITALIANA DI STORIA DEL DIRITTO, LA STORIA DEL DIRITTO NEL QUADRO DELLE SCIENZE STORICHE* 437 (1966).

12. *See generally* C. FIFOOT, *LORD MANSFIELD* 82-117 (1936); 5 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 102-54 (3d ed. 1945); 6 *id.* 519-22 (2d ed. 1937); 12 *id.* 524-42 (1938); Sutherland, *The Law Merchant in England in the Seventeenth and Eighteenth Centuries*, 17 *TRANS. ROYAL HIST. SOC'Y* 149 (4th ser. 1934).

13. *See, e.g.*, F. MAITLAND, *Outlines of English Legal History*, in 2 *COLLECTED PAPERS* 417, 438-45 (H. Fisher ed. 1911); *see also* F. MAITLAND, *supra* note 10.

14. 3 W. BLACKSTONE, *COMMENTARIES* *86.

overemphasize their importance if we look at English legal history from the vantage point of the common law courts' ultimate triumph. If we instead take the point of view, say, of a sophisticated 14th century litigant, the picture is considerably different. True, if the litigant is not a serf, he will be advised that the common law courts have taken over much of what had formerly been feudal jurisdiction.¹⁵ But he still has a bewildering variety of courts in addition to the superior common law courts open to him, depending on who he is and what kind of claim he has. His claim, for example, may be heard in a county court, in a church court, in a borough court, or in a merchant court. He may try the as yet ill-defined jurisdiction of Chancery. Indeed, certain cases may be heard before the High Court of Parliament itself. From what is now known of the county courts, we would expect to find little penetration of the learned law in them.¹⁶ On the other hand, in the church courts our litigant will find the academic Romano-canon law being applied. The importance of this law for the development of English law can only be determined when more of the records of the medieval ecclesiastical courts are published, when we have a clearer idea of the extent of these courts' jurisdiction. The work that has been done would indicate that if our litigant's case concerns a promise, a marriage, a will, a piece of ecclesiastical property, defamation, or a group of offenses which might roughly be described as morals offenses, he may well find himself in an ecclesiastical court.¹⁷ In the merchant courts, where our litigant may go if he is a merchant, the law applied will be the custom of merchants, a diverse body of rules that will become a transnational body of law with substantial civil law underpinnings.¹⁸ Some influence of the law merchant can be seen as well in the borough courts.¹⁹ The civil law element in the law applied in Chancery and in the High Court of Parliament is more problematic. There can be little doubt, however, that the shape of the procedure before these bodies displays the influence of the learned law.²⁰

15. See S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 8-12, 376 (1969).

16. See W. MORRIS, *THE EARLY ENGLISH COUNTY COURTS* (14 U. CALIF. PUB. IN HIST. No. 2, at 89-230, 1926); S. MILSOM, *supra* note 15, at 6-8, 376.

17. See Donahue, *Roman Canon Law in the Medieval English Church: Stubbs vs. Mailland Re-examined after 75 years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647, 658-70 (1974).

18. See W. MITCHELL, *AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* (Yorke Prize Essay 1904). But see Sutherland, *supra* note 12, at 151-54 for the suggestion that the law merchant does not acquire a cohesive character until the Renaissance.

19. See, e.g., 2 *BOROUGH CUSTOMS* lxvii-lxxxv (M. Bateson ed., Selden Soc'y Pub. No. 21, 1906).

20. See J. BARTON, *supra* note 5, at 28-71.

If we move to Professor Levack's period, the reigns of James I and Charles I, shortly after the period in which Maitland perceived a threat of reception, the situation is even more confused. At the local level, our hypothetical litigant will still find county and borough courts and local ecclesiastical courts, with ultimate appeal from these latter now to the High Court of Delegates, instead of to the Court of Rome. In addition, if he lives in the right part of the country, his case may be heard before the Council of the North or the Council of Wales and the Marches. At Westminster he will find that the superior common law courts have lost some business to the newer conciliar courts, the Court of Star Chamber and of Requests, and to the Privy Council itself, as well as to the increasingly active jurisdiction of the Chancery.²¹ In addition, the High Court of Admiralty and local admiralty courts are seeking to expand their jurisdiction over mercantile matters, while an offshoot of the Council, the High Commission (Commissions for Ecclesiastical Causes), is tending to draw business away from the regular ecclesiastical courts.²²

Of this multiplicity of courts only the ecclesiastical and admiralty courts are distinctly civil law courts, applying civil law and dominated by civil lawyers. In the conciliar courts and the Chancery, the civilians filled some but by no means all of the positions.²³ As in the medieval Chancery, civil law influence can be seen in the shape of the procedure of these courts; how much its influence goes beyond that is a difficult question.

In summary, current research forces us to discard any notions we may have had of the total isolation of English legal development from the academic law. It also indicates that if we want to have a full understanding of how the English legal system operated in the Middle Ages and Renaissance, the non-common law is worth further examination. That examination has already begun. Marsden and Senior have studied the admiralty jurisdiction.²⁴ More recently, Woodcock has given us a view of the medieval diocesan court of Canterbury;²⁵ Mar-

21. For a readable account of these developments with a strong point of view, see C. OGILVIE, *THE KING'S GOVERNMENT AND THE COMMON LAW 1471-1641* (1958). On the chancery, see W.J. JONES, *THE ELIZABETHAN COURT OF CHANCERY* (1967).

22. On the High Court of Admiralty, see 2 *SELECT PLEAS IN THE COURT OF ADMIRALTY* xii-xv, xli-lvii (R. Marsden ed., Selden Soc'y Pub. No. 11, 1897); on the High Commission, see R. USHER, *THE RISE AND FALL OF THE HIGH COMMISSION* 91-105 (1913).

23. Pp. 21-30.

24. 1 *SELECT PLEAS OF THE COURT OF ADMIRALTY* (R. Marsden ed., Selden Soc'y Pub. No. 6, 1892); 2 *id.* (No. 11, 1897); W. SENIOR, *DOCTORS' COMMONS AND THE OLD COURT OF ADMIRALTY* (1922).

25. B. WOODCOCK, *MEDIEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY* (1952).

chant has studied the ecclesiastical courts, particularly the York courts under Elizabeth I, James I and Charles I,²⁶ and more on the ecclesiastical courts is promised.²⁷ Squibb has studied the High Court of Chivalry,²⁸ Duncan the High Court of Delegates.²⁹ Usher's pioneering study of the High Commission will be considerably enhanced when Tyler's study of the Ecclesiastical Commission of York is published.³⁰ Jones has given us an excellent study of the Elizabethan court of Chancery,³¹ and there exist Selden Society volumes on the Council, the Court of Requests, the Star Chamber and the law merchant.³²

So far the studies have tended to focus on an individual court. Such a focus permits the scholar to work with relatively well-catalogued and well-defined archival material, to construct an institutional history and to keep his analysis of cases within jurisdictional bounds. Such studies are necessary, but they are confining. They lead, without their authors' intending that they do so, to associating a body of legal ideas, in this case the civil law, with a given set of legal institutions, the civil law courts. Further, they tend to make us look lineally at a given segment of the legal system rather than at how all the pieces of the system fit together at any given time.

Professor Levack boldly takes another approach. Rather than looking at any one court, he has chosen to look at the body of men who practiced before a number of courts—the doctors of civil law from Oxford and Cambridge who were active in England in a variety of roles during the reigns of James I and Charles I.

Levack's thesis unfolds carefully from chapter to chapter of the book. He begins by outlining the social and economic characteristics of the 200 men with whom he is dealing. By and large his civil lawyers rank lower on the socioeconomic scale than do the common lawyers of

26. R. MARCHANT, *THE CHURCH UNDER LAW: JUSTICE, ADMINISTRATION AND DISCIPLINE IN THE DIOCESE OF YORK 1560-1640* (1969).

27. The Selden Society has announced volumes on the ecclesiastical courts of Canterbury in the 13th century and those of York in the 14th and 15th.

28. G. SQUIBB, *THE HIGH COURT OF CHIVALRY* (1959). This court, which dealt with military and heraldic matters, was also a civil law court.

29. G. DUNCAN, *THE HIGH COURT OF DELEGATES* (Cambridge Stud. in Legal Hist. 1971).

30. R. USHER, *supra* note 22; P. TYLER, *The Ecclesiastical Commission for the Province of York 1561-1641*, 1967 (unpublished D. Phil. thesis on file in the Bodleian Library, Oxford).

31. W.J. JONES, *supra* note 21.

32. *SELECT CASES BEFORE THE KING'S COUNCIL* (I. Leadham & J. Baldwin eds., Selden Soc'y Pub. No. 35, 1918); *SELECT CASES IN THE COUNCIL OF HENRY VII* (C. Bayne & W. Dunham eds., Selden Soc'y Pub. No. 75, 1956); *SELECT CASES IN THE COURT OF REQUESTS, A.D. 1497-1569* (I. Leadham ed., Selden Soc'y Pub. No. 12, 1898); *SELECT CASES BEFORE THE KING'S COUNCIL IN THE STAR CHAMBER, 1477-1544* (I. Leadham ed., Selden Soc'y Pub. No. 16, 1903); 2 *id.* (No. 25, 1911); 1 *SELECT CASES CONCERNING THE LAW MERCHANT* (C. Gross ed., Selden Soc'y Pub. No. 23, 1908); 2 *id.* (H. Hall ed., No. 46, 1930); 3 *id.* (H. Hall ed., No. 49, 1932).

the same period. They are the sons of merchants and the second sons of gentry, not the heirs of landed estates.³³ They lived by their wits, and they needed professional positions in order to advance economically. At the beginning of the 17th century, when Levack's story begins, the profession is in trouble. From a high point in the decade of the 1580's, the number of doctors of civil law graduating from Oxford and Cambridge is on the decline. Perhaps as a result of the common lawyers' reaction to the loss of business to the civilian-oriented courts, James was not preferring civil lawyers in the way that Elizabeth had.³⁴

The crisis, according to Levack, led the civil lawyers to seek help from their usual sources of preferment, the King and the Church. In the succeeding chapters he tries to show how the civil lawyers used their learning to defend the royal prerogative in the political arena,³⁵ to make use of their jurisdiction to further the purposes of the King and the Church,³⁶ and thus to become intimately associated with the prevailing ecclesiastical polity that was to collapse thunderously in the Long Parliament.³⁷

As a profession the civilians never regained the position that they had prior to the Long Parliament. Some of the positions which they had held, such as those in the Court of Requests and the High Commission, were abolished; the positions in Chancery became exclusively the province of the common lawyers; the positions in the Church courts never achieved the importance after the Restoration that they had had before. Doctors' Commons, the High Court of Admiralty and the Church courts continued, but the beginnings of their decline as

33. Pp. 9-16.

34. Pp. 60-66. There may not be any necessary connection between the civilians' perceived economic difficulties at the beginning of the 17th century and the common lawyers' assault on their jurisdiction. For example, the analysis that has been done of the case loads of the local ecclesiastical courts shows no significant decline in the cases being heard. See R. MARCHANT, *supra* note 26, at 16 (Table 2, Norwich Consistory Litigation, 1509-10), at 20 (Table 3, Norwich Consistory Litigation, 1623-24, 1626-37), at 62 (Table 8, Cases Entering the York Consistory Court, 1561-1639), at 68 (Table 9, Cases Entering the York Chancery Court, 1571-1635), at 110 (Table 10, York Exchequer Litigation, 1592-93, 1637-38). (Dr. Ralph Houlbrooke's forthcoming study of the Norwich court during this period should be a considerable help in this regard.) Quite independent reasons may be found for the civil lawyers' economic difficulties. For one thing this is a period of increasing laicization of the civil law profession, and laymen, unlike clergymen, cannot rely on a benefice to provide them their basic income. Secondly, with an economic naïveté that is typical of the period, the Church, under parliamentary pressure, displayed great reluctance to raise the statutorily-fixed fees charged to litigants, while at the same time England experienced a 650 percent inflation between the years 1500 and 1640. On both points, see *id.* at 243-45; on the fees point, see *id.* at 21-31, 51-54, 111-12, 134-36, 140-45, 189-92. Levack also discusses fees. See pp. 66-72.

35. Pp. 86-121 (ch. 3).

36. Pp. 122-95 (chs. 4-5).

37. Pp. 196-202 (ch. 6).

independent and effective institutions can be seen as early as the Restoration.³⁸

Levack's thesis is an attractive one. It explains why the common law, which at one time might almost be described as a partner in England of a number of other civil-law based systems of law, ultimately came to triumph. In the struggle between King and Parliament, court and country, the civilians of necessity backed the wrong horse, and the civil law was severed from English legal development when Charles I's head was severed from his body. The thesis also goes much of the way to explaining why the civil law is held in such bad odor in American legal circles, and why it comes out so badly in the peculiarly whiggish view of English history that is favored by our Supreme Court. If we can associate the civil law with absolutism, whether there is any necessary connection between the two or not, then we are against it because that is what the Founding Fathers were trying to get away from.

Levack's work in its broad outlines is a careful and helpful book. He has worked long and hard in the basic source materials and has assembled an impressive amount of information. The biographical dictionary of his 200 civilians appended at the end of the book is a labor of love which will serve scholars for many years to come.³⁹ He has shown us the political ideas and alliances of an interesting group of men in a critical period of English constitutional and political history. The book is not, however, and does not purport to be, a complete assessment of the role that the civil law played in the development of English law during this period.

Viewed as a study of the profession of civil law in England in the first half of the 17th century, the book is confined to the 200 lawyers who were at the very top of their profession from an academic point of view, and it is limited to the institution, Doctors' Commons, which many of them used as a base for their activities. But the bread-and-butter courts of the civil lawyers, the ecclesiastical courts, were not staffed exclusively by the doctors of the civil law. For example, relatively few of Levack's lawyers appear in the ecclesiastical courts of York during this period.⁴⁰ I do not know what an intensive study of all

38. For the depressing story of the state of the ecclesiastical courts just prior to reform, see Manchester, *The Reform of the Ecclesiastical Courts*, 10 AM. J. LEGAL HIST. 51 (1966).

39. Pp. 203-82. The book also contains a useful bibliography of both printed and unprinted sources, although the usefulness of the latter would have been enhanced if the publishers had allowed Levack the space to give at least short-titles and authors of the manuscript tracts and treatises.

40. See R. MARCHANT, *supra* note 26, at 247.

the personnel of the York Court would reveal. Certainly one would not be surprised to find that these men, too, espoused orthodox religious positions. On the other hand, since the York lawyers had their roots deep in the countryside, we might find that the York lawyers were not as closely associated with the political positions of the court as their London contemporaries with greater academic qualifications.

Levack's omission of the civilians in the provinces has some substantive ramifications. First, it makes it easier for him to say that the civilians' political positions were influenced by their self-interest. If we could determine what the political views of the provincial civilians were, we would have a valuable check on Levack's thesis, since the provincial lawyers' self-interest was not nearly so closely associated with the King and the court. Second, Levack's book can give one the impression that the civilians were a considerably narrower group than they actually were. The doctors did not have a monopoly on civilian writing; indeed Henry Swinburne's treatises on wills and spousals⁴¹ were certainly among the most important pieces of civilian writing in this period. Thus, if we are trying to fashion an accurate picture of the 17th century legal system, we cannot ignore the men in the provinces, because a large number of cases were tried in their courts.⁴² Nor should we ignore them if we are trying to assess the impact of the civil law on the common law, since the practitioners of the common law may well have come to know the civil law through the local church courts or the writings of such men as Swinburne.

Although considerable work still needs to be done, the main outlines of the English civil law courts, as institutions, are now reasonably clear, and thanks to Levack's book we now have some idea of the civilians as men. We have gone beyond the narrow confines of specific courts, again thanks to Levack's book, but we are still in the realm of the institutional—the civil law courts as institutions, the body of lawyers who practiced before them as an institution. Further, because of the excellent work which has been done with civil law institutions, we are in danger of equating the history of civil law institutions in England with the history of the civil law itself, of seeing in the failure of the former to establish and maintain a significant position the ultimate insignificance of the latter.

As to the impact of the civil law on English political and consti-

41. H. SWINBURNE, *A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES* (1590); H. SWINBURNE, *A TREATISE OF SPOUSALS* (1686). The former went through at least seven editions and was still being published as a practice book in 1803.

42. See generally R. MARCHANT, *supra* note 26.

tutional ideas, Levack's answer—that it was a body of doctrine from which a group of men, driven by the pressure of circumstances, derived justifications for a position that ultimately lost in the political battle—must be accepted only as a partial one. Levack has discovered, as many law students have before him, that law is malleable stuff.⁴³ Two civilians, relying on the same texts of the civil law, could reach diametrically opposite political conclusions. John Cowell was proceeded against in Parliament for his extreme views of absolute monarchy, whereas Isaac Dorislaus became a regicide.⁴⁴

It is not Levack's view, then, that civil law necessarily leads to absolutism. Rather it was the civil lawyers' need for preferment that determined their association with royal absolutism, the Church, and the court, against the parliamentary party, the Puritans, and the country. Thus Levack's thesis is deterministic, and this political determinism is not really undercut by his one attempt at qualification in the concluding chapter.⁴⁵

By detailing the divergent stories of men such as Dorislaus and Cowell and by showing how others, such as Marten, could, despite views generally in accord with the prevailing ideas of the civil law tradition, support the Petition of Right,⁴⁶ Levack has demonstrated that all the conclusions of the writers in the mainstream do not follow ineluctably from the basic civil law texts. We should not conclude from his book, however, that the civilians' general position can only be explained by self-interest. Perhaps more importantly, Levack has not shown what there was about these texts of the civil law that gave them such power that men felt they had to come to grips with them in propounding their political ideas. Perhaps Levack's perception of the civilians' self-interest has led him to underestimate the role their ideas played in determining the course of English political and legal development. For example, the civilians have much to say about sovereignty, an idea which they borrow from Jean Bodin, himself a civilian, and a quality which they attribute to the King.⁴⁷ Ultimately English political thought is to keep the idea but reject the attribution, transferring the locus of sovereignty to Parliament.⁴⁸ There was obviously something about the idea of sovereignty that men, including the civilians who introduced it, found powerfully attrac-

43. See pp. 86-95, 109-21, 152-54.

44. Pp. 4, 224.

45. P. 200.

46. Pp. 117-21.

47. Pp. 97-98, 101-02.

48. See C. OGILVIE, *supra* note 21, at 152-55.

tive, but Levack contents himself with a thorough description of what the civilians said and disappoints, at least this reader, by not applying his substantial body of knowledge to the question of what it was that gave the civilians' ideas such power.

The relationship between what goes on on the high level of theory and what actually goes on in the courtroom may be tenuous in the extreme, and it is at the level of the courtroom that Levack's book is most incomplete. The book is rightly subtitled a "political study." It is the work of a careful historian who is interested in lawyers, their political ideas and alliances, but it is not really a work of legal history, if we define "legal history" as the history of legal doctrine, of courts, and of cases.⁴⁹

The civil lawyers with whom Levack is dealing had received extensive university training in their discipline. He regards this training as highly impractical,⁵⁰ but did it have no effect on the judgments

49. Indeed, it is in the minutiae of legal history that Levack makes the only errors or questionable statements which I found. For example: (1) The fact that Robert Newcomb was his great uncle's legatee did not give him "in effect" "control of the entire family estate" (p. 14), since the family was a landed one. The history of the family that Levack suggests, however, indicates that Newcomb may well have been his great uncle's heir, or he may have been his great uncle's devisee, both of which might have given him the family lands. (2) It is unlikely that "the emperors of Ulpian's time [early 3d c., A.D.] ruled by the classical *lex de imperio Vespasiani* . . .," and Schulz does not say that they did (p. 94 & n.1). What Schulz says on the cited page is that "we know by the *lex de imperio Vespasiani* that only a strictly limited power was given to [the emperor]." The *lex* may have been a purely political document used on a one-time basis to still people's fears after the traumatic events of 69 A.D. (3) The Henrican Commission to revise the canon law did complete its assignment (p. 183). Professor Donald Logan of Emmanuel College announced the discovery of a manuscript of the commission's work at the International Congress of Medieval Canon Law in Toronto in August 1972 (perhaps too late for inclusion in Levack's work). (4) On pp. 33-34 we learn that Dr. John Burman, sitting as Judge of the Vice-Admiralty Court in Norfolk, when confronted with a Mayor who had ordered jurors that Burman had summoned not to perform their office, "'acquainted the said Mayor that he was about Her Majesty's service and told him that he greatly wondered how he durst offer such a disturbance in the execution thereof.'" While Levack suggests that this incident illustrates the peculiar attachment of the civilians to the central authority they served, I cannot imagine that a common law assize judge, confronted with the same act of contempt, would not have replied in language at least as strong. (5) On p. 156 Levack states that the "civilians' initial presumption that the accused was guilty serves as only one indication of their partiality." This just will not do. That the civil law has a presumption of guilt in criminal cases is a shibboleth that Merryman on the cited page (*id.* at n.1) is trying to dispel. Usber at the page cited in the same note makes quite clear how strict the civil law of proof applied by the High Commission was, and shows that the source of the problem is the civilians' statement that accusation creates a sufficient *praesumptio* that the accused must come forward and deny the charge, a shift of the burden of coming forward which was shifted back upon the denial of the charge. It is well to point out that at common law at this time a person who refused to plead to a felony charge was crushed with weights until he did plead or died. Compared to this, a shifting of the burden of coming forward seems quite civilized. It was not until 1827 in England that refusal to plead at common law was treated as a plea of not guilty rather than an admission of guilt.

But these are counsels of perfection. As a whole the work is careful and well-written.

50. Pp. 16-18.

the civilians reached when they were daily confronted by social reality in their courts? Levack suggests, and he may be on the track of something quite significant here, that the civilians had a different style of judgment from the style professed by the common lawyers. Despite their more rule-oriented system, the civilians handled their cases in a less rigid way than did the common lawyers.⁵¹ Unfortunately, Levack pulls back from this suggestion after he makes it, without a systematic analysis of the types of cases and the law applied in the civil law courts.

As to the possible influence of the civil law on the practice of the common law courts, Levack tells us little; he is studying civil lawyers, not common lawyers. He does suggest, however, that the relationship between the two groups was not always as strained as when they opposed each other in Parliament. They served together, apparently amicably, on the High Court of Delegates, the High Commission, the Court of Requests, and in Chancery, and a number of civilians were admitted to membership in the Inns of Court, although none seems to have been called to the bar.⁵² All of this suggests a working relationship and at least the opportunity for exchange of ideas.

What evidence can we find for influence of the civil law on the development of the common law? As I suggested before, the problem suffers from a lack of definition. While the citation of cases as authorities is at least as old as Bracton, the doctrine of precedent does not achieve its modern form until the 18th century.⁵³ When English courts in the 19th century cite Roman law (which they do more frequently than one might think),⁵⁴ it is clear that the citation is to an "academic" authority, an authority which will be followed only in the absence of domestic authority and only because it is persuasive, not because it is binding. Until the doctrine of binding authorities was developed, however, the distinction between "academic" and "binding" authorities was considerably fuzzier. Further, the absence of citation of civil law authorities in the year books is not conclusive, since those books are, by and large, concerned with the pleading stage of a case. Nonetheless, the general absence of citations to civil law in both the later year books and the earlier common law reports would seem to indicate that civil law was not "authoritative" in the common

51. Pp. 152-57.

52. Pp. 126-30.

53. 12 W. HOLDSWORTH, *supra* note 12, at 146.

54. See Oliver, *Roman Law in Modern Cases in English Courts*, in CAMBRIDGE LEGAL ESSAYS WRITTEN IN HONOUR OF AND PRESENTED TO DOCTOR BOND, PROFESSOR BUCKLAND AND PROFESSOR KENNY 243 (P. Winfield & A. McNair eds. 1926).

law courts in this period, at least in the sense that it was not a body of doctrine to which counsel regularly asked the judges to turn for the resolution of specific questions of law.⁵⁵

Failing discovery there, we must look for the influence of the civil law in the way in which English law in its broad outlines changed over the course of the 16th and 17th centuries. The common law at the end of the 15th century was in a sorry state. Narrowly confined to property and crime with a few rudimentary ideas of tort and contract, the system had declined to one that was procedurally unworkable for all but the richest and the most patient, and substantively incapable of handling the great commercial expansion that was to come. Somehow two centuries later, the system had withstood the challenge of the conciliar courts and had managed to incorporate enough new ideas that the cry for more radical reform died down.⁵⁶ Did at least some of the new ideas come from the civil law?

If we look for civil law influence in the specific rules that the common law or equity courts adopted, we quickly find ourselves in a hopeless morass. For every principle of common law alleged to have civil law ancestry, there is a case to be cited which explains it totally in common law terms, or a text from the Digest which suggests that the civil law rule was really quite different.⁵⁷

The problem with this kind of analysis is that it glorifies the specific rule by which the case is decided and underplays the basic principles underlying the rule and the methodology used to arrive at that

55. The situation in Chancery is considerably more difficult to assess, since the court throughout the 17th century was only gradually developing a system of precedents. See 1 LORD NOTTINGHAM'S CHANCERY CASES xxxvii-cxxiv (D. Yale ed., Selden Soc'y Pub. No. 73, 1957). The question, then, is what was it that informed the Chancellor's conscience when the decision turned on it, and what role did the learned law play in the hardening of the principles that were to become the rules of equity? Jones suggests that the connection between equity and the civil law is tenuous at best. W.J. JONES, *supra* note 21, at 266, 301. Others have suggested civil law influences on specific bodies of doctrine. See, e.g., T. SCRUTTON, THE INFLUENCE OF THE ROMAN LAW ON THE LAW OF ENGLAND 152-62 (Yorke Prize Essay 1885). The opportunity for civilian influence was there, both from the civilian-trained masters of the court and from the fact that the three great 17th century chancellors—Ellesmere, Bacon and Nottingham—were all men who had considerable acquaintance with continental learning. See 2 J. CAMPBELL, LIVES OF THE LORD CHANCELLORS 309-10 (4th ed. 1856) (Ellesmere); 3 *id.* 5-6 (4th ed. 1857) (Bacon); 1 LORD NOTTINGHAM'S CHANCERY CASES, *supra*, at xxxiv n.3 (Nottingham). But this leads us to the consideration of influence on principles and methodology rather than on specific rules, and to the point next developed in the text.

56. On the situation of the common law in the 15th century, see C. OGILVIE, *supra* note 21, at 13-14, 19-24, 43-54; A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW 119-39 (1966). For the suggestion that there were few changes in the 17th century and that the Interregnum was a great opportunity lost, see *id.* at 265-67; D. VEALL, THE POPULAR MOVEMENT FOR LAW REFORM 1640-1660, at 225-40 (1970).

57. This is particularly characteristic of the debates concerning the influence of the civil law on the early development of the common law. See sources cited in notes 7-9 *supra*.

rule. If it is true that the life of the law has not been logic but experience, it is equally true that that experience has been shaped by the power of certain fundamental ideas and methods of proceeding. And in the development of these ideas and methods in England, civilian influence may have played some part.

As an example of the type of elements in the English law which suggest the influence of civil law ideas, consider the limitation act⁵⁸ passed by Parliament in 1623, right in the middle of Levack's period. This act is the ancestor of our own statutes of limitations for actions to recover real property, and its history is known to every first-year property student: What is worded as a simple statute of limitations became the statutory basis of the doctrine of adverse possession with the familiar judicially engrafted requirements that the possession be actual, continuous, open and notorious, and hostile, with the frequent addition that it be under "(good faith) claim of right" and "color of title."⁵⁹ A great deal has been written emphasizing how the common law system of limitation differs from the civil law system of acquisitive prescription.⁶⁰ The point is not often made, however, that adverse possession, in the hands of at least some judges, looks remarkably like acquisitive prescription, without quite the civilian emphasis on bona fides.⁶¹ Whether this result was foreseen by the framers of the 1623 statute is hard to know. The notion of prescription was, however, not unknown to them; it had been brought into English law by Bracton to compensate for the fact that the common law of his day had no system of limitation that applied to someone claiming a nonpossessory right to the land of another.⁶² The preamble to the 1623 statute states twin purposes: "avoiding of suits" and "quieting of men's estates."⁶³ The former idea is clearly derived from the notion of limitation, but the latter certainly smacks of prescription.

The question which I am suggesting needs further exploration is not whether a "reception" of Roman law was threatened in the 16th or 17th centuries, nor whether the institutions of the civil law, their courts, and the body of civil lawyers themselves were stronger than recent research would suggest they were.⁶⁴ Nor am I suggesting that

58. 21 Jac. 1, c.16.

59. See generally 3 AMERICAN LAW OF PROPERTY §§ 15.1-15.14, at 755-831 (A.J. Casner ed. 1952).

60. See, e.g., B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 120-30 (1962).

61. See, e.g., Taylor v. Horde, 1 Burr. 60, 97 Eng. Rep. 190 (K.B. 1757) (Mansfield, L.C.J.); cf. City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908 (1929).

62. See W. HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 279-86 (1927).

63. 21 Jac. 1, c.16, preamble.

64. See, e.g., Ives, *The Common Lawyers in Pre-Reformation England*, 18 TRANS. ROYAL HIST. Soc'y 145 (5th ser. 1968).

at least the main elements in the movement for law reform were motivated by a desire to abandon the "barbaric" common law for the more "elegant" civil law.⁶⁵ The evidence seems quite convincing that there was no real danger of reception, that the civil law institutions never posed a serious threat to the common law, and that the motivation for the most thoughtful of the reform writing was not an intellectual but a practical one. What I am suggesting needs more study is what role the learned law played in shaping the reactions of the English legal system, a system concededly dominated by common lawyers, to the felt need for reform.

In the latter part of the 17th century and in the 18th, the academic civilians on the Continent abandoned the idea of getting the Digest as such accepted as an authoritative body of law in the courts and began instead to use the civil law as a means for determining certain first principles of law—what we might today call fundamental Western legal ideas and what they called natural law.⁶⁶ The abrasive contact between the civil law taught in the academies, the non-civil law espoused in the courts, and the diverse human conflicts which call for resolution led thoughtful men to search for first principles. That contact occurred in England at many times, most notably in the 16th and early 17th centuries, and it is the effect of this contact that ought to be more fully explored.

65. See pp. 131-33, on the attitude of the humanists. See generally D. VEALL, *supra* note 56, for what the reformers were after.

66. See A. PASSERIN D'ENTREVES, *NATURAL LAW* 51-64 (2d ed. 1970); B. NICHOLAS, *supra* note 60, at 50-51.